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purpose of loaning funds of their depositors may loan the funds thereof, receive deposits of money, loan the same, and repay depositors, with or without interest,—the method in which such bank conducted its business.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by the Security Savings Bank & Trust Company against J. W. Hinton, city assessor of the city of Los Angeles, to recover a tax alleged to have been illegally assessed against plaintiff's property, and collected by defendant. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland, for appellant. C. McFarland, for respondent.

HAYNES, C. Appeal from a judgment rendered in favor of defendant upon his demurrer to the complaint. The complaint alleges, in substance, that plaintiff is a corporation, organized for the profit of its stockholders, exclusively, with a capital stock of \$200,000. The purposes of the corporation, as stated in its articles of incorporation, are as follows: "To receive deposits, and pay interest on the same, upon such terms and conditions as may from time to time be prescribed by its board of directors; to preserve and to safely invest the funds of its members and depositors in loans on real and personal property, and all adequate securities, public or private, or in such manner, on such terms, at such rate of interest, and for such consideration, as may be determined by the officers of the corporation under direction of the board; to sell, transfer, and assign its loans to individuals and corporations, without recourse upon the corporation; and to receive funds from private parties and corporations for the purpose of loaning the same upon adequate security." That in June, 1891, the plaintiff made out and delivered to the defendant, the city assessor of the city of Los Angeles, upon a blank furnished by the city, a statement of its property, as it existed on the first Monday of March preceding, which statement showed that plaintiff had money and personal property amounting to \$3,233; that there were owing to it solvent credits, unsecured, \$58,002.50; due from banks and bankers, \$6,424.23; and that there was due from the bank to depositors, bona fide residents of this state, unsecured debts for deposits of money with the plaintiff, \$407,926.90. Mortgages to a very large amount were returned separately. Plaintiff offered to pay the taxes upon \$3,233, its money and personal property, but declined to pay upon \$64,426.73, being solvent credits unsecured, and moneys due from banks and bankers, claiming that it was entitled to deduct from its said credits the unsecured debts to its depositors, which amounted to a much larger sum. The assessor demanded payment of taxes upon the whole sum of its personal property and unsecured credits, being \$67,659.73, amounting to \$805.12, which plaintiff refused to pay, and tendered \$38.80, the amount assessed upon the personal property; whereupon the assessor seized the amount of the whole tax,

97 Cal. 214

SECURITY SAV. BANK & TRUST CO. v. HINTON, City Assessor. (No. 14,877.)

(Supreme Court of California. Jan. 18, 1893.)

MUNICIPAL TAXATION—CONSTITUTIONAL LAW—SAVINGS BANK—DEDUCTION OF UNSECURED DEBTS.

1. Const. art. 11, § 8, provides that any city of over 100,000 inhabitants may frame a charter for its own government, consistent with the laws and constitution of the state, which shall be submitted to the legislature; and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city. Const. art. 11, § 12, provides that the legislature shall not impose taxes on cities for municipal purposes, but may, by general laws, vest such power in the authorities thereof. *Held*, that a city organized under a charter approved by legislature by resolution, and not by bill, may provide in its charter for taxation for municipal purposes, though no general law has been passed by legislature authorizing it to do so, since, the power of taxation being essential to municipal existence, such power is necessarily implied.

2. Const. art. 13, § 1, provides that all property in the state, not exempt under laws of the United States, shall be taxable; that the word "property" includes moneys, credits, etc.; and that the legislature may provide, except in the case of credits secured by mortgage, for a deduction of credits or debts due bona fide residents of the state. Los Angeles City Ordinance,

§ 4, subd. 5, (a copy of Pol. Code, § 3629, subd. 6,) provides that the taxpayer may deduct from his solvent unsecured credits his unsecured debts owing to bona fide residents of the state. Pol. Code, § 3617, subd. 6, as amended by Laws 1881, provides that credits or debts arising on account of any money deposited with savings or loan corporations shall, for the purpose of taxation, be deemed an interest in the property of such corporation, and shall not be assessed to the creditors thereof. *Held* that, if there be any conflict between such ordinance and section 3617, the latter governs, as being a "general law," and a loan and savings bank doing business in the city of Los Angeles is not entitled, for the purposes of municipal taxation on its property, to a deduction from its solvent unsecured credits of its unsecured liability to its depositors for money deposited.

3. A contention that the debts of such bank are not, for the purpose of taxation, within section 3617, on the ground that they are not ordinary deposits, but debts for borrowed money, repayable in the exact sum borrowed, with interest thereon, irrespective of the profits or losses of the bank, cannot be sustained; Civil Code, § 571, under which such bank was organized, providing that corporations organized for the

\$805.12, in money, appellant owning no real estate; and this action is brought to recover of the defendant that sum, less the taxes admitted to be due on the personal property. Appellant presents two principal grounds upon which it contends that the action of the defendant was illegal, and which, if sustained, must require a reversal of the judgment: (1) That the city of Los Angeles has no power to levy taxes; (2) that, if it be conceded that the city has such power, the assessor had no authority to deny the deduction from its solvent credits of moneys due or owing to depositors.

1. The first of these propositions is based upon the fact that the charter of the city is what is known as a "Freeholder's Charter;" that the charter was approved by the legislature by resolution, and not by bill, and therefore, it is argued, is not a law; and that the existence of a law enacted by the legislature is essential to the exercise of the power to levy, assess, and collect taxes. It is not necessary to reconsider the case of *People v. Toal*, 85 Cal. 333, 24 Pac. Rep. 603, cited by appellant. The question there presented was whether the city of Los Angeles could create a police court, and fix its jurisdiction; and the point of the decision was that under section 1, art. 6, of the constitution, the power to establish inferior courts in any incorporated city or town was vested in the legislature, and that by section 13 of the same article it was enjoined upon the legislature to fix by law the jurisdiction of any inferior court established in pursuance of section 1. In none of the several cases appealed to this court, touching the charter of the city of Los Angeles, has it been held that the charter was not properly adopted, nor that it was invalid, though some of its provisions have been held to be inoperative because inconsistent with certain legislative acts which were declared to be "general laws." In *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652, it was said: "It is enough to say that the whole charter cannot be held to be invalid because of the fact that a few of its provisions may conflict with general statutes now in force." And this language was repeated in *People v. Toal*. *Brooks v. Fischer*, supra, was an application for a writ of prohibition to prevent the respondent, the city assessor of the city of Los Angeles, from proceeding to act as such assessor under the charter here brought in question. It was there alleged by the petitioner that the charter had been approved by resolution, and not by bill, and was not presented to nor approved by the governor; and the third paragraph of the petition alleged "that the powers and duties of the city assessor in relation to the assessment of property prescribed by the laws existing prior to the framing of the aforesaid charter, were other than, and essentially different from, the powers and duties provided in said charter;" and it was further alleged that respondent "threatens, and is now proceeding, to assess all taxable property in said city according to, and by virtue of, the provisions of said charter," etc. The petition was dismissed, and the effect of

the decision could not have been less than a determination that the respondent was authorized to proceed in the discharge of his duties as city assessor.

But appellant contends that, in the absence of a law enacted by the legislature in the constitutional mode, the city of Los Angeles has no power to levy taxes, and that no general law applicable to cities having "freeholder charters" has been passed for that purpose. If no such general law has been enacted, there can be no conflict between the charter and such law, and it is only as to such conflicts that the validity of the charter has been heretofore questioned. But counsels' argument makes such general law the essential basis of the power of the city to impose taxes for municipal purposes. This argument is based upon section 12 of article 11 of the constitution, which is as follows: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." But the authority given by the constitution¹ to frame and adopt "a charter for its own government," which "shall become the organic law thereof," is comprehensive enough to authorize a provision such as that contained in the charter of the city of Los Angeles, providing for taxation for municipal purposes. The legislature, however, was required by the constitution to provide by a general law for the incorporation of towns and cities that could not, for the want of sufficient population, or should not for any reason desire to, adopt a freeholders' charter, and, as to municipal corporations organized under such general law, the latter clause of the above-quoted section has full application, and as there is no act of the legislature relating to taxation for municipal purposes, except that contained in the municipal government act, and which appellant correctly contends does not apply to cities having freeholders' charters, there can be no conflict between such charters and the general laws of the state upon this subject. As above remarked, in no one of the several cases have the validity, force, and constitutional authority of the Los Angeles charter for the exercise of all municipal powers been questioned as to any provision not in conflict with some general law, except in the *Toal* Case; and the decision was there based upon the constitutional provision wherein the judicial power of the state is granted to such inferior courts in any municipality as the legislature may establish. It is undoubtedly true that the legislative branch of the government has the exclusive power of

¹Const. art. 11, § 8, provides that any city of over 100,000 inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of the state, which shall be submitted to the legislature for its approval or rejection; and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, and shall become the organic law thereof.

taxation, except so far as that power is restrained by the constitution, or delegated by the legislature or the constitution to local municipalities. But by section 12 of article 11, above quoted, the legislature is prohibited from imposing taxes upon counties, cities, towns, or other municipal corporations, for municipal purposes. It must therefore follow that in authorizing freeholders' charters, which the legislature cannot change or amend, the power of taxation being essential to municipal existence, that power is necessarily implied. In speaking of municipal corporations the supreme court of the United States said: "When such a corporation is created the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence, unless its exercise be, in express terms, prohibited." *U. S. v. New Orleans*, 98 U. S. at page 393. See, also, *Ralls County Court v. U. S.*, 105 U. S. 733; *Peoria, D. & E. Ry. Co. v. People*, 116 Ill. 401, 6 N. E. Rep. 497. The implication of this power, however, does not rest solely upon the power to create and adopt a charter, and the assent of the legislature in approving it; but by the prohibition against the imposition of such taxes by the legislature and by sections 13, 16-18 of article 11, prohibiting the delegation of power to special commissioners, private corporations, companies, or individuals, to exercise the power of municipal taxation; requiring county and city taxes to be paid into the treasury; prohibiting the making of profit out of county, city, or other public moneys; and restraining municipal indebtedness beyond the current revenue without making provision therefor,—the constitution assumes that all municipalities, however chartered, shall have and exercise the power of taxation. We have considered this point somewhat at length, because the question here presented was neither argued by counsel, nor considered by the court, in *Brooks v. Fischer*.

2. In support of its contention that appellant was entitled to deduct from its solvent unsecured credits its unsecured liability to its depositors for moneys deposited, several considerations are urged.

It is first insisted that, if the charter vests the power to levy taxes, such power must be exercised strictly in accordance with the ordinances of the city, and that the ordinance upon the subject of taxation provides that the taxpayer may deduct from his solvent unsecured credits his unsecured debts owing to bona fide residents of this state, and that appellant was therefore entitled to the reduction claimed. The fifth subdivision of section 4 of the city ordinance, which contains the foregoing provision, is a copy of subdivision 6 of section 3629 of the Political Code. Section 46, art. 4, of the charter, (Laws 1889, p. 469,) defines the duty of the city assessor, and declares that he shall "make out, within such time as may be prescribed by ordinance of said city, * * * a full, true, and correct list of all the property, both real and personal, taxable by law, within the limits of said city," etc. Section 1 of article 13 of the constitution provides that all prop-

erty in the state, not exempt under the laws of the United States, shall be taxed; that the word "property" includes moneys, credits, bonds, etc. The last clause is as follows: "The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state." The legislature in 1881 amended section 3617 of the Political Code; and the sixth subdivision thereof, as amended, after defining the terms "credits" and "debts," concluded as follows: "But credits, claims, debts, and demands due, arising or accruing for or on account of money deposited with savings and loan corporations, shall, for the purpose of taxation, be deemed and treated as an interest in the property of such corporation, and shall not be assessed to the creditor or owner thereof." This section and section 3629, Pol. Code, as amended, and from which the above-mentioned city ordinance was copied, were approved and took effect the same day. It cannot be contended that the latter section was intended to repeal the provision above quoted from section 3617, or that it conflicted with it; and, if that be true, it cannot be held that the ordinance above quoted could in any manner conflict with the charter provision requiring the city assessor to make a list of all the property "taxable by law." We perceive no conflict between the charter and the ordinance, nor between the charter and ordinance and the provisions of the Code; but, if such conflict existed, we should be bound to hold that section 3617, Pol. Code, declares, and was intended to declare, the general policy of the state upon the subject of the taxation of savings and loan corporations, and was therefore a "general law," in the broadest sense of the term, and as such would control. In *Dillon on Municipal Corporations*, (section 772,) it is said: "So authority in the charter of a city to 'assess all taxable real and personal property within the city' refers to the general state law to ascertain what kind of property is subject to taxation; and the corporation has power to assess, not only what was then taxable, but also whatever might afterwards be made subject to taxation by any general statute."

It is, however, contended that appellant does not come within the provisions of section 3617, Pol. Code, because the debts in question are not ordinary deposits in savings banks, but debts for borrowed money, repayable in the exact sum borrowed, with interest thereon, irrespective of the profits or losses that may accrue to the bank. The learned counsel distinguishes between savings and loan associations which distribute to depositors the net profits realized by the bank, in proportion to their several deposits, and those which pay to depositors a specified rate of interest on time deposits; that in the former class the depositors are, in effect, members of the corporation, and interested in its profits, while in the latter class they are creditors, and have no interest in the profits. The language of section 3617, however, is comprehensive enough to include both classes, and we see

no ground upon which we can say that the latter class was not intended to be included. All are organized under title 10 of the Civil Code. Section 571, Civil Code, is as follows: "Corporations organized for the purpose of accumulating and loaning the funds of their members, stockholders, and depositors may loan and invest the funds thereof, receive deposits of money, loan, invest, and collect the same, receive interest, and may repay depositors, with or without interest. No such corporation must loan money except on adequate security, on real or personal property, and such loan must not be for a longer period than six years." This section expressly authorizes such corporations to receive deposits, loan and invest the same, and repay depositors, with or without interest, which is the mode in which appellant conducts its business. We are not referred to any decision rendered since the amendment of section 3617, Pol. Code, was adopted; but it is argued that that amendment was made immediately after the decision was rendered in *People v. Badlam*, 57 Cal. 594, which involved the taxation of the San Francisco Savings Union, which was of the first class of associations above mentioned, and that the amendment was therefore intended only to apply to those savings and loan associations in which depositors shared in the general dividend. In that case an effort was made to tax both the bank and the depositors upon the same moneys; and it was held that that would be double taxation, prohibited both by the constitution and the statute. But the other provision of the constitution and statute, requiring all property to be taxed, was found to be equally imperative; and for the purpose of securing the taxation of all property of the character in question, and at the same time avoiding double taxation, the amendment of section 3617, Pol. Code, was made. So far as the depositors are concerned, these deposits are not treated or taxed as solvent and unsecured credits, and therefore are not taxable to them, and, being thus taken out of the category of credits, cannot be treated as liabilities by the bank for the purpose of reducing the amount of its solvent unsecured credits liable to taxation. As savings banks are prohibited from loaning the money of depositors except on adequate security, upon real or personal property, we must assume that the solvent unsecured credits reported by appellant were loans of its capital or profits upon personal security; and, if its contention in this case should be carried out, a savings bank, with a capital paid in by its stockholders, could always evade taxation upon its entire capital, so long as its savings deposits equaled or exceeded its capital, by converting its capital into unsecured credits. We think the demurrer to the complaint was properly sustained, and advise that the judgment be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

LOS ANGELES SAV. BANK v. HINTON,
City Assessor. (No. 14,879.)

(Supreme Court of California. Jan. 18, 1893.)

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by the Los Angeles Savings Bank against J. W. Hinton, city assessor of the city of Los Angeles, to recover a tax alleged to have been illegally assessed against plaintiff's property, and collected by defendant. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland, for appellant. C. McFarland, for respondent.

HAYNES, C. The facts in this case are the same, except as to amounts, as in the case of *Trust Co. v. Hinton*, 32 Pac. Rep. 3, (No. 14,877, this day filed,) and the complaint, demurrer, and judgment were the same. The appeal is from the judgment, and is submitted upon the same briefs. On the authority of that case, the judgment should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the case of *Trust Co. v. Hinton*, 32 Pac. Rep. 3, (No. 14,877, this day filed,) the judgment is affirmed.

(3 Cal. Unrep. 757)

MAIN ST. SAV. BANK & TRUST CO. v.

HINTON, City Assessor. (No. 14,878.)

(Supreme Court of California. Jan. 18, 1893.)

SAVINGS BANKS—TAXATION.

The fact that a corporation is engaged in a general banking business, in addition to a savings bank business, does not exempt that part of its business done as a savings bank from taxation under the laws applying to other savings banks.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

(Not to be published in California Reports.)

Action by the Main Street Savings Bank & Trust Company against J. W. Hinton, city assessor of the city of Los Angeles, to recover taxes alleged to have been illegally assessed against plaintiff's property, and collected by defendant. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland, for appellant. C. McFarland, for respondent.

HAYNES, C. This action was brought by appellant to recover from the defendant the sum of \$1,075.59, the tax assessed and collected by seizure upon its solvent and unsecured credits. A demurrer was interposed to the complaint, which was sustained, and judgment rendered thereon for defendant, and plaintiff appeals. This cause is submitted upon the briefs filed in *Trust Co. v. Hinton*, the same defendant, 32 Pac. Rep. 3, (No. 14,877, this day filed,) and involves the same questions, and an additional one, which we shall briefly notice. It is claimed in this case that appellant does a general banking business, as well as that of a savings bank. We do not see that this fact materially affects any question decided in 14,877, or the correctness of the judgment rendered in this

case by the superior court. So far as its general banking business is concerned, appellant is subject to the same law, as regards taxation, as other banks not doing a savings bank's business; and, as to that part of its business done as a savings bank, it is subject to the same law that applies to other savings banks. There should be no difficulty in separating its ordinary deposits from its savings deposits, though none is found in its statement to the assessor, or in the complaint in this action. In paragraph 20 of the complaint, it is alleged that the unsecured debts due from appellant to bona fide residents of this state were debts "due depositors for sums borrowed from them upon interest;" and, that being true, no distinction can be made between this case and that of the Security Savings Bank, (No. 14,877,) and the judgment should therefore be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

97 Cal. 247

PEOPLE v. McDERMOTT. (No. 20,921.)

(Supreme Court of California. Jan. 21, 1893.)

CRIMINAL LAW—DISMISSAL OF APPEAL—RECALL OF REMITTITUR.

Where, in a criminal cause, because of the failure of appellant's counsel to file a brief, or to appear at the hearing, an appeal from a conviction has been dismissed, and the judgment affirmed, without examination of the record, as prescribed by Penal Code, § 1253, under section 1265, providing that after the judgment has been remitted to the court below the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, such court has no power to recall such remittitur, and to reinstate such appeal, even though appellant's counsel by inadvertence had failed to file the brief, and to appear at the hearing.

In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Indictment against one McDermott for murder. This is a motion to recall the remittitur, and reinstate an appeal from a conviction that had been dismissed because of the failure of defendant's counsel to appear at the hearing on the appeal. Motion denied.

Blackstock & Shepherd, for appellant. Atty. Gen. Hart, for the People.

BEATTY, C. J. This is a motion to recall the remittitur, and reinstate the appeal in a cause wherein the judgment was affirmed without examination of the record by reason of the failure of counsel for appellant to file a brief, or to appear at the time set for the hearing. The facts of the case are as follows: February 18, 1892, defendant was convicted in the superior court of Ventura county of murder in the second degree. On February 23d he appealed. March 30th he filed the printed transcript of the record at Los Angeles,—5 days before the commencement of the April term at Los Angeles and 33 days before the commencement of the May term at Sacramento. The cause was not placed upon either the Los Angeles or the Sacramento calendar,

but was placed upon the calendar for the July term at San Francisco, and set down for hearing on July 27th. On that day, there being no brief on file, and no appearance of counsel, for appellant, the judgment and order appealed from were, on motion of the attorney general affirmed. Pen. Code, § 1253. After the expiration of 30 days, a remittitur was issued, and was, we presume, filed with the clerk of the superior court of Ventura county, though the papers before us do not show that fact. At the Los Angeles term in October this motion was submitted upon affidavits which show that the failure of counsel for appellant to appear in his behalf on the day set for the hearing of his appeal was solely due to inadvertence upon their part. It seems that counsel, recognizing the fact that the record was filed too late for the Los Angeles calendar, requested the deputy clerk there to have the cause placed on the Sacramento calendar. In the last week of April, in response to their inquiry, the clerk informed them that the cause was not on the Sacramento calendar, whereupon they assumed that it would not be heard until the October term at Los Angeles, and never knew that it had been placed upon the San Francisco calendar until September 7th, when they learned that the judgment had been affirmed.

The question arising upon this state of facts is whether this court has any power to recall the remittitur, and reinstate the appeal; whether, in other words, we have not lost all jurisdiction over the cause by the issuance of the remittitur and its filing in the superior court. It is the settled law of this state that when a remittitur has been regularly issued and filed, when there has been no violation of law or of our own rules in ordering the remittitur, no mistake of facts, and no fraud or imposition practiced by the prevailing party upon the court or upon the losing party, our jurisdiction over the cause is at an end, and our judgment final. Rowland v. Kreyenhagen, 24 Cal. 52, and cases therein cited; People v. Sprague, 57 Cal. 147; Vance v. Pena, 36 Cal. 328; Hanson v. McCue, 43 Cal. 178. Here there was no fraud or deception, no imposition or mistake, so far as the court is concerned. The cause was regularly on the San Francisco calendar for July. It might have been placed on the Sacramento calendar for May, and at the request of the appellant ought to have been so placed; but the failure to do so only rendered it more imperatively the duty of the clerk to place it on the July calendar, (Pen. Code, § 1252;) and by rule 15 of the old rules of this court, which remained in force until July 1, 1892, and after the July calendar was made up, it was the duty of the clerk to put the case on that calendar. Being a criminal case, it did not belong to the Los Angeles calendar, by reason of the fact that Ventura is one of the counties whose civil causes are assigned to the Los Angeles district. Criminal causes are regularly placed on the first calendar made up (whether for Sacramento, Los Angeles, or San Francisco) after the records are filed, regardless of the county in which the charges were tried.

Upon these grounds the motion must be denied, and it is so ordered.

We concur: GAROUTTE, J.; McFARLAND, J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.

(97 Cal. 241)

HICKS v. FOLKS, Sheriff. (No. 19,087.)
(Supreme Court of California. Jan. 21, 1893.)

EMPLOYMENT OF CONVICTS—CUSTODY.

Pen. Code, §§ 1613, 1614, provide that certain prisoners may be required to labor on the public works or ways in the county, by an order of the board of supervisors; and in the county government act (Laws 1891, p. 306, § 25, subd. 30) it is stated that such work shall be done "under the direction of some responsible person." *Held*, that notwithstanding Pol. Code, § 4176, which provides that the sheriff must take charge of and keep the county jail, and the prisoners therein, and section 1600, which states that a prisoner must be kept actually confined in the jail until legally discharged, it was not intended that the prisoners should be in the actual custody of the sheriff while at work, and therefore he must deliver those required to work to such "responsible person" as is duly authorized by the supervisors to direct their labor.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Petition by J. V. Hicks for a mandamus to compel John H. Folks, sheriff of the county of San Diego, to deliver to him certain prisoners required by the supervisors to work on the public road. From an order overruling his demurrer to the petition, and granting a peremptory writ, defendant appeals. Affirmed.

Copeland & Daney, for appellant. Hunsaker, Britt & Goodrich, for respondent.

HAYNES, C. Appeal from a judgment granting a writ of mandate. The board of supervisors of San Diego county passed an order providing for the working of prisoners thereafter committed to the jail of said county under judgment of conviction of a misdemeanor, under the direction of a responsible person, upon public roads and other places mentioned in the order, and appointing respondent overseer of such prisoners, with authority to receive them from, and return them to, the sheriff, and making him their "legal custodian" while at work, and going and returning therefrom. After respondent was appointed he demanded of the sheriff that he deliver to him such prisoners as were required by the order to perform such labor, for the purpose required by the order, but appellant refused to do so. An alternative writ of mandamus was granted and duly served, and appellant appeared and demurred to the petition. The demurrer was overruled and, appellant electing to stand on his demurrer, a peremptory writ was granted.

Appellant's contention is that the sheriff is the only legal and proper custodian of prisoners confined in the county jail, and cites section 4176, subd. 6, of the Political Code, which provides that "the sheriff must * * * take charge of and keep the county jail, and the prisoners therein."

The power of the board of supervisors

to provide for the working of such prisoners is not questioned, but appellant insists that they cannot be taken out of the custody of the sheriff for such purpose; that the words, "under the direction of some responsible person," as used in the county government act, (Laws 1891, p. 306, § 25, subd. 30,) do not mean in his custody. Appellant also cites a part of section 1600 of the Penal Code, that "a prisoner * * * must be actually confined in the jail until he is legally discharged." This section prescribes the general duty of the sheriff in relation to prisoners, and whether the last clause of the section is a modification which would include the order of the board of supervisors it is not necessary to determine, inasmuch as sections 1613, 1614, of the Penal Code expressly provide that certain prisoners may be required to labor on the public works or ways in the county by an order of the board of supervisors. See, also, Laws 1891, p. 306, § 25, subd. 30. Appellant's contention cannot be sustained. These statutes do not impose any additional duties upon the sheriff. If it were intended that prisoners, while at labor, should be in immediate custody of the sheriff, it is reasonable to suppose the statute would have said so. The authority given the board of supervisors is broad enough to include the custody of the prisoners while absent from the jail; and, indeed, the custody by the "responsible person" under whose direction they are required to labor is essential to their profitable employment. It does not follow from the fact that they are such officers that the sheriff, or any of his deputies, are suitable persons to direct such labor; while it is undoubtedly competent for the legislature to commit the custody of this class of prisoners, for such special purposes, to a person selected by the board of supervisors. The authority conferred upon the board of supervisors "to provide for the working of prisoners" includes all that is required to prevent escapes, as well as the direction of their labor. Any other construction would, at the pleasure of the sheriff, defeat the operation of the statute, since the statute neither requires the sheriff to perform this duty, nor authorizes the board of supervisors to compel him to perform it. Their custody, as well as direction while at work, is confined to some "responsible person" by contract, and not by arbitrary direction. The sheriff might be selected for such purpose, but could not be required to perform the duty, except as the result of a contract voluntarily made by him. The judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 238)

PEOPLE v. STEWART. (No. 20,941.)
(Supreme Court of California. Jan. 21, 1893.)
ASSAULT WITH INTENT TO RAPE—EVIDENCE—COMPLAINT.

1. In the trial for an assault with intent to rape, made in the nighttime, in an isolated

place on the highway, where defendant forcibly pulled the prosecutrix out of a buggy in which they were riding, and threw her down, and his conduct indicated that his mind was bent on using whatever force was necessary, the fact that he abandoned his purpose on hearing the approach of a third party does not purge him of the offense.

2. Where the prosecutrix, on the approach of such third party, jumped up, and ran to the approaching party, the fact that she remained unconscious or semiunconscious for some hours thereafter was admissible in evidence.

3. The fact that prosecutrix made immediate complaint was competent evidence, but her statement of the details of the affair was properly rejected as hearsay.

Department 1. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

William Edward Stewart was convicted of assault with intent to commit rape, and appeals. Affirmed.

B. F. Howard, W. G. Dyas, and John B. Moore, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant was convicted of an assault with intent to commit rape, and now insists that the evidence is insufficient to support the verdict. Like a great majority of this class of cases, the facts here relied upon to support a conviction are largely dependent upon the testimony of the prosecuting witness alone; still this court has repeatedly held that the testimony of the prosecutrix may be sufficient of itself to establish a prima facie case. The alleged assault occurred in the nighttime, while the parties were traveling upon a public highway; and, after detailing certain language that appellant addressed to her touching his desires and purposes, the prosecuting witness further testified as follows: "He told me I could scream all I chose to, because there was nobody within three miles from me, and then he stopped the buggy and got out and took the lines and whip with him, and went around in front of the horse, and spent some little time like he was fastening the lines to the bridge railing. Then he came back and asked me if I would get out without any trouble, and I told him, 'No.' Then he said he would pull me out, and I told him that he would not either. Then he started to catch hold of me. He did catch hold of me, and I got hold of the buggy, and he pulled my hands loose, and pulled me all out,—out of the buggy,—but I came down, I believe, on my feet, as near as I could remember; and when I got down on the bridge he threw me and fell with me, and just as he fell with me he heard this team coming, and he jumped up and says 'Here comes a team; get into this buggy,' and I jumped up and ran for the team that was coming." We think the foregoing evidence, if bearing the stamp of truth, fills the measure furnished by the statute. If her statement as to the occurrence is true, the assault is entire and complete, and the intent is plainly apparent from the acts of the appellant, conjoined with his menacing language. This question as to the sufficiency of the evidence necessary to support a conviction for the offense here

charged, and the principles of law applicable thereto, are quite fully discussed in *People v. Fleming*, 94 Cal. 308, 29 Pac. Rep. 647, and it is there held that the conduct of the defendant must be such as to indicate a purpose to use whatever force upon the female is necessary to accomplish the consummation of his desires. In this case the appellant's conduct indicates that his mind was bent on using whatever force the exigencies of the case demanded, but, fortunately for his intended victim, the arrival of third parties upon the scene furnished her an avenue of escape. The fact that he abandoned his wicked purpose upon the approach of other parties has not the slightest tendency to purge him of the legal consequences of his criminal conduct. If an assault with the intent here alleged is made, it is no less a crime, though the aggressor should abandon his intentions before the consummation of the act, by reason of the pains of a stricken conscience alone.

It is insisted that the court erred in admitting evidence showing that the prosecutrix remained in an unconscious or semiunconscious state some hours after she escaped from the defendant. We see no objection to this evidence. It is a universal rule that evidence of physical injuries upon the person of a female are proper matters to be placed before the jury, and the evidence here disclosed partakes of that character. The fact that she made immediate complaint was material and competent evidence, and her statements as to the details of the affair were properly rejected as hearsay. *People v. Mayes*, 66 Cal. 597, 6 Pac. Rep. 691; *People v. Tierney*, 67 Cal. 54, 7 Pac. Rep. 37; *State v. Richards*, 33 Iowa, 420; *State v. Shettleworth*, 18 Minn. 208, (Gil. 191.)

Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

(97 Cal. 244)

ELBERT v. LOS ANGELES GAS CO. (No. 19,014.)

(Supreme Court of California. Jan. 21, 1893.)

CONTRACT OF HIRING—EVIDENCE—STATUTE OF FRAUDS.

1. In an action for damages for the breach of an alleged contract of employment for two years, the evidence showed that, as the result of a correspondence by letter and telegraph between plaintiff, residing in M., and the president of defendant company, residing in L., plaintiff gave up his position in M., came to L., and entered into the employ of defendant, and that he remained in such employ over a year, receiving as salary the amount stated in the correspondence. Held evidence sufficient to warrant a finding that a contract of employment for two years, at a fixed salary, was entered into by the parties.

2. Where plaintiff, as the result of a correspondence by letter and telegraph, enters the employ of defendant for a period of two years, these letters and telegrams constitute a contract or memorandum in writing sufficient to satisfy the statute of frauds.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by V. L. Elbert against the Los

Angeles Gas Company for damages for breach of a contract by which defendant agreed to employ plaintiff. From a judgment for plaintiff, defendant appeals. Affirmed.

Cheney & Cronin, for appellant. Graft & Latham, for respondent.

McFARLAND, J. This is an action to recover damages for the breach by defendant of an alleged contract by which defendant agreed to employ plaintiff as its superintendent for a term of two years. Judgment went for plaintiff, and defendant appeals. The main points made by appellant may be condensed into the statement that the evidence does not show any contract such as is averred in the complaint and found by the court, and that, at least, it does not show a contract in writing, within the meaning of the statute of frauds. We, however, do not think that appellant's position is tenable. It appears beyond dispute, from the evidence, that in November, 1888, certain letters and telegrams passed between C. H. Simpkins, who was then president of the defendant, (a corporation,) and the respondent, concerning the employment of the latter. At that time Simpkins was in Los Angeles, Cal., which was the principal place of business of the defendant. Respondent was at Minneapolis, in the state of Minnesota. It appears further, beyond doubt, that in pursuance of said correspondence the respondent left his employment at Minneapolis, came to Los Angeles, entered upon the duties of the office of superintendent of appellant, performed said duties continuously for more than a year, and received his salary from the defendant in the amount stated in said correspondence. It appears, further, that, shortly after the expiration of the first year, the appellant, through its then president, W. B. Cline, without cause, discharged the respondent, and refused to accept further services, or to pay for the same; the only cause being that appellant desired to go out of business. Now, with respect to the question whether or not the letters and telegrams afford sufficient evidence that a contract for two years at a certain stipulated price was made, we deem it enough to say that we think said evidence was sufficient to show said facts; and we do not consider it necessary to repeat said letters and telegrams here in detail.

It is contended, however, by the appellant, further, that said letters and telegrams do not constitute a sufficient contract or memorandum in writing to satisfy the statute of frauds. It is settled law, however, that a correspondence through letters or telegrams, or both, if they show clearly what the contract was, is sufficient under the statute of frauds. In *Breckinridge v. Crocker*, 78 Cal. 534, 21 Pac. Rep. 179, this court said: "In order to take a contract * * * out of the statute of frauds, it is not necessary that there be a formal contract drawn up, with technical exactness. A memorandum of the agreement is sufficient, and it may be found in one or more

papers, some or all of which may be telegrams." In *Ryan v. U. S.*, 136 U. S. 68, 10 Sup. Ct. Rep. 913, the court held that "a complete contract, binding under the statute of frauds, may be gathered from letters, writings, and telegrams between the parties relating to its subject-matter, and so connected with each other that they may fairly be said to constitute one paper relating to the contract." We think, also, that it clearly appears that the respondent was employed by the appellant, and not by said Simpkins personally.

We do not think that the court erred in sustaining an objection to a question put to the respondent, by which he was asked if he had tried to get employment in a kind of business different from that for which he was employed by the appellant.

The exception to the ruling of the court touching certain personal expenses of respondent is of no consequence, as in the findings and judgment no such expenses were allowed.

There are no other points necessary to be noticed. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; PATERSON, J.

97 Cal. 182

HANLY v. SIXTEEN HORSES AND THIRTEEN HEAD OF CATTLE. (No. 14,919.)

(Supreme Court of California. Jan. 13, 1893.)

TRESPASSING ANIMALS—PROCEEDINGS IN REM.

Act March 7, 1878, which embraces the whole subject of trespassing animals in several counties, including Santa Barbara, and which restricts the right of proceeding in rem against such animals to cases where the owner is unknown, repeals, by implication, Act Feb. 4, 1874, which applies also to Santa Barbara county, and which gives a right of action in rem, where the owner is known.

Department 2. Appeal from superior court, Santa Barbara county; B. T. Williams, Judge.

Proceedings in rem by Peter Hanly against 16 horses and 13 head of cattle. A demurrer was sustained to the complaint, and from a judgment thereon, plaintiff appeals. Affirmed.

Wright & Day, for appellant. B. F. Thomas, for respondent.

McFARLAND, J. The court below sustained the demurrer to the complaint; and, plaintiff declining to amend, judgment, from which defendants appeal, was rendered for plaintiff. The action is in the nature of a proceeding in rem, against certain animals, under an act of the legislature approved February 4, 1874, concerning animals trespassing upon private property, which was made applicable to several counties, including the county of Santa Barbara. Afterwards, on March 7, 1878, another act of the legislature upon the same subject was approved, which was made applicable also to several counties, including Santa Barbara, although all the counties in the latter act were not identical with those named in the first act. It was held by the

court below that the first act was in conflict with the last one, and that the last act really repealed the first; and we think that the court was right in so holding. The two acts are conflicting in many points. For instance, under the first act a proceeding in rem might be commenced against the animals, although their owner was known to the plaintiff, as was the case in this action, while under the act of 1878 a proceeding in rem could be commenced only in case the owner was not known. Moreover, it plainly appears that the act of 1878 embraces the whole subject of trespassing animals in the county of Santa Barbara, and was intended by the legislature to be, and was, a substitute for the first-named act. In such a case the latter act operates as a repeal of the former, although there be in the latter act no express words repealing the former act, by name. *Fraser v. Alexander*, 75 Cal. 147, 16 Pac. Rep. 757; *Treadwell v. Board of Sup'rs of Yolo Co.*, 62 Cal. 563, and cases there cited; *Murdock v. Memphis*, 20 Wall. 617. Judgment affirmed.

We concur. DE HAVEN, J.; PATERSON, J.

HILTON v. HANLY. (No. 19,071.)

(Supreme Court of California. Jan. 13, 1893.)

Department 2. Appeal from superior court, Santa Barbara county; B. T. Williams, Judge. Action by W. H. Hilton against Peter Hanly. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Wright & Day, for appellant. B. F. Thomas, for respondent.

PER CURIAM. The judgment in this case is affirmed, upon the authority of *Hanly v. Sixteen Horses, etc.*, 32 Pac. Rep. 10, (No. 14,919, this day decided.)

97 Cal. 224

PEOPLE v. LEM YOU. (No. 20,961.)

(Supreme Court of California. Jan. 18, 1893.)

PERJURY—EVIDENCE—TESTIMONY OF STENOGRAPHER—INSTRUCTIONS.

1. In a prosecution for perjury it is competent to show what witnesses testified to in the cause in which defendant is alleged to have perjured himself, in order to show the materiality of defendant's alleged false testimony, and an objection that defendant was not present at the giving of such testimony, and had no opportunity to cross-examine such witnesses, cannot be sustained; the evidence being offered to show merely that such testimony had been given, and not to prove the facts stated therein.

2. A stenographer, who took down the evidence at a trial, may, subject to cross-examination from the adverse party, testify from his notes as to the evidence; Code Civil Proc. § 2047, providing that a witness may refresh his memory respecting a fact, by anything written by himself at the time such fact occurred, but that the writing must be shown to the adverse party, who may cross-examine the witness upon it if he desires.

3. In a trial for perjury it is for the court to determine whether certain false testimony alleged to have been given by defendant was ma-

terial; a charge to the jury, defining materiality of testimony, and instructing them to find for or against defendant, according as they may determine that the facts are within or without that definition, being improper, as leaving to the jury the function of determining whether such testimony was material.

4. In the trial of A. for the murder of G. the two witnesses whose evidence was admitted to show the materiality of defendant's evidence on such trial testified that they heard gunshots, and, going in the direction of the house, found G. lying before her house wounded, and carried her in. Defendant testified that two Chinamen carried her into the house before such witnesses arrived. *Held*, that, there being no controversy as to the fact that G. was found lying in front of her house wounded, and no issue as to such fact, it was not material to know who carried her in, and an instruction that defendant's evidence in that regard was material was erroneous.

5. Defendant testified that when he approached the spot where G. laid wounded she told him that she did not know who shot her. Another witness testified that G. told him the day after the shooting that A. shot her. *Held*, that an instruction by the court that if they believed that the statement, made by G. the next day, was a dying declaration, defendant's testimony was material, was erroneous, in that the court should have more particularly determined for itself whether such statement was a dying declaration.

6. It appeared that A. had been tried for the murder of G. three times. A witness, L., did not appear at the first trial, but on the second trial testified that he saw A. shoot G. *Held*, that it was error to refuse to allow defendant, on trial for perjury committed in that action, to ask L. who took him up to the district attorney's office, in that it appeared somewhat suspicious that he should come at so late a time to tell what he knew about the case.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Lem You was convicted of perjury, and appeals. Reversed.

F. B. Guthrie and E. M. Guthrie, for appellant. W. H. H. Hart, Atty. Gen., and James McLachlan, Dist. Atty., for the People.

McFARLAND, J. Defendant was convicted of perjury, and appeals from the judgment and from an order denying a new trial. It is charged in the information that the appellant, Lem You, gave certain false and material testimony on the trial of one Wong Ark for the alleged murder of a woman named Goot Gue, who was shot in or in front of the house in which she lived, on the night of April 26, 1891, in the city of Los Angeles. There is great conflict of evidence as to whether or not the said testimony of the appellant was false, and appellant makes no point as to the sufficiency of the evidence to justify the jury in finding that said testimony was false. But appellant contends that the court committed several errors in ruling upon the admissibility of evidence and in instructing the jury.

1. For the purpose of showing the materiality of the alleged false testimony of appellant, the prosecution offered evidence of the testimony which two witnesses named Rohn and Bevan gave at the said trial of said Wong Ark. (There were two or three trials of the said Ark, but the al-

leged false testimony occurred at the first of said trials.) To this evidence appellant objected as incompetent, irrelevant, and immaterial, because appellant, not being present when said testimony was given, had no opportunity to examine or cross-examine said witnesses, because said Rohn was living within the jurisdiction, and should have been called himself, and because, Bevan having since died, there is no rule by which his former testimony can be introduced in this cause. The court overruled the objections, and appellant excepted. The ruling of the court was right. The purpose was not to produce said testimony anew, as tending to prove the facts stated therein; it was offered merely for the purpose of showing as a fact that such testimony had been given, and it was expressly limited by the court to that purpose. The materiality of alleged false testimony does not always appear upon its face, or when simply compared with the indictment. It may be material on account of certain other testimony, which had been previously introduced on the trial of a cause. The testimony of a witness may be material when contradicting a part of the testimony given by another witness, which is material, or if going to the credit or discredit of other witnesses, etc. For instance, if on the trial of A. for a felony, B. should testify that C. was at a certain place at a certain time, this would not appear upon its face to be material; but if C. had previously testified that he was at another and remote place at said time, and had seen A. commit the criminal offense charged, then it clearly would be material. And so the previous evidence and the state of the cause in the action in which the alleged false testimony was given may be proven in order to show the materiality of the latter, (2 Russ. Crimes, 662; 3 Greenl. Ev. § 197;) otherwise the materiality of alleged false evidence could rarely be shown. The rule contended for by appellant that a defendant must be confronted with his witnesses, etc., does not apply here. All that was sought to be proven here was the mere fact that certain testimony had been given, and the appellant was confronted with the witnesses who testified to that fact. If the greater part of the testimony of appellant given in the Wong Ark trial was material at all, it was so only in connection with the said testimony of said witnesses Rohn and Bevan. The said previous testimony of said Rohn and Bevan was read by F. H. Longley, the official stenographic reporter of the court, from his transcript of notes of the testimony, which he testified to be correct; and appellant seeks to make the point that said transcript was not admissible evidence. But we do not think that the point whether or not a certified transcript of the reporter's notes would, as an independent document, have been admissible, arises in this case. Mr. Longley was sworn as a witness, and testified that he had taken such notes, and that they were correct, and he was allowed to read them, and was subject, of course, to cross-examination; and his testifying from his notes was clearly admissible under section

2047, Code Civil Proc.¹ None of the authorities cited by appellant are applicable to this point.

2. Appellant makes the contention that the court erred in instructing the jury, for the reason, among others, that in one part of the instructions given the question of the materiality of the alleged false testimony was left to the jury, while in another part of the instructions it was decided by the court, and taken away from the jury; and this contention must be sustained. For instance, instructions Nos. 4 and 5, given at the people's request, and instructions Nos. 3 and 11, given at request of defendant, go upon the theory that it was proper for the court to give the jury certain advice, information, and definitions upon the general subject of the materiality of the testimony, and allow the jury, under such instructions, to determine whether or not it was material; while in instructions Nos. 2 and 3, given by the court of its own motion, the court determined that two of the items of alleged false testimony were material. If the said two specific instructions had embraced all the matters charged in the information, it might perhaps be said that the general instructions did not work any prejudice to appellant, although even then the instructions would have been subjected to the charge of inconsistency. But the said two specific instructions do not embrace all the charges of false testimony made in the information, and therefore the materiality of all the other testimony alleged to have been given by appellant was left to the jury. The question of the materiality of evidence, no matter when or how it may arise, is always one of law for the court, and not of fact for the jury. It usually arises in the ordinary trial of a cause where one party offers evidence and the other objects to it as immaterial, and in that case it would be clear to every one that the question was for the court. But the question is exactly the same when, on a trial for perjury, the materiality of the alleged false testimony arises. Of course, a jury, in rendering a general verdict in a criminal case, necessarily has the naked power to decide all the questions arising on the general issue of not guilty; but it only has the right to find the facts, and apply to them the law, as given by the court. And on a trial for perjury it is the duty of the court to instruct the jury as to what facts would show material testimony. 2 Whart. Crim. Law, § 1284; *Cottrhan v. State*, 39 Miss. 541; *Steinman v. McWilliams*, 6 Pa. St. 170; *Reg. v. Southwood*, 1 Fost. & F. 356; *Power v. Price*, 16 Wend. 448; *State v. Lewis*, 10 Kan. 157; *People v. Clementshaw*, 59 Cal. 385. There is nothing to the contrary in the case of *People v. Brilliant*, 58 Cal. 214. The court was there considering an entirely different question, viz. the sufficiency of the indictment; and in the language quoted by ap-

¹Code Civil Proc. § 2047, provides that a witness may refresh his memory respecting a fact by anything written by himself at the time such fact occurred, but the writing must be shown to the adverse party, who may cross-examine the witness upon it if he desires.

pellant from the opinion of McKinstry, J., it is merely said that certain questions were to be determined in that "present cause," and that whether certain facts existed which would make the matter material was to be determined by the jury. In Wharton's Criminal Law, *supra*, it is said that "the proper course is for the court, assuming all the evidence to be true, to determine whether the particular article of evidence is or is not material. Any dispute as to the truth of facts, however, must go to the jury." The same rule was substantially declared in *People v. Clementshaw*, *supra*,—the syllabus of the case being misleading. The proper course for the court to pursue in such a case is aptly stated on the kindred subject of malicious prosecution in the opinion of this court rendered by Mr. Justice Harrison, in *Ball v. Rawles*, 93 Cal. 228, 28 Pac. Rep. 937. Substituting the words "materiality of testimony" for "probable cause," the following language from that opinion is a correct statement of the duty of the court on the trial of a defendant for perjury: "It is necessary for the court in each instance to determine whether the facts that they [the jury] may find from the evidence will or will not establish that issue. Neither is it competent for the court to give to a jury a definition of probable cause, and instruct them to find for or against the defendant, according as they may determine that the facts are with-in or without that definition. Such an instruction is only to leave to them, in another form, the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove and then instruct the jury that, if they found such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly." These views do not conflict with *People v. Ah Sing*, 95 Cal. 659, 30 Pac. Rep. 797. There the manner of establishing the materiality of evidence was not before the court.

It is not clear from the record whether or not appellant makes a specific objection to the correctness of said instruction No. 2, given by the court on its own motion; but, as we think said instruction was wrong, although the method pursued in it was right, and as the case may probably be tried again, we think it proper to notice it. It appears that on the said trial of Wong Ark the witness Rohn testified, in substance, that at the time the woman Goot Gue received the mortal wound, he, the witness, was about 140 yards from where she lived; that he heard a police whistle in the neighborhood of where she lived, and immediately proceeded to that place; that he found Goot Gue lying in front of the house, suffering from a gun-

shot wound; that there were only a few persons there at the time; that another man, named Roper, who was on horse-back, appeared at the scene at about the same time; and that he (Rohn) and Roper carried the woman Goot Gue into the house. Now, the appellant herein, Lem You, testified, among other things, that he heard the shot at the same time, being at another point near the place of shooting; that he, the appellant, and one Ah Tet, also went immediately to the place, and also found the woman lying on the sidewalk, shot; that when he got there there were a good many people present, but that neither Rohn nor Roper had come; that two other Chinamen carried the woman into the house, and that Rohn and Roper did not carry her in. The court, in said instruction No. 2, instructed the jury, in substance, that said testimony of the appellant was material; and in this we think that the court erred, at least upon the state of the evidence as it then appeared. There was no conflict of testimony and no issue as to the fact that the woman Goot Gue was found lying in front of the house, wounded. All the witnesses swore to that fact, and there was no controversy about it. Under those circumstances, we do not think it was material to know who carried her into the house; nor is the latter fact connected in any way with anything that was material. If the witness Rohn had given further testimony about something that was material, then the contradiction by appellant of his statement that he carried the woman into the house might have been material, for it might have affected his credibility, and lessened the weight of the additional material evidence. But the record does not show that at the first trial of Wong Ark the witness Rohn testified to any other fact material in the case, and the testimony of the appellant must have been material at the time when it was given.

It may be well also to notice the third instruction given by the court of its own motion. It seems that the appellant testified that when he approached the woman on the sidewalk he asked her who shot her, and she replied that she did not know; and it appears further that the witness Bevan testified that on the next day, about 11 o'clock A. M., the said Goot Gue told him, in substance, that Wong Ark killed her. The court told the jury that the testimony of the appellant as to what Goot Gue told him was material, if the jury believed that the statement made the next day by her to Bevan was a dying declaration; at least that is the way we construe the instruction. If the statement of Goot Gue, made to Bevan, was made under such circumstances that it was admissible as a dying declaration, then said testimony of defendant was probably material, because it might have affected in some degree the truth of the statement made by Bevan; but the court should have more particularly and clearly determined for itself whether or not the said statement, made to Bevan, was a dying declaration.

3. We think the court erred in refusing

to allow appellant to ask of the witness Ah Lung, on cross-examination, the question: "Who took you up to the district attorney's office?" although this error may not be of great importance. The said Ah Lung had testified that he was present, and saw Wong Ark shoot Goot Gue; that he was not a witness on the first trial of Wong Ark, and had told no person what he knew about the shooting until he was picked up on the street during the second trial of Wong Ark, and taken to the district attorney's office. This conduct of the witness was rather suspicious; and, for the purpose of showing how he came at so late a time to tell what he knew about the case, we think it was not improper to ask him upon whose suggestion he went to see the district attorney. The record does not disclose any other error, and we do not deem it necessary to discuss the other points made by appellant. Judgment and order reversed.

We concur: DE HAVEN, J.; GAROUTTE, J.

(3 Cal. Unrep. 771)

SAN BERNARDINO NAT. BANK v. ANDRESON et al. (No. 19,002.)

(Supreme Court of California. Feb. 8, 1893.)

NOTES SIGNED AS OFFICERS OF CORPORATION—
PERSONAL LIABILITY—ACTION—PLEADING.

1. Where defendants sign a note with their individual names, adding thereto "president" and "secretary," respectively, in which note they promise to pay plaintiff bank a certain amount, and there is nothing on the face of the note to indicate a principal back of them, they are personally bound, and cannot set up a defense that they executed the note as officers of a corporation, that the loan which the note was given to secure was made to such corporation, and that the intention of both parties was that it should bind the corporation, and not defendants.

2. The fact that a resolution of the corporation, with the corporate seal thereon, authorizing defendants to make the loan and execute the note in the name of, and as the note of, the corporation, was attached to the note, was without effect, as such attachment did not make the resolution a part of the note.

3. By failing to verify their answer, where a copy of the note was set out in the complaint, defendants admitted, not only the genuineness, but also the due execution, of the note.

4. A cross-complaint setting up the facts in regard to the execution of the note, and praying that the corporation be made defendant, and that the note be reformed so as to make it the note of the corporation, could not be sustained; for, if a proceeding for reformation could be maintained by plaintiff, it could not by defendants, whose only interest in reforming the contract was to relieve themselves from liability thereon, and to show it was not their contract, but that of the corporation, which they cannot be allowed to do.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

(Not to be published in California Reports.)

Action by the San Bernardino National Bank against John Anderson and J. A. Crawford to recover on a promissory note. From a judgment for plaintiff, defendants appeal. Affirmed.

C. W. Rowell and E. E. Rowell, for appellants. Curtis, Oster & Curtis, for respondent.

TEMPLE, C. Defendants appeal from the judgment and from an order denying a new trial. The complaint is in the ordinary form, upon a promissory note,

which is set out, and is as follows: "San Bernardino, Cal., July 16, 1888. \$2,000. On August 16, 1888, at three o'clock P. M. of that day, (no grace,) for value received, in gold coin of the government of the United States, we promise to pay to the order of San Bernardino National Bank, of San Bernardino, two thousand dollars, with interest from date at the rate of one per cent. per month until paid, payable monthly; both principal and interest payable in like gold coin. John Anderson, President. J. A. Crawford, Secretary." The defendants answered, setting up two separate defenses. The first avers that the note was without consideration. The finding to the effect that there was sufficient consideration is fully sustained by the evidence.

The second defense was stricken out on motion of plaintiff, and this ruling is assigned as error. In this defense it is averred that the defendants, at the time of the execution of the note, were, and for a long time prior thereto had been, respectively, the president and secretary of the San Bernardino Fruit Company, a corporation, of which facts plaintiff had full knowledge; that, prior to the making of the note, plaintiff had agreed with the corporation to loan to it \$2,000; that the money was so loaned and delivered to the corporation, and the note in suit was given to secure it, and for no other purpose; that plaintiff and its officers well knew the facts, and that the note was intended as and for the note of the corporation, and not as the individual note of the defendants, and that it was intended to bind the corporation and not the defendants, and was received by plaintiff as the note of the corporation; that the corporation had duly authorized, by resolution, the making of the loan, and these defendants to execute the note in the name of, and as the note of, the corporation, as plaintiff well knew, and that "there was attached to said note, as part thereof, a copy of said resolution, and that plaintiff received said note with such copy of said resolution attached thereto, which said resolution showed that defendants had been authorized by said company to make said note as the corporate note of said company, and not otherwise; and defendants further allege that said note bore the impress of the corporate seal of said company, and was so received by plaintiff, which corporate seal disclosed the corporate name and capacity of said San Bernardino Fruit Company."

The case of *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. Rep. 320, would seem to be on all fours with this. It was as manifest in that case as here that the loan was to the corporation; that the defendant did not intend to bind himself personally, but did intend to bind the corporation; and that all these facts were known to the payee. There, as here, the action was between the original parties to the note. In that case, also, as in this, there was nothing on the face of the note to indicate that there was a principal back of the defendant. The signature was the same as here, and it was held that the defendant was personally bound, and could not show a

contract differing from that which he had executed. The fact that the resolution of the company, with the corporate seal, was attached to the note, did not make that document a part of the note. Besides, by failing to verify their answer, since a copy of the note was set out in the complaint, the defendants admitted, not only the genuineness, but the due execution, of it. Section 447, Code Civil Proc.; *Burnett v. Stearns*, 33 Cal. 473.

There was also a cross-complaint, to which plaintiff demurred. The demurrer was sustained, and defendants did not amend. It set up pretty much the same facts which were stated in the second defense, as above recited; prayed that the San Bernardino Fruit Company be brought in, and made a defendant, and that the note be reformed so as to make it the note of the San Bernardino Fruit Company. This is on the theory that the execution of the note by the defendants as their individual note was a mistake. Conceding that such a proceeding could be maintained by plaintiff, it is plain that it cannot be done by these defendants. This would not be a reformation of an instrument which had been executed by the corporation. It would be to compel the corporation to execute a contract to which it is now not a party, on the ground that the corporation intended to execute it, and plaintiff received the note believing that it had done so. The only interest defendants have in reforming the contract is to be relieved from it themselves; that is, to have it show that it was not executed by them, was not their contract, but was the contract of the corporation. No authority for such a proceeding is cited, and I know of none. This would allow them to do indirectly that which it is held in *Hobson v. Hassett* they cannot do, to wit, to show by parol that they are not liable on the note as parties thereto.

The other alleged errors are disposed of by this conclusion. I advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 254)

MILLS v. LA VERNE LAND CO. et al.
(No. 19,037.)

(Supreme Court of California. Feb. 1, 1893.)

MECHANIC'S LIEN—ASSIGNMENT OF RIGHT.

Code Civil Proc. § 1183, provides that "all persons, and laborers of every class, performing labor upon, or furnishing materials to be used in the construction" of, a building, may have a lien thereon for such services or materials; and section 1187 provides that such persons shall themselves file a claim for record, stating the character of the labor or materials which they themselves furnished for the building. *Held*, that the right to assert such a lien is a personal right, for the laborer's own protection, and cannot be assigned.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by J. S. Mills against the La Verne Land Company and others to enforce an alleged mechanic's lien. From a judgment for defendant, entered on an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

J. G. Rossiter, for appellant. W. S. Wright, for respondent.

McFARLAND, J. This action was brought to enforce an asserted lien under the mechanics' lien law. The court below sustained a general demurrer to the complaint, and judgment was rendered for defendants. Plaintiff appeals. The averments of the complaint are, in brief, that the La Verne Company, defendant, was indebted to Meek & Benton in the sum of \$700 for labor and materials furnished by them for and in the construction of a building on land of said company; that said Meek & Benton, by a written instrument, assigned the indebtedness to plaintiff, and also assigned, if the thing could be done, all their "right of lien" against said building and land; and that afterwards, and within the statutory time, plaintiff, as assignee, formally filed in the recorder's office a notice of claim of lien against said property for the money due said Meek & Benton for the said labor and materials which they had furnished as aforesaid. And we think that the demurrer was properly sustained. The question presented is not whether a lien for work or materials can be assigned, or would pass under an assignment of the debt secured, but whether a laborer or material man can assign his mere right to assert and create a lien,—by complying with statutory provisions, clothe the assignee with the power to create the lien for himself,—and we are satisfied that he cannot. This question has never been heretofore determined in this state. In *Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. Rep. 890, referred to by appellant, the only question involved was whether in an action brought by the assignee of "a lien," there should be an averment that the assignment was in writing. The case in our Reports which comes the nearest to touching the principle involved is *Godeffroy v. Caldwell*, 2 Cal. 489, where it was held that "one who advances money as a loan, though expressly for the payment of materials and labor devoted to the structure of a building, can have no claim to the benefit of the mechanic's lien law. The decisions on the point in other states are no doubt somewhat conflicting, although the conflict may be explained to some extent by the different provisions of various statutes; some showing more clearly than others that only a personal right was intended to be conferred. But the weight of authority is clearly to the point that the said right cannot be assigned. In *Rollin v. Cross*, 45 N. Y. 771, the court said: "The lien under statutes of this character is, in general, a personal right given to the mechanic, material man, and laborer for his own protection, and the right to create it cannot be assigned or transferred to another. The statute under which the plaintiff claims does not authorize a lien to

be filed by the assignee of a debt for work performed under a building contract." In *Fitzgerald v. Trustees*, Mich. N. P. 243, note, the court holds that "the lien is personal to the contractor or subcontractor, and is assignable." In *Caldwell v. Lawrence*, 10 Wis. 331, it is held that "the lien of the mechanic, lumberman, etc., for work and materials, is a personal right, and cannot be transferred or assigned so as to enable the assignee to prosecute the claim in his own name, and avail himself of the benefit of the lien given against the building." In Iowa, the courts having decided that such right was not assignable, the legislature enacted that "the mechanics' liens are assignable, and shall follow the assignment of the debt. But the court, in *Brown v. Smith*, 55 Iowa, 31, 7 N. W. Rep. 401, held that the statute referred "to the lien perfected by the filing of a claim therefor, and not to the inchoate right to a lien," and, further, as follows: "The mere performance of the requisite labor is not sufficient. His right to a lien cannot be said to exist until he has complied with the statute. When he does so, it will be conceded, for the purposes of this case, that he has a lien which may be assigned, and that an assignment of the account carries with it the lien. The language of the statute is that the lien is assignable, and not the mere right, which follows the performance of labor, and which depends for its existence on the volition of the subcontractor." In the late case of *Dexter, Horton & Co. v. Sparkman*, 2 Wash. 168, 25 Pac. Rep. 1070, the court, speaking of a claim filed by an assignee, said: "This he could not do. The lien given by statute is personal to the laborer. It does not run with the chose in action." There are many other decisions in various states to the same point, but the foregoing citations are sufficient to show the general drift of judicial opinion on the subject. In *Phillips on Mechanics' Liens* decisions on both sides of the question are referred to, and we think that the true rule is expressed in the following paragraph from section 54 of said work: "Where, throughout the whole act, the right of lien, and the right to enforce it, appear to be confined to the contractor, laborer, or persons furnishing materials, and where in no instance is the assignee of such claim recognized in connection with the creation or enforcing of the lien, there can be no construction given to such a statute other than as conferring a mere personal right on the contractor laborer, etc., and not on his assignee." And, under our statutory provisions on the subject, no right of lien is given to an assignee, or to any person other than those mentioned in section 1183 of the Code of Civil Procedure; and the persons there mentioned include only "mechanics, material men, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers, of every class, performing labor upon, or furnishing materials to be used in the construction," etc.

Appellant invokes the rule that the assignment of a debt carries with it the lien by which it is secured. But, in the first place, that rule is not of universal applica-

tion. It does not apply, for instance, to vendors' liens, or to the many liens which accrue to various kinds of bailees. And, in the second place, at the time of the assignment of the debt to plaintiff in the case at bar, there was no lien securing it in existence. The assignors had merely a personal right to create a lien by complying with the statute. But the statute nowhere confers such right upon an assignee. It would be impossible for an assignee to comply with the statute; for the Code, § 1187, provides that the contractor or other person mentioned in section 1183 must himself file a claim for record, stating the character of the labor or materials which he himself furnished for the building. And this shows clearly that the legislature was providing a lien only for a contractor, laborer, or material man. It is urged that it would be a construction beneficial to the laborer to hold that he could sell or raise money upon his mere personal, inchoate right to procure a lien; but the legislature may not have thought that it would be advantageous to a laborer (for whose benefit the law was originally passed) to allow him the privilege of frittering away his wages at ruinous discount to money lenders and speculators. At all events, a court can neither make nor amend a statute. The law must be enforced as we find it enacted.

Judgment affirmed.

We concur: De HAVEN, J.; HARRISON, J.

97 Cal. 253

GARIBALDI v. GARR. (No. 19,079.)

(Supreme Court of California. Jan. 31, 1893.)

DISMISSAL OF APPEAL—EFFECT.

Where a former appeal has been dismissed for failure to file a transcript within the prescribed time, and the order of dismissal did not expressly provide that it was made without prejudice to the right to take another appeal, such dismissal was, under Code Civil Proc. § 955, in effect an affirmation of the judgment.

Department 2. Appeal from superior court, Los Angeles county; W. L. Pierce, Judge.

Action by one Garr against one Garibaldi. From the judgment, defendant appeals. Appeal dismissed.

A. B. Hotchkiss, for appellant. James McLachan, Dist. Atty., for respondent.

DE HAVEN, J. This is an appeal by the plaintiff from a judgment in favor of the defendant. This is the second appeal plaintiff has taken from the same judgment. The former appeal was dismissed by this court on April 12, 1892, for failure to file the transcript within the time prescribed by rule No. 2; and the order of dismissal did not expressly provide that it was made without prejudice to the right of defendant to take another appeal. This being so, the dismissal of the former appeal was in its effect an affirmation of the judgment. Section 955, Code Civil Proc. The order submitting this case for decision upon the merits will be set aside, and

the motion of respondent to dismiss the appeal granted. Appeal dismissed.

We concur: BEATTY, C. J.; McFARLAND, J.

(97 Cal. xviii; 3 Cal. Unrep. 717)

ROUSSET v. REAY et al. (No. 14,368.)

(Supreme Court of California. Feb. 3, 1893.)

On petition for a rehearing. Denied.

For former report, see 31 Pac. Rep. 900.

PER CURIAM. Ordered: The petition for a rehearing herein is denied, but the judgment of the department is hereby modified so as to read as follows: "The order appealed from is reversed, and the cause remanded for further proceedings."

(97 Cal. 259)

HAYNE v. HERMANN. (No. 19,099.)

(Supreme Court of California. Feb. 4, 1893.)

CONSTRUCTIVE TRUSTS — CONVEYANCE PROCURED BY UNDUE INFLUENCE—EVIDENCE.

1. Civil Code 1886, § 153, provides that transactions between husband and wife shall be governed by the general rules which control the actions of persons occupying confidential relations with each other. Section 1575 defines undue influence as the use by one in whom a confidence is reposed by another of such confidence to obtain an unfair advantage over him. Held, that a conveyance of land from the husband to the wife, with an oral agreement that it was to be held in trust by her, would be presumed to have been obtained by undue influence whenever the trust should be violated. *Brison v. Brison*, 17 Pac. Rep. 689, 75 Cal. 525, and 27 Pac. Rep. 186, 90 Cal. 323, followed.

2. The declarations of the trustee as to the character in which she held the property are admissible in an action against her by the cestui que trust, to corroborate the latter's witnesses.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Martha H. Hayne against Angelica Hermann to enforce a trust in property, and for a conveyance thereof. Judgment for plaintiff. Defendant appeals. Affirmed.

L. S. Seaman and Louis Luckel, for appellant. A. G. Hinckley and Guthrie & Guthrie, for respondent.

HARRISON, J. Action to obtain a judgment that certain property is held by the defendant in trust for the plaintiff, and for a conveyance thereof. E. C. Hermann, the father of the plaintiff, and the husband of the defendant, in his lifetime caused a certain tract of land in Los Angeles county, of which he was the owner, to be conveyed to the defendant, and also certain moneys and other personal property to be paid and delivered to her. The court finds "that said money was paid to defendant, and note and deed delivered to her, upon the express understanding and agreement that she would hold the same in trust for said E. C. Hermann during his life, and for plaintiff and herself in equal proportions after his death, and said defendant accepted said money, note, and deed to hold in trust, as aforesaid, and without hav-

ing paid any consideration therefor." This finding is fully sustained by the evidence. Von der Kühlen, who held the property in trust for Hermann, and who made the conveyance to the defendant, testified: "On the direction of Mr. Hermann, she was to hold it in trust for Mr. Hermann while he lived, and then for plaintiff and defendant equally. That is what was said at the making of the arrangement, that she should keep it in that way, and Mrs. Hermann consented." The plaintiff herself testified: "My father directed the deed to be made to my mother by Mr. Von der Kühlen. It was said by my father and mother at the time as to making the deed that way that it was to be made in my mother's name for my father in trust, and after a while to be divided up in equal proportions. My mother agreed to that. Mother and father said that it was to be held in trust for him, and after his death it was to be divided in equal parts between me and my mother."

* * * My father said to me and my mother that she was to take the deed in her name in trust for the family. * * * My father said the property was to be for us both, and said that it was to be conveyed to my mother in trust. I heard him use the word 'trust.' Other testimony to the same effect was given by these witnesses, and the finding of the court in conformity therewith must be sustained.

It is objected, however, on the part of the appellant, that a trust in lands cannot be created by parol, and that, inasmuch as there was no note or memorandum in writing expressing the trust, no trust was created, and that she is entitled to retain the property as her own estate. Constructive trusts, however, or such as arise by operation of law, are expressly excepted from the requirement that a trust can only be created by an instrument in writing, (Civil Code, § 852;) and whenever one person acquires from another the title to real estate by a fraud, actual or constructive, practiced upon that other, a constructive trust is created, which a court of equity will fasten upon the title in his hands. There are certain relations in which such confidence and trust exists between the parties that any dealings between them wherein one obtains an advantage from the other raises the presumption of fraud, and casts upon him the burden of executing the trust which the law imposes upon him. One of these relations is that of husband and wife, and their transactions with each other respecting property are declared by Civil Code, § 158, to be "subject to the general rules which control the action of persons occupying confidential relations with each other, as defined by the title on 'Trusts.'" Fraud also is presumed whenever one party gains an advantage to himself through any undue influence exercised by him over the party from whom the advantage is derived; and section 1575 of the Civil Code declares that undue influence consists "in the use by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him."

In *Brison v. Brison*, 90 Cal. 336, 27 Pac. Rep. 186, it is said: "The influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity, but is that influence which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust which he has in the devotion and fidelity of the other. Such influence the law presumes to have been undue whenever this confidence is subsequently violated or abused." The complaint in the present case alleges, and it is not denied in the answer, "that the said E. C. Hermann reposed great faith and confidence in his wife, the defendant herein, and, believing that she would faithfully execute the trust created in her, directed Von der Kuhlen" to make the conveyance and deliver the property; and the court finds that the deed was made and the property delivered to her upon the aforesaid trusts, "on account of the confidence that said E. C. Hermann reposed in his said wife, the defendant, that she would take and hold the said property in trust for him during his lifetime, and in trust for the plaintiff and defendant thereafter." The facts in this case are not distinguishable in principle from those presented in the cases of *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689; *Id.*, 90 Cal. 323, 27 Pac. Rep. 186; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. Rep. 599; and *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. Rep. 521; and upon the authority of those cases the action of the court below must be sustained.

The claim that the conveyance was made to hinder, delay, and defraud the creditors of Hermann is not sustained by the record. No issue of that character was presented by the pleadings, and there was no proof of any debts against Hermann that it could have defeated. See *Alaniz v. Casenave*, 91 Cal. 47, 27 Pac. Rep. 521.

The court did not err in receiving the testimony of certain witnesses concerning the declarations by the defendant of the character in which she held the property. This testimony was not competent for the purpose of proving the trust, but was admissible in corroboration of the testimony of the plaintiff's witnesses. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

97 Cal. 263

GIANT POWDER CO. v. SAN DIEGO FLUME CO. (No. 19,018.)

(Supreme Court of California. Feb. 7, 1893.)

MECHANICS' LIENS—MATERIAL MEN.

Code Civil Proc. § 1183, provides that, where a building contract is void because it is not recorded, the materials furnished shall be deemed to have been furnished at the personal instance of the owner, and the material man shall have a lien for the value thereof. *Held* that, where materials used in the construction of a flume were furnished before the contract for the construction thereof was recorded, the material man is entitled to a lien against the flume for the value thereof.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by the Giant Powder Company against the San Diego Flume Company and another to enforce a material man's lien. From a judgment for plaintiff, defendant flume company appeals. Affirmed.

Shaw & Holland, for appellant. J. F. Cowdery and Oscar Trippet, for respondent.

PER CURIAM. This appeal is from a judgment rendered in the court below in favor of the plaintiff. The action was brought to obtain judgment against a contractor, by a material man, for materials furnished in the construction of certain works to be used to support the flume of one of the defendants and appellant, and against the flume company, to subject the structure in which the materials were used to the statutory lien of the plaintiff. The case has been twice before, on appeal, in the supreme court. 78 Cal. 193, 20 Pac. Rep. 419; 88 Cal. 20, 25 Pac. Rep. 976. The point made for the reversal of the judgment, on the judgment roll alone, now, is that the judgment is not supported by the findings; the argument appearing to be that it was held on the last appeal, which is the law of the case, that there was no valid contract existing between one John-drew, the contractor, and the flume company, until the contract was filed for record on the 6th of June, 1887, and that as a consequence there was no lien in favor of the material man against the structure, which had been accepted by the flume company from the contractor, for materials furnished before the filing of the contract, although the materials were used in the construction of the accepted work or structure. The opinion filed at that time is not, in our judgment, susceptible of any such construction. The pivotal point in that case was whether or not the structure was completed, by acceptance on the part of the flume company, when abandoned to it by the contractor; and thereby depended the determination of the question as to whether or not the filing of the notice of lien of the plaintiff was premature, under section 1187 of the Code of Civil Procedure, as amended March 15, 1887. That part of the section which makes the acceptance of the structure or improvement conclusive evidence of completion has reference to cases where there is a valid contract between contractor and owner of the structure, improvement, or building; and the language of the opinion, which it is erroneously claimed by appellant declares that the payment of the value of the materials furnished before the contract was filed for record cannot be enforced as a lien, must be read with reference to the precise matter which was being discussed in the opinion,—that is, whether, admitting a valid contract to have existed by virtue of the filing thereof for record on the 6th of June, 1887, the notice of lien was premature, or not. There was no need to determine whether a lien could be enforced for materials furnished, when no valid contract existed; that is, before the contract

was filed for record. And the decision only goes to the extent, on that head, of determining that a lien for those materials furnished, "by virtue of the contract," i. e. the filing of the contract, could be enforced if the notice was properly filed for record. And, after that matter is disposed of, there follow expressions, merely, which lead up to the consideration of the real point in the case which was to be decided; and then the writer of the opinion proceeds to dispose of the mooted question in favor of the proposition that the notice was a proper one, because the date of the acceptance of the structure, under the circumstances of the case, was the date of its completion, and the plaintiff, having filed a notice of lien within 30 days after such completion, did not proceed prematurely.

But, as to the enforcement of the lien for the value of the materials furnished before there was any valid contract between the contractor and the owner, the findings must be construed with reference to the case as it is now presented, uncontrolled by anything said in the former opinion in 88 Cal. 26, 25 Pac. Rep. 976. The findings now show a completion of the structure by its acceptance, and that a notice of lien was filed in due and proper time; and they also show that the materials and the value thereof, claimed by the plaintiff to have been furnished to the contractor, and used in the completion of the structure, were so furnished and used. It was said by the supreme court in *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. Rep. 509, where a contract was void because not filed for record, and where a material man sought to enforce his lien: "The extent of the material man's recovery is not measured by the terms of the contract. On the contrary, the statute provides in express terms that where the contract is not recorded the material man shall have a lien for the value thereof. In case the contract is not recorded the statute, and not the contract, measures the extent of his recovery." The statute alluded to above (section 1183, Code Civil Proc.) provides, where an attempted contract is void for nonfiling for record, that "in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

The judgment appealed from is affirmed.

97 Cal. 266

McDONALD v. DREW et al. (No. 14,916.)
(Supreme Court of California. Feb. 8, 1893.)

ADVERSE POSSESSION—PAYMENT OF TAXES.

Defendant owned lot 7, adjacent to plaintiff's lot 4, and for more than five years the division fence existed so as to place a narrow strip of lot 4 on defendant's side. *Held*, where during all the time plaintiff's property was assessed to him as "lot 4," and he paid all taxes on such assessment, and defendant's property was assessed to defendant simply as "lot 7," without mention of the fence, and he paid all taxes on such assessments, that defendant's possession of the strip of lot 4 on his side of the fence was not adverse; Code Civil Proc.

§ 325, providing that adverse possession cannot be established without payment by claimant of all taxes on the land in question during the alleged adverse possession. *Webb v. Clark*, 2 Pac. Rep. 747, 65 Cal. 56; *Ross v. Evans*, 4 Pac. Rep. 443, 65 Cal. 439; *McNoble v. Justiniano*, 11 Pac. Rep. 742, 70 Cal. 395,—followed.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Mary A. McDonald against H. L. Drew and others. Judgment for defendant. Plaintiff appeals. Reversed.

Rolfe & Freeman and Paris & Fox, for appellant. Goodcell & Leonard, for respondents.

VANCLIEF, C. Action in the nature of ejectment to recover possession of a narrow strip of land, about 18 inches wide and 100 feet in length, being part of lot No. 4, block 20, of the city of San Bernardino, the east side of which strip adjoins the east boundary line of said lot. The defendant pleaded title by prescription through an adverse possession during a period of five years. The court found the facts as follows: "For the purpose of this action the following are stipulated as facts: (1) That at the time of the commencement of this action the plaintiff was, and for twenty years next prior thereto she and her grantors had been, the owners of lot 4, in block 20, of the city of San Bernardino, the land described in the complaint, except in so far as such ownership may have been impaired by adverse possession of the defendants and their grantors as to the strip of land described and claimed in the answer; (2) that during all of said times the plaintiff and her grantors have been in the actual and exclusive possession of said lot four as owners, except in so far as such possession may have been ousted or withheld by the defendants and their grantors as to said strip; (3) that J. W. Satterwhite was such owner and possessor at the time of the construction of the fence mentioned in the answer, and referred to as a division fence, and the plaintiff's title is derived through him; (4) that during all of said times the defendants and their grantors were the owners of the west half of lot 7, in said block 20, lying east of and adjoining said lot four; (5) that, at the time of the construction of the fence mentioned, Byron Waters was the owner of the said west half of lot 7, and in the actual possession thereof, and the defendants' title is derived through him, but this does not admit any possession, or right of possession, as to said strip of land; (6) that during all of said times the said lot 4 has been assessed to the plaintiff and her grantors, described simply as lot 4, in said block 20, without mention of said fence or reference thereto, and the plaintiff and her grantors have paid all taxes upon such assessments; (7) that during all said times the said west one half of lot 7 has been assessed to the defendants and their grantors simply as to the west one half of lot 7 of said block, without mention of said fence or reference thereto, and the defendants and their grantors have paid all

taxes upon such assessments. Rolfe & Freeman and Paris & Fox, for Plaintiff. Goodcell & Leonard, Attorneys for Defendants. And in addition to said stipulation the court finds the following facts from the evidence: (8) That the east line of lot 4, block 20, of the city of San Bernardino, referred to in the findings and the aforesaid stipulation, commences at a point on Court street, in said city, 22 inches west from the southwest corner of the brick building on the north side of said Court street known as the 'Courier Office,' running thence due north about 130 feet to the northeast corner of said lot 4, and the same line constitutes the west line of lot 7 of said block. (9) That ever since the spring of the year 1881, being more than five years before the commencement of this action, the defendants and their grantors and predecessors in interest were in the actual, uninterrupted, open, and exclusive possession of the strip of land along and upon the east side of said lot 4 referred to in the complaint, said strip being about one foot and a half wide at the south end, and extending north 100 feet from the north side of said Court street, and gradually narrowing northward a few inches, to wit, to about one foot in width at the north end of said 100 feet; such possession being under claim as of right, and adverse to plaintiff and her predecessors in interest and all the world, except as such adverse possession may be affected by the nonpayment of taxes by the defendants or their predecessors, on any of said lot 4, as shown by the aforesaid stipulation." Upon the facts found the court adjudged that the defendants were the owners of the land in question. Plaintiff brings this appeal from the judgment upon the judgment roll, and contends that upon the findings of fact the judgment should have been in her favor; and so it appears to me.

The controversy is reduced to the question of law, as to whether the possession of the defendants could have been adverse without payment by them of all taxes which had been levied and assessed upon the land in question during the five-years period of the alleged adverse possession, as required by section 325 of the Code of Civil Procedure. This question has been answered negatively by this court in several cases.—Webb v. Clark, 65 Cal. 56, 2 Pac. Rep. 747; Ross v. Evans, 65 Cal. 439, 4 Pac. Rep. 443; McNoble v. Justiniano, 70 Cal. 395, 11 Pac. Rep. 742; see, also, Allen v. Reed, 51 Cal. 362,—and, as all the arguments urged here by counsel for respondent seem to have been considered and answered in the cases cited, it is unnecessary to reconsider them on this appeal. I think the judgment should be reversed, and the lower court be directed to render judgment on the findings of fact in favor of the plaintiff.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the lower court is directed to render judgment on the findings of fact in favor of plaintiff.

McFARLAND, J., (concurring.) I concur in the judgment because it does not appear in the findings either that the co-terminous owners had agreed upon the fence as the line between lots 4 and 7, or that respondents had claimed it as such line. All that appears is that respondents, in addition to the west half of lot 7, also held by adverse possession a part of lot 4 as such; and, as they had paid no taxes on the part of lot 4 in their adverse possession, they could not invoke the statute of limitations. But I do not think that the provision of section 325 of the Code of Civil Procedure, about the payment of taxes, applies to a small strip along a boundary line, when the adverse holder claims that the general description in his title deed carries him to the line to which he had held adversely by actual possession, and he has paid the taxes on the land thus described in his deed.

97 Cal. 258

TIBBETTS et al. v. RIVERSIDE BANKING CO. et al. (No. 19,154.)

(Supreme Court of California. Feb. 4, 1893.)

BILL OF EXCEPTIONS — SETTLEMENT — MANDAMUS.

Code Civil Proc. § 652, provides that, "if a judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same." *Held*, that where a judge refuses to settle a statement of the case and bill of exceptions, prepared by an appellant, and served on the opposite party, or any bill of exceptions according to the facts of the case, the proceedings must be by mandamus to compel the judge to settle the bill or statement.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by L. C. Tibbetts and another against the Riverside Banking Company and another. On a motion for a new trial the judge of the superior court refused to sign the statement of the case and bill of exceptions offered by plaintiffs, or any other bill of exceptions. Plaintiffs petition the supreme court to settle the statement and bill. Petition denied.

L. C. Tibbetts and A. B. Paris, for petitioners. H. C. Hibbard, for respondents.

PER CURIAM. The plaintiffs have filed a petition here purporting to be made under section 652 of the Code of Civil Procedure. Petitioners say that they prepared a statement of the case and bill of exceptions, served it on counsel for defendants, and presented it to the judge of the superior court for settlement; "that said judge refused to sign said bill of exceptions, and still refuses to sign said bill, or any bill, according to the facts of the case." Therefore they pray "that this court may sign and seal said bill of exceptions, as provided for under section 652, Code Civil Proc."¹ Petitioners have mis-

¹Code Civil Proc. § 652, provides that, "if a judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same."

taken the provisions of said section. That section only provides that where, upon the settlement of a bill of exceptions or statement, the judge refuses to allow an exception, the party may petition this court to prove said exception; but in this case petitioners merely show that they presented quite a lengthy statement on motion for new trial to the judge of the superior court, and that he refused to sign it, or any other bill of exceptions. In such case the judge can be compelled by mandamus to settle the bill or statement; but this court has not the power, nor is it its duty, to take the place of the judge of the lower court, and perform the duty of settling the statement.

The petition is denied.

enforce the assessment, though the contract for the street work did not provide for those bulkheads, since defendant, not having appealed to the city council from the action of the superintendent, as provided by Act March 18, 1885, will be deemed to have waived his right to make such objection.

7. Act March 18, 1885, providing for work on streets, does not require a property owner to appeal to the city council in order to obtain relief from an assessment under a void contract, or from one which includes the cost of work which the council would not itself have jurisdiction to contract for, because not embraced in the resolution of intention.

8. Where, in an assessment made under a valid contract for street improvement, there is erroneously included the cost of work not falling within the provisions of the contract, though reasonably related thereto, and which might have been included in the contract without rendering it void, a failure by a property owner to appeal to the city council for redress is a waiver of the right to make the objection in an action brought to enforce the assessment.

Department 2. Appeal from superior court, Santa Barbara county; R. M. Dillard, Judge.

Action by one Perine against one Forbush upon a street assessment. From a judgment for plaintiff, entered upon an order overruling a demurrer to the complaint, defendant appeals. Reversed.

R. B. Canfield and B. F. Thomas, for appellant. J. J. Perkins and Wright & Day, for respondent.

DE HAVEN, J. This action is upon a street assessment, and it appears from the complaint that the contract which is the foundation of the assessment was not entered into within 15 days after the first posting of the notice of its award to plaintiff. Section 5 of the act of March 18, 1885, (St. 1885, p. 147,) contains the following: "But if said original bidder neglects, fails, or refuses for fifteen days after the first posting of notice of the award to enter into the contract, then the city council shall again advertise for proposals, as in the first instance, and award the contract for said work to the then lowest responsible bidder." This provision of the law is not directory, as claimed by plaintiff. It is true that statutes which fix the time within which official acts are to be performed are often held to be merely directory as to the time so fixed, but such a statute is never so construed when its language indicates the contrary intention; as, for instance, when the statute attaches a consequence to the failure to perform the act within the time limited. "In such a case," said Mr. Justice Cope, in delivering the opinion of the court in the case of *Shaw v. Randall*, 15 Cal. 385, "the consequence can be avoided only by compliance with the statute." The provision of the statute above quoted, which fixes the time within which contracts for street improvements shall be executed, is mandatory, and when the bidder has neglected or refused for 15 days to enter into the contract awarded him the city council must again advertise for proposals, and the superintendent of streets is without power to relieve him from the consequence of his neglect or refusal to complete the contract within the time specified. As al-

97 Cal. 305

PERINE v. FORBUSH. (No. 14,867.)

(Supreme Court of California. Feb. 15, 1893.)

STREET IMPROVEMENTS—ACTION TO ENFORCE ASSESSMENT—COMPLAINT—DEFENSES—WAIVER OF OBJECTIONS.

1. Where, in an action to enforce a street assessment, it appears from the complaint that the contract on which the assessment was based was not entered into within 15 days after the posting of the notice of its award, as provided by St. 1885, p. 147, and there is no averment that this delay was not caused by the fault of plaintiff, the complaint is demurrable as failing to state a cause of action.

2. Where a contract for certain street work was void because it was not made within the time prescribed by St. 1885, p. 147, the fact that the property owner did not appeal to the city council from the action of the superintendent of streets in entering into such contract will not validate an assessment made thereon.

3. In an action to enforce a street assessment it is no defense that the contract for the work contained a provision that there should be no assessment on the adjoining property for improving that part of the street occupied by a street-railway company, but that the company should pay therefor.

4. In an action to enforce a street assessment it is no defense that the property against which the lien is sought to be enforced is defendant's homestead.

5. In an action to enforce a street assessment it is no defense that plaintiff agreed orally to enter into a written contract by which plaintiff was to accept from defendant a conveyance of certain land in payment of the assessment against defendant's property, and then refused to enter into such contract.

6. An objection that a street assessment is void because the superintendent of streets included in the assessment the cost of certain bulkheads, will not be sustained in an action to

ready stated, the complaint alleges that the contract for the street work was made more than 15 days after the first posting of notice of its award to plaintiff, but there is no averment therein that the delay in entering into the contract was not caused by the fault of plaintiff, and, in the absence of such an allegation, the complaint does not state a cause of action, as it fails to show any authority in the superintendent of streets to make the contract after the expiration of the 15 days named in the statute. The facts showing such authority cannot be left to inference, but they must be alleged. It is incumbent upon the plaintiff in this class of actions to show in his complaint, "by either special or general averment of the character permitted by our statute, that the various provisions of the statute under which it is sought to charge the defendant were complied with, for, unless they have been complied with, the defendant is not liable." *Himmelmann v. Danos*, 35 Cal. 441. It is claimed, however, by plaintiff that the assessment cannot be held invalid because of the act of the superintendent in entering into the contract after the time fixed in the statute, as the defendant failed to appeal to the city council from such action of the superintendent, as provided for by section 11 of the act of March 18, 1885, (St. 1885, p. 147;) but, the contract being void, it was not incumbent upon the defendant to appeal to the city council. This was so held in *Brock v. Luning*, 89 Cal. 316, 26 Pac. Rep. 972, construing a similar section found in the act of April 1, 1872, (St. 1871-72, p. 894.) The court in that case said: "As the action of the superintendent of streets was void, it could not become valid by the failure of the property owner to appeal, under section 12 of the law of 1872, to the board of supervisors. He could not appeal unless 'aggrieved.' Such owner was not aggrieved, for the contract made was void, and affected his rights no more than would a void judgment." And in the case of *McBean v. Redick*, 96 Cal. 191, 31 Pac. Rep. 7, it was also held that the property owner is not required to appeal to the board of trustees or city council, when the assessment is based upon an invalid contract. It follows from what we have said that the demurrer to the complaint should have been sustained.

It is possible, however, that the plaintiff may be able to obviate this objection to the complaint by its amendment, and it is therefore necessary to pass upon other questions which have been argued, which we now proceed to do. There was no error in sustaining the demurrer to the answer of defendant. The fact that there was a provision in the contract to the effect that there should be no assessment upon the adjoining property for improving that part of the street occupied by the railway company, and that plaintiff would accept as payment for all work done thereunder "the warrant of said superintendent as the same may be issued by him, * * * and also the amount which may be paid by any person holding a franchise for any operation of a street railroad throughout State street," did

not render the contract void. The contract was to do all the work specified in the resolution of intention, and the agreement of plaintiff to accept payment from the street railway company for a portion of the work was one which he had a right to make, and which could not possibly injure the defendant, or any property owner.

Nor is it any defense to this action that the property against which it is sought to enforce the lien constitutes the homestead of defendant. The cost of making improvements like those embraced in this contract is as much a charge against the homestead as against any other property fronting upon such improvements.

The third separate defense set out in the answer is equally without merit. The verbal agreement of plaintiff to enter into a written contract with defendant by which plaintiff was to accept from defendant a conveyance of certain land in payment of the amount which should be assessed against the property of defendant for the street improvements, and to pay to defendant the balance of the purchase price of said land, and the refusal of plaintiff to complete such written contract after doing the street work, constitute no defense to this action. Nor is the case of defendant strengthened by the averment that, if it had not been for such verbal agreement, he would have commenced an action to enjoin plaintiff from prosecuting the street work under his contract made with the superintendent of streets. As we construe the answer, the alleged agreement upon the part of plaintiff to purchase defendant's land, and in part payment therefor to credit defendant with the amount of the street assessment, was never completed; and it is unnecessary to consider what would have been its effect if it had been reduced to writing, as verbally agreed upon, and defendant had tendered a deed in accordance with its terms.

In making the assessment the superintendent of streets included \$444, the cost of 37 bulkheads, which were not named in the plans and specifications attached to the contract, and it is claimed by defendant that the assessment is for this reason void. This contention cannot be sustained. It is true that, as the contract did not provide for constructing these bulkheads, the superintendent of streets ought not to have included their cost in the assessment which he made, but for such erroneous action on his part the only remedy was an appeal to the city council, as provided for in section 11 of the act "to provide for work upon streets * * * within municipalities," approved March 18, 1885, (St. 1885, p. 147.) Such an objection to the assessment could have been corrected by the city council, and the defendant waived his right to now make it by not appealing to that body for its correction. *Himmelmann v. Hoadley*, 44 Cal. 276; *Boyle v. Hitchcock*, 66 Cal. 129, 4 Pac. Rep. 1143; *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. Rep. 943; *Frick v. Morford*, 87 Cal. 579, 25 Pac. Rep. 764. When, however, an assessment includes the cost of work not falling within the general description of that which is referred to in the

resolution of intention, or when such work bears no relation whatever to that which is described in the contract, this rule would not apply. But this is not such a case. The construction of the bulkheads was not, so far as appears here, an entire departure from the general plan or scope of the improvement described in the resolution of intention, although mention of them is omitted in the plans and specifications attached to the contract. In such a case, the determination of the superintendent of streets that their construction was necessary in order to fully complete the work called for by the contract, was only an error of judgment, and his action in making an assessment to cover their cost was only a mere error, which it is too late now to correct, and which does not render the assessment wholly void. We do not regard the cases of *Dyer v. Chase*, 52 Cal. 440, and *Donnelly v. Howard*, 60 Cal. 291, cited by defendant, as being opposed to our conclusion upon this point, but, on the contrary, they are in harmony with the views here expressed. In each of those cases the assessment and the demand for its payment included the cost of work not authorized by the resolution of intention, although provided for in the contract upon which the assessment was based; and it was held that such assessment could not be enforced as a lien upon the property of the defendant, and that the owner was not required to appeal to the board of supervisors for its correction, or, failing to do so, submit to it as a burden upon his property. We are satisfied that section 11 of the act of March 18, 1885, above referred to, does not require the property owner to appeal to the city council for relief from an assessment based upon a void contract, (*McBean v. Redick*, 96 Cal. 191, 31 Pac. Rep. 7; *Frick v. Morford*, 87 Cal. 579, 25 Pac. Rep. 764; *Brock v. Luning*, 89 Cal. 316, 26 Pac. Rep. 972;) or for relief from an assessment which includes the cost of work which the city council itself would not have had jurisdiction to contract for, because not embraced in the resolution of intention; but when the contract is valid, and the error complained of is only found in the assessment because it was made to cover the cost of work not falling strictly within the provisions of the contract, although reasonably related thereto, and which might have been included in the contract without rendering it void, as not being within the authority conferred by the resolution of intention, the failure to appeal to that body for redress is a waiver of the right to make such objection in the action brought to enforce the assessment.

Judgment and order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

97 Cal. 316

LIBBEY v. ELLSWORTH et al. (No. 19,009.) (Supreme Court of California. Feb. 16, 1893.)

STREET IMPROVEMENTS—ACTION TO ENFORCE ASSESSMENT—SUFFICIENCY OF COMPLAINT.

Under Act March 18, 1885, providing that the superintendent of streets "shall fix the time for the commencement, which shall not be

more than 15 days from the date of the contract, and for the completion of the work, under all contracts entered into by him," the complaint in an action to enforce an assessment for street improvements must show that the contract under which the work was done fixed the time for commencement and completion of the work as provided in the statute.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by one Libbey against one Ellsworth and another upon a street assessment. From a judgment for defendants, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Jones & Carlton, for appellant. Julius Lyons, for respondents.

DE HAVEN, J. The action is upon a street assessment. The court below sustained a demurrer to the complaint, and thereupon rendered judgment in favor of defendants. The plaintiff appeals.

We think the demurrer was properly sustained. It appears from the complaint that the contract which is the basis of the assessment sought to be enforced was not entered into between the assignor of plaintiff and the superintendent of streets within 15 days after the first posting of the notice of its award to plaintiff's assignor, the plaintiff alleging that posting of such notice was first made on September 22, 1890, and the contract executed on the 8th day of October following. There is no averment in the complaint that this delay in executing the contract was not caused by the neglect, failure, or refusal of plaintiff's assignor, and we held in the case of *Perine v. Forbush*, 32 Pac. Rep. 226, (No. 14,867, recently decided,) that such an allegation is necessary in order to state a cause of action in this class of cases, when it also appears from the complaint that the contract was not entered into within 15 days after notice of its award was first posted, and the judgment here must be affirmed upon the authority of that case.

In addition to this, the complaint fails to show that the contract entered into between the superintendent of streets and the assignor of plaintiff fixed any time for the commencement or completion of the work therein provided for. Looking at the contract as stated in the complaint, it is not possible to say whether it was one authorized by the law or not. Section 6 of the act "to provide for work upon streets * * * within municipalities," approved March 18, 1885, (St. 1885, p. 147,) provides that the superintendent of streets "shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work, under all contracts entered into by him." This requirement of the statute is mandatory, and a contract not in accordance with its terms would be destitute of binding force; and, as the validity of the assessment must depend upon the validity of the contract upon which it is based, it is incumbent upon the plaintiff seeking to enforce the alleged lien of such assessment, to show by his complaint that the contract was one au-

thorized by law. "The complaint must show by either special or general averments of the character permitted by our statute that the various provisions of the statute under which it is sought to charge the defendant were complied with, for, unless they have been complied with, the defendant is not liable." *Himmelman v. Danos*, 35 Cal. 441. It is not sufficient to allege generally, as in this case, that the contract entered into with the superintendent of streets was one by which the contractor agreed to do the work named therein in accordance with specifications which are not set out, and under the direction and to the satisfaction of the superintendent of streets; but it must affirmatively appear from the statement of the contract, whether it is set out in *haec verba* or according to its legal effect, that it contained everything essential to make it a valid contract under the statute.

Judgment affirmed.

We concur: FITZGERALD, J.; McFarland, J.

3 Cal. Unrep. 765

DREW v. COLE et al. (No. 19,143.)

(Supreme Court of California. Feb. 4, 1893.)

SURFACE WATER — OBSTRUCTING NATURAL FLOW.

Where, from time immemorial, surface water had flowed through well-defined channels, from the adjacent country, upon plaintiff's land, and would still but for the erection by plaintiff of an embankment which diverted the water upon defendants' land, the fact that a change in the conformation of the adjoining country, resulting from its cultivation by strangers, had obliterated the natural channels, and formed new ones, which would cause the water to overflow defendants' lands but for an obstruction erected by strangers many years before such change, will not justify plaintiff in maintaining his embankment, to the injury of defendants.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

(Not to be published in California Reports.)

Petition for injunction by H. L. Drew against Henry Cole and another. Defendants filed a cross bill for affirmative relief. Judgment for defendants. Plaintiff appeals. Affirmed.

Willis, Cole & Craig and C. W. C. Rowell, for appellant. Paris & Satterwhite, Rolfe & Freeman, and Harris & Gregg, for respondents.

HAYNES, C. Plaintiff appeals from the judgment and an order denying his motion for a new trial. The action was brought to enjoin defendants from constructing a bulkhead or embankment by which, it is alleged, certain waters would be turned upon plaintiff's premises, to his injury. Defendants answered, and also filed a cross complaint, seeking affirmative relief against the plaintiff. The findings of the court, upon all the issues, were in favor of defendants. The locus of the controversy is upon a subdivided portion of the San Bernardino ranch, northwesterly from the city of Redlands. Colton avenue runs east and west and California street crosses the avenue at right angles.

The plaintiff's land lies on the north side of Colton avenue, and the land of defendants, Cole and Hicks, on the south side. California street is the east boundary of the land of the plaintiff and of defendant Hicks, and defendant Cole's land adjoins Mrs. Hicks' land on the west. The Adams or La Pierce land, mentioned in the testimony, lies on the south side of Colton avenue, and is separated from Mrs. Hicks' land by California street, and the land of William Curtis, mentioned in the testimony, lies on the west side of California street, and adjoins the land of defendant Hicks on the south. The lands of plaintiff and defendants, Cole and Hicks, are highly cultivated, and planted in orange, lemon, and other fruit trees and vines. The complaint alleges "That to the southeast of plaintiff's premises is a large section of country comprising what is known as the 'Old Barton Ranch' and 'Redlands,' all of which is cultivated and irrigated; and since the cultivation and irrigation of the same, and during heavy storms of rain, the water flows down from the same to the southeast corner of plaintiff's land, and has cut itself a channel down through said Colton avenue, running westward along plaintiff's south line, but outside and south of plaintiff's improvements, and is flowing thereon in greater or less quantities at different times." The complaint then charges that defendants are proceeding to build a bulkhead across Colton avenue, on the line of California street, for the purpose of preventing the water from passing down Colton avenue, and compelling it to pass over plaintiff's premises, to the great injury of his orchards and improvements, by cutting channels, etc. The answer alleges that during storms of rain, from time immemorial, the water has naturally flowed from the section of country mentioned in the complaint, in a northwesterly direction, to the southeast corner of plaintiff's land, and would still naturally flow in the same direction, upon and across plaintiff's premises, but for a dam or embankment constructed by plaintiff in the spring of 1890 across the natural course of said water, whereby it was diverted, and caused to flow down Colton avenue and over the defendants' lands; that the construction of the embankment being built by them, and the construction of which plaintiff seeks to enjoin, was necessary to prevent the diversion caused by plaintiff, and to protect their premises. Defendants' cross complaint repeats these allegations, alleges that plaintiff threatens and intends to maintain his dam, and prays for an injunction, and that the dam may be abated as a nuisance. Plaintiff's answer to the cross complaint denies specifically the material averments thereof, and alleges that about 1887, owing to the cultivation of the land lying to the southeast, large bodies of water were accumulated thereon for the purposes of irrigation, and ditches and canals were constructed; that by natural and artificial causes, over which he had no control, the conformation of the country lying southeasterly from his premises was so changed that ancient channels were obliterated, and new channels created, "and that the

water since then coming through said channels will, if unobstructed, discharge itself over and through the place of William Curtis and the defendants in a north-west direction, and on through and over Colton avenue a long distance west of the southeast corner of his place;" and further alleges that defendants so graded California street, and constructed an embankment along the easterly side of said street, as to prevent the water from flowing as it otherwise would across their land, and that, if the water was permitted to flow as it naturally would across their land, the quantity would be insufficient to injure them. The court found (1) that all the matters and things stated in defendants' answer are true; (2) that plaintiff did, in the year 1890, erect a dam at the southeast corner of his land, with the intent and to the effect of diverting all of the water which flowed to said corner of his land through the natural drains of the country, down Colton avenue, and thereby caused a large wash or gulch to be made in the avenue, and also caused said waters to run over the defendants' lands, and wash and injure and greatly damage the same, and that the water never flowed down Colton avenue before the erection of said dam by plaintiff; and, as to the cross complaint, found all the allegations true, and all the denials and matters alleged in the answer thereto untrue. Judgment was rendered that plaintiff take nothing by his action, and upon defendants' cross complaint judgment was entered that plaintiff's dam be abated as a nuisance. Appellant's notice of intention to move for a new trial specified, as the grounds thereof, (1) insufficiency of the evidence to justify the decision of the court; (2) errors of law occurring at the trial, and excepted to by the plaintiff; and (3) that said decision is against law. Under the second ground of motion above mentioned, there are no specifications whatever. Several particulars are specified wherein the evidence is claimed to be insufficient to justify the findings; but these, so far as material, hinge upon the question whether there was a natural channel or drainage which conducted the water to plaintiff's southeast corner, and thence into and upon his premises, and not down Colton avenue, or over the lands of defendants. The evidence is very voluminous, and every fact bearing on the issues between the parties appears to have been fully developed. Careful surveys of the country from which water flows to the vicinity of plaintiff's and defendants' lands were made, and topographical and profile maps were prepared to illustrate the various contentions of the parties and the testimony of the witnesses.

After a careful examination of the maps and the testimony of the witnesses, the principal issue of fact is not difficult of determination. It is somewhat obscured by the large mass of testimony, much of which is immaterial and sharply conflicting. Counsel for appellant concedes that "it is in evidence, and not contradicted, that at some time in the past a dry gulch ran down through these places to the southeast corner of plaintiff's place."

Plaintiff's answer to the cross complaint would seem to show quite conclusively that such dry gulch existed until about 1887, when, by the improvement and cultivation of the land, "the conformation of the country lying to the southeast" was changed by natural and artificial means; that old channels were obliterated and new ones created; and that "the water since then coming through said channels will, if unobstructed, discharge itself over and through the places of William Curtis and the defendants, Cole and Hicks." The change in the conformation of the country, and the obliteration of the old channels, and the creation of new ones, were not upon defendants' lands, nor caused by them. Defendants' map shows, and there is much evidence tending to establish the fact, that the main gulch or arroyo came down from at or near the city of Redlands, and entered the Adams or La Pierce lot near the middle of the east line, and pursued its course to the southeast corner of plaintiff's land, and continued in the same general direction for some distance into plaintiff's lands, where it spread out into what one of the witnesses termed "a swale." Another arroyo, but a smaller one, came into the Adams lot on the south side, and continued across the lot, and entered the main gulch near the point where it left that lot and entered plaintiff's premises. California street, as before stated, runs north and south on the west line of the Adams place and the east line of Mrs. Hicks' land. On the west line of the street is an embankment, averaging about three feet higher than the level of the cultivated land. This embankment was made 21 years ago for the purpose of a fence, by digging a ditch, and throwing the earth upon one side, and this embankment is about a foot higher than the present grade of California street. It does not appear, however, that at the time this embankment was made, nor until recent floods, the water would have flowed over the land of the defendants, nor that it would now have any material effect, but for the changes made in the surface of the lands above, whereby the ancient channels have been obliterated to a greater or less extent. Appellant relies very largely upon his topographical survey to show that the natural flow of the water would now be over defendants' land. That the natural flow would be at right angles to the contour lines is true, and would be conclusive upon that point if the surface were absolutely even and regular, but slight obstacles lying between the contour lines may divert the water from the course it would otherwise pursue. But such evidence cannot overcome or change the course of natural channels conceded to exist or to have existed. Besides, these surveys were made shortly before the trial, and after the changes in the surface of the lands referred to by appellant in his pleadings and testimony, and for these changes the defendants are not responsible; nor are they responsible for the increased quantity of water reaching the east line of plaintiff's and defendants' property, resulting from clearing the lands above them, and the increased use

of water for the purpose of irrigation, the breakage or overflow of ditches, and the like. So far as the arroyos across the Adams place, if they had remained unobstructed, would have conveyed the water, as they formerly did, to appellant's southeast corner, and into his land, he is not injured by the same quantity of water being now turned to the same point by the grading up of California street, or by the embankment maintained by Mrs. Hicks; nor could the defendants in any manner be held responsible for the acts of the public authorities in grading the street, so far as that may, under present circumstances, operate to turn the water to plaintiff's corner. But no relief was sought against those who changed the surface of the land above, so as to change or divert the course of the water, or through whose agency the quantity of the flow was increased, nor against the public for raising the grade of the street, nor against Mrs. Hicks for maintaining an embankment made many years before; for, if the defendants could be held liable for all this in an appropriate action, it could not change the result in this action. Appellant erected a dam across what is conceded to be at that point a natural channel, and which at some time in the past was the continuation of a natural channel or drainage for storm water from the city of Redlands to that point; and by the erection of the dam, and the removal of earth from that part of Colton avenue next his premises, appellant diverted the water into a new channel, to the injury of the avenue and of defendants' premises. So far, therefore, as the judgment against appellant is concerned, the material facts necessary to support it, so far as the existence of the water course, the erection of the dam, and the diversion of the water down the avenue were concerned, could have been sustained upon his own testimony, while the injury to defendants resulting therefrom, as testified to by them, was practically uncontradicted; and the same facts found from the same evidence justified the dismissal of the plaintiff's bill for an injunction.

Appellant complains that there was no finding upon the allegation that not more than 2,500 inches of water naturally flowed at the point where the channel entered his land. But it is immaterial whether the quantity naturally flowing there was 500 or 2,500 inches. If any material quantity—that is, any quantity capable of doing damage to others if diverted—naturally flowed there, he had no right to obstruct it, and divert it to other and new channels, to the injury of others; and hence the quantity diverted, within the limits above stated, could not affect the character of his dam as a nuisance. I think the findings cover all the material issues, and are fully justified by the evidence, and that the findings support the judgment.

Some exceptions to evidence are found in the body of the transcript, but which are not referred to in the specifications of error, nor in appellant's brief, and we therefore assume that they are not relied upon. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

97 Cal. 270

LABORY v. LOS ANGELES ORPHAN ASYLUM. (No. 19,111.)

(Supreme Court of California. Feb. 8, 1893.)

ADVERSE POSSESSION—CONSTRUCTIVE OCCUPANCY—RIGHT OF CORPORATION TO DEFEND SUIT—FILING ARTICLES.

1. In an action to quiet title to land included in a patent originally granted to a city, it appeared that plaintiff claimed title relying on adverse possession by his predecessors in interest, who had actually occupied a small portion of the grant the required period, and claimed constructive possession of much more, including the land in controversy, which the city deeded to defendant's predecessors. Held, that the city, being the owner of the land, was constructively in possession of all that was not actually occupied by others, and therefore plaintiff's title extended only to the amount actually occupied by him, and the deed to defendant, including only what plaintiff claimed by constructive possession, conveyed the valid title.

2. An objection that defendant corporation is not entitled to defend the suit because it has not complied with Civil Code, § 299, requiring that every corporation shall file a copy of its articles of incorporation in every county where it holds property, and on failing to do so it shall not maintain or defend any proceeding in relation to such property, will be deemed waived unless taken during the trial.

Commissioners' decision. Department

2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action to quiet title by Leonard Labory against the Los Angeles Orphan Asylum. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. A. Meserve and M. W. Conkling, for appellant. Stephen M. White, for respondent.

BELCHER, C. This is an action to quiet the plaintiff's title to a tract of land in the city of Los Angeles, and the complaint is in the usual form. The defendant is a corporation, and by its answer it denies that the plaintiff is the owner or entitled to the possession of a described portion of the tract, and avers that it is the owner in fee, and in possession thereof; and it disclaims any claim to or interest in the remaining portion of the tract. The court below found the facts to be in accordance with the averments of the answer, and gave judgment accordingly. The plaintiff appeals from the judgment and an order denying his motion for a new trial.

The city of Los Angeles was incorporated by an act of the legislature in 1850, and was made to succeed to all the rights, claims, and powers of the pueblo of that name in regard to property. In due time it presented to the board of land commissioners, appointed under the act of congress of March 3, 1851, its claim for four square leagues of pueblo lands, and its title thereto was thereafter duly and regularly confirmed. The decree of confirma-

tion became final on February 1, 1858, and on August 9, 1866, the United States issued its patent for the lands to the city. The land in controversy is included within the four leagues so confirmed and patented, and the principal question is, had the plaintiff's predecessors in interest acquired a title thereto by prescription as against the defendant and its predecessors in interest, who claimed title under conveyances from the city? To establish his title the plaintiff relies upon deeds, executed by his predecessors in interest, of a tract of land including the land in controversy, and an actual occupancy of a small part of the tract, under claim in good faith and color of title to the whole. The first deed was executed on May 31, 1866, and the last to the plaintiff on August 26, 1890. The tract described was situated on the east side of and adjoining the Los Angeles river, and was in form a parallelogram, having a length from west to east of 400 varas, and a width of 250 varas. Next to the river was a small flat, containing two or three acres, then a rise or hill, and back of that a level plain or mesa, extending east for many miles. The flat next to the river was inclosed and planted with fruit trees, and on it was an adobe house, which was occupied by each of the grantors, or his tenants, during the time of his claimed ownership. The balance of the tract was never inclosed or used by any of the plaintiff's predecessors in interest, but was a common pasture, used by any one and every one for that purpose who chose to do so, until the part of it in dispute was inclosed by the defendant in March, 1886. To establish its title the defendant relies upon two deeds executed by the city to its predecessors in interest, both deeds conveying the land in controversy and other land, and one dated August 12, 1875, and the other March 8, 1886.

The plaintiff claims that the entry of each of his predecessors into the actual possession of the flat by the river was made in good faith, and under claim and color of title to the whole tract; and that under section 322 of the Code of Civil Procedure a title to the whole tract, denominated a "title by prescription," (section 1007, Civil Code,) which was good as against the city and the whole world, had vested in his predecessors before the city made its first deed to one of defendant's predecessors. This claim cannot, in our opinion, be sustained. At all the times named the city was the owner of all the pueblo lands, except such parcels thereof as private parties had acquired title to by purchase or otherwise; and the court will take judicial notice that the city had actual possession of certain parcels of such lands and constructive possession of the balance. This being so, no mere intruder could obtain a constructive possession which would oust or supersede the constructive possession of the real owner. "The rule is well settled that title draws to it the possession, and it remains with the owner of the legal title until he is divested of it by an actual adverse possession; and while he is in possession of a part of the premises his possession is entitled to the constructive possession, and

can only be ousted by and to the extent of the actual occupation of a mere intruder." Wood, Lim. Act. § 261. In *Hunnicutt v. Peyton*, 102 U.S. 368, it is said: "It is true that when a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be coextensive with his deed or title, and the true owner will be disseised to the extent of the boundaries described in that title. Still his possession beyond the limits of his actual occupancy is only constructive. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder, and this though the owner's actual possession is not within the limits of the defective title. The reason is plain. Both parties cannot be seised at the same time of the same land under different titles. The law, therefore, adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title." And in *Semple v. Cook*, 50 Cal. 26, it was held that if one who claims title under a deed to a large tract of land enters upon it and erects a house, and acquires actual possession of a small part around his house and constructive possession of the whole, and the owner of the true title afterwards enters on the same tract in another place, claiming the whole, the constructive possession thus acquired by the one who first entered is overcome by the constructive possession of the true owner, so that the statute of limitations does not run in favor of the one who had not the true title. In view of these authorities,—and many more to the same effect might be cited,—it is clear that, as to the premises in controversy, the statute of limitations did not begin to run in favor of any of the plaintiff's predecessors in interest before August 12, 1875, the date of the city's first deed of the property. It is also clear that after the first deed was made no title by limitation could have been acquired, for the reason that to create such title an adverse possession for five years, and after April 1, 1878, the payment by the adverse claimant of all taxes assessed against the property, were required. Section 325, Code Civil Proc. But it was proved that, beginning with 1878, the land had been assessed to the defendant and its predecessors in interest, and that all the taxes thereon had been paid by them. It is also claimed that the judgment should be reversed for the reason that the defendant failed at the trial to show that it had complied with the provisions of section 299 of the Civil Code. That section requires every corporation to file a copy of the copy of its articles of incorporation, duly certified by the secretary of state, in the office of the county clerk of every county in this state in which it holds any property, except the county where the original articles are filed; and it declares that "any corporation failing to comply with the provisions of this section shall not maintain or defend any action or proceeding in relation to such property." The complaint alleges "that the defendant,

the Los Angeles Orphan Asylum, is now and ever since the 21st day of June, 1869, has been a corporation organized, existing, and doing business under and by virtue of the laws of the state of California." At the trial the defendant offered all its testimony, and it was received without objection or suggestion by the plaintiff that it had no right to defend the action. The case was then argued, submitted, and decided, and after that the point seems to have been first raised by a specification attached to the statement on motion for new trial, to the effect that the finding that the defendant was the owner of the land in controversy was not justified by the evidence, because it was not shown by the evidence that defendant had complied with the provisions of the section named. We do not think the point can be thus raised for the first time. The objection should have been made when the defendant was introducing its evidence, or at least at the conclusion of it. Not having been made at any time during the trial, the objection must now be deemed waived. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

3 Cal. Unrep. 775

LOS ANGELES COUNTY v. REYES et al.
(No. 19,106.)

(Supreme Court of California. Feb. 8, 1893.)

EMINENT DOMAIN—PROCEEDING TO OPEN PRIVATE ROAD—VALIDITY.

1. Where defendant, through whose land a private road was surveyed, refused to accept the compensation awarded, and the case was tried by a jury, he cannot complain of the jury's action in assessing damages on the ground that the evidence is insufficient to justify the verdict, as the burden of proving damages rests on defendant.

2. Pol. Code, § 2692, provides that a private road may be opened for the convenience of one or more residents or freeholders in the same manner as public roads are opened, except that only one petitioner shall be necessary. *Held*, that while the principal use of such private road may be for the petitioner, as a means of egress from his farm, it is also for the use of the public, in deriving the benefit of his products, and in going to his place, and the legislature has the power to declare it a public use, for which the right of eminent domain may be exercised. *Monterey Co. v. Cushing*, 23 Pac. Rep. 700, 83 Cal. 511, followed.

3. The appellate court will not consider an objection to oral instructions given by the trial court, where no exception was taken, nor the attention of the court called to anything objectionable therein.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

(Not to be published in California Reports.)

Action by the county of Los Angeles against Pablo Reyes and others. From a judgment opening a road through de-

fendants' property, and awarding damages therefor, defendant Reyes appeals. Affirmed.

Roberts & Robinson, for appellant. James McLachlan, Dist. Atty., Waldo M. York, and B. M. Marble, for respondent.

HAYNES, C. This is an action to condemn certain lands for road purposes, by virtue of the provisions of article 6, tit. 6, pt. 3, of the Political Code, and of title 7, pt. 3, of the Code of Civil Procedure. The contemplated road is one designated in section 2692, Pol. Code,¹ as a private road. Proceedings were duly taken by the board of supervisors, under the statute, upon the petition of Cheesebrough, to lay out and establish the road. Viewers were appointed, and reported. But defendants, through whose lands the road was surveyed, refused to accept the compensation awarded; and this proceeding was ordered by the board to be taken in accordance with the statute. The cause was tried by a jury, who found the special facts authorizing the condemnation of the land for the purposes of a private road, and assessed the damages and benefits accruing to the defendants, and the value of the land proposed to be taken; and the court, having made its findings to the effect that all the allegations of the complaint were true, and the allegations of the answer untrue, rendered the appropriate judgment. A motion for a new trial made by defendants was denied, and this appeal from the judgment and order denying a new trial is taken by the defendant Pablo Reyes alone.

The first point urged by appellant is that the evidence is insufficient to justify the verdict of the jury and the findings of the court, especially as to the damages awarded the defendants, and the practicability of some other route than that selected by the viewers, and adopted by the court and jury. As to the first of these particulars the appellant cannot complain, if, as urged by counsel, there was no evidence, since the burden of proving the damages in condemnation cases rests upon the defendant. Counsel contend that the true rule is to determine the effect of the proposed change upon the market value of the property effected. Such evidence would, of course, cover the entire question of compensation, viz. the value of the land taken, and the damage to the land not taken, diminished by the benefits accruing to the defendant from the opening of the road; but it is not contended that defendant was prevented from giving evidence of such market value. The jury assessed the damages to the

¹Pol. Code, § 2692: "Private or by roads may be opened, laid out, or altered, for the convenience of one or more residents or freeholders of any road district, in the same manner as public roads are opened, laid out, or altered, except that only one petitioner shall be necessary, who must be either a resident or freeholder in said road district, and the board of supervisors may, for like cause, order the same to be viewed, opened, laid out, or altered; the person for whose benefit said road is required paying the damages awarded to landowners, and keeping the same in repair."

land not taken at \$50, and the benefits at the same sum, and we think there was sufficient evidence to sustain each of those findings; and, as to the value of the land taken, there was evidence which, if uncontradicted, would have justified a less valuation than that found by the jury. All the facts necessary to enable the jury to make a proper estimate of the compensation to be awarded the defendant were as fully presented as could be reasonably required, and upon most points the evidence was sharply conflicting. As to whether it was practicable to locate the road upon section or quarter section lines, or by the route of Macala Canon, the evidence was also conflicting, but, we think, largely preponderated against each of those routes, and that the selection made is fully justified by the evidence.

Counsel for appellant refer to the case of *Sherman v. Buick*, 32 Cal. 242, and question its correctness. They admit that as a general rule a legislative declaration that a specified use is a public use, for which the right of eminent domain may be exercised, is not open to review by the courts, yet that when it appears plainly that property sought to be taken is for a purely private use, the courts are not bound by the declaration. But that is not this case. The use is not "a purely private use." The principal use will doubtless be by Mr. Cheesebrough, but every one of the public at large who may have occasion to visit his place has the right to use the road. Besides, the state and all its inhabitants have an interest in having the products of his land brought to market, thus adding to the wealth of the state, and the comfort of its inhabitants. Not that the state will do that for a man which he can do for himself; but where he is powerless to do that which is necessary to be done, and which is essential to the use and enjoyment of his property for purposes in which the public have an interest, it is clearly in the power of the legislature to declare the use a public one. This question must be regarded as settled by the case of *Monterey Co. v. Cushing*, 83 Cal. 511, 23 Pac. Rep. 700, where the case of *Sherman v. Buick* is approved. Nor is there any inconsistency between these cases and *Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269, cited by counsel. For a more extended discussion of this subject, see the recent case *In re Madera Irrigation Dist.*, 92 Cal., especially pages 309 to 313, 28 Pac. Rep. 274, 275, 675.

It is further contended that the oral instructions given by the court were erroneous. This point cannot be considered, because no exception was taken to it, nor the attention of the court called to anything objectionable therein. *Rider v. Edgar*, 54 Cal. 130.

We see no objection to the instructions given to the jury at the request of the parties, nor do we think that the court erred in refusing to give the instructions requested by defendants which were not given. So far as they correctly stated the law, they were covered by instructions

given; so that the court could properly decline to modify them, and none of them could properly be given without modification.

Several exceptions were taken to the rulings of the court upon the admission and exclusion of evidence; but, as the questions presented by these exceptions do not present any new or important principles of the law of evidence, it is sufficient to say that a careful consideration of them does not disclose any error which could prejudice appellant, or justify a reversal of the judgment. We therefore advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

97 Cal. 281

In re KIMBERLY'S ESTATE. (No. 19,082.)
(Supreme Court of California. Feb. 9, 1893.)
SETTING APART HOMESTEAD TO WIDOW—ADVERSE TITLE.

On a petition to set apart a homestead property inventoried as belonging to the decedent's estate, the probate court has no jurisdiction to try adverse claims to such property.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Petition in probate by the widow and minor children of one Kimberly, deceased, to have the homestead set apart. From the order denying the petition, petitioners appeal. Reversed.

B. F. Thomas, for appellants. E. B. Hall and Richards & Carrier, for respondents.

DE HAVEN, J. Appeal from an order refusing to set aside a homestead for the widow and minor children of deceased out of property claimed to belong to the estate of the deceased, and inventoried as such. In refusing to set aside a homestead for the widow and minor children of deceased the court erred. The question of the validity of the adverse title claimed by the contestants to an undivided interest in the property sought to be set apart as a homestead is one not proper to be litigated in this proceeding. In *re Groomer's Estate*, (Cal.) 29 Pac. Rep. 487; *Estate of Burton*, 64 Cal. 428, 1 Pac. Rep. 702. Whether the contestants acquired by virtue of the foreclosure proceedings referred to in the findings of the court any interest in the land described in the petition for homestead must be determined in some appropriate action brought for the purpose of settling that question. The question is not involved here, and we express no opinion in relation to it. Order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

(3 Cal. Unrep. 779)

SCHALLERT-GANAHL LUMBER CO. v. SHELDON et al. (No. 19,044.)

(Supreme Court of California. Feb. 9, 1893.)

MECHANIC'S LIEN—TIME OF FILING—COMPLETION OF WORK.

Under Code Civil Proc. § 1187, as amended by St. and Amend. 1887, p. 154, providing that every person, save the original contractor, claiming a lien, must, within 30 days after the "completion" of the building, file his lien, but that any "trivial imperfection" in the construction shall not be deemed such a lack of completion as to prevent the filing of the lien, a lien filed before the doors of a house were hung, the plumbing finished, the closets and bath room completed, ventilators placed, and mouldings put in, is premature, and cannot be enforced, as such things are not "trivial imperfections," but are necessary to be done to effect a "completion" of the building.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by the Schallert-Ganahl Lumber Company against H. A. Sheldon and others to foreclose a material man's lien. From a judgment for defendants, and from an order denying its motion for a new trial, plaintiff appeals. Affirmed.

H. A. Barclay, for appellant. W. P. Gardiner, for respondents.

HAYNES, C. Action to foreclose a material man's lien. Appellant is a corporation engaged in the lumber business. Sheldon & Son are copartners, and contracted in writing with the defendant Annie C. Severance to furnish the material and erect upon her separate property a dwelling house. Appellant furnished lumber to Sheldon & Son for the building, and a notice of lien therefor was filed. Both parties to this appeal concede that the contract was void. Sheldon & Son abandoned the work early in January, 1889, before completion, and Mrs. Severance employed mechanics, and proceeded with the work. In May, 1889, she, with husband and servants, moved into and occupied the rear portion of the house, and continued such occupation while work proceeded upon the remainder of the building; and upon August 22, 1889, appellant filed its notice of lien. Sheldon & Son made no defense, and judgment passed against them. Mr. and Mrs. Severance answered, and upon the trial rested upon plaintiff's evidence, and had judgment. This appeal is from the judgment and order denying plaintiff's motion for a new trial.

The court found that the building was not completed at the time the notice of lien was filed; and, if that finding is justified by the evidence, it will not be necessary to consider any other specification of error. The occupancy of the rear portion of the house was known to appellant on June 25th, but appellant makes no point upon such occupancy. The complaint alleges completion "on or about August 22d," and whether the building was then completed was a question of fact to be determined by the court. *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, 94 Cal. 237, 29 Pac. Rep. 629. The only witness who testified upon the subject of

the completion of the building was Mr. Driscoll, the secretary of the plaintiff corporation. He testified in substance that he visited the building on August 21st; that workmen were there on that day, doing some little things; that there might be one or two men there for several months doing little things, waiting the arrival of material from the east; that Mr. Cranton was working in the house; that Cranton said there were 24 doors to hang, ventilators to make, water-closet traps, bath room not completed, wardrobe not completed, a painter working on the house; that the doors were made, and only had to be hung; that the oxidized hardware, door knobs and locks were not on; that it was stated the locks costs \$35 each,—a couple of thousand dollars on the whole house, he heard; that he did not know whether the tiling was in the bath room, nor whether the picture mouldings were up in the second story, nor whether the front chamber was completed, nor whether the closets were finished, or the plumbing finished, but thought the house was substantially completed; and, further, that the oxidized hardware and the tiling he thought were not in the contract. Such was the condition of the building on August 21st, the day before the lien was filed, and that was the last time the witness visited the house. Upon this evidence we think the court correctly found that the notice of lien was prematurely filed; that the building was not substantially completed, and that what remained to be done constituted something more than "trivial imperfections." The burden of proof was on the plaintiff to show completion of the building within 30 days prior to the filing of the lien. Mr. Driscoll testified that he "thought the house was substantially completed," but admitted that certain things, which it is apparent are necessary to completion, had not been done, while his testimony that he did not know whether certain other things had been completed, and which he could have ascertained by inspection, destroys any weight which his statement that he "thought the house was substantially completed" might otherwise have had. It is immaterial whether the oxidized hardware and tiling were in the written contract attempted to be made with Sheldon & Son, or whether they were to be furnished by the owner or the contractor. If the use of these materials was necessary to the completion of the building, the purchase of them by the one party or the other could not affect the question whether the building was completed. As was said in a recent case: "In the absence of any statutory qualification or definition of the term 'completion,' there would be no room for its construction by the court, but it would be construed to mean 'completion,' and would be a question of fact in each case." *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, 94 Cal. 237, 29 Pac. Rep. 629. For a statement of these qualifications and definitions, and their application, see *Id.* It may be quite true that it would not takelong to do what remained to be done, and that what remained to be done was trifling, compared with the whole work of

building an elegant residence; but it must be obvious that if the erection and completion of the house had been provided for in a valid contract, the contractor could not have successfully insisted on the day the lien was filed that he had complied with his contract within the meaning of any of the qualifications or exceptions contained in the statute. That the filing of a lien before the completion of the building is premature and confers no right, see *Roylance v. San Luis Hotel Co.*, 74 Cal. 273, 20 Pac. Rep. 573, and *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, supra. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

97 Cal. 276

PEOPLE v. MONTECITO WATER CO. et al. (No. 19,074.)

(Supreme Court of California. Feb. 9, 1893.)

CORPORATIONS — VALIDITY OF INCORPORATION — FORFEITURE OF FRANCHISES — PARTIES TO PROCEEDING.

1. In an action by the state to forfeit a corporation's charter for want of substantial compliance with the statutory requirements in its formation, the corporation is a necessary party defendant, and making it such is not an admission of its corporate character, so as to preclude the state from questioning its right to corporate existence. *People v. Stanford*, 18 Pac. Rep. 85, 19 Pac. Rep. 693, and 77 Cal. 360, distinguished.

2. Civil Code, § 292, provides that articles of incorporation must be subscribed by five or more persons, and acknowledged by each. *Held*, in an action by the state to forfeit a charter, that a complaint showing that the articles of incorporation were signed by five persons, and acknowledged by four only, stated a cause of action.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; John L. Campbell, Judge.

Action by the people against the Montecito Water Company, C. B. Hall, and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

W. H. H. Hart, Atty. Gen., John J. Boyce, and Richards & Carrier, for the People. W. C. Stratton, for respondents.

TEMPLE, C. Plaintiff appeals from a judgment entered upon demurrer to complaint. The demurrer was general, and on the ground of insufficiency of the facts. It is a proceeding taken by the attorney general of the state, in the nature of a quo warranto, to deprive the defendant corporation of its corporate charter, and procure its dissolution on two grounds—First, for want of a substantial compliance with the statutory requirements in its formation; and, second, for abandonment and misuse of its corporate franchise and powers, and for alleged violations of law.

In answer to the first point the respondent

ent raises the preliminary objection that, by making the corporation a defendant, its corporate character is admitted, and cannot be questioned in this proceeding. As authority for this proposition the case of the *People v. Stanford*, 77 Cal. 360, 18 Pac. Rep. 85, and 19 Pac. Rep. 693, is chiefly relied upon. In that case it was alleged in the complaint that the assumed corporation had never been a corporation. If it were not a corporation of any character, it had no legal existence, and could not be sued. By making it a party, plaintiff conceded that it was a person that could be sued. It was said that the corporation could not be treated as a person which could be sued simply to obtain a judgment; that it was not and never had been such a person. There is no such inconsistency here. It is averred that the corporate defendant is a corporation de facto, but it is claimed that it did not become a corporation de jure, because the persons who attempted the incorporation did not comply with the conditions which the statute makes conditions precedent to its rightful incorporation. Under such circumstances, although the association is a legal entity, which may be sued, its right to corporate existence may be questioned by the state in a proceeding of this character. Section 358, Civil Code. This court said in *People v. La Rue*, 67 Cal. 530, 8 Pac. Rep. 84, and repeated the language in *First Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. Rep. 60: "A corporation de facto may legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world, except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." Under such circumstances it seems clear that the corporation is not only a proper, but a necessary, party. *People v. Flint*, 64 Cal. 49, 28 Pac. Rep. 495; *People v. Gunn*, 85 Cal. 244, 24 Pac. Rep. 718.

It is contended that the corporation is not rightfully such because, while five incorporators signed the articles of incorporation, only four acknowledged the same. Section 292 of the Civil Code reads as follows: "The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property." It was said in *People v. Selfridge*, 52 Cal. 331: "The right to be a corporation is in itself a franchise; and, to acquire a franchise under a general law, the prescribed statutory conditions must be complied with." Still, a substantial, rather than a literal, compliance will suffice. *People v. Stockton & V. R. Co.*, 45 Cal. 313. Was there substantial compliance in this case? Because a substantial compliance will do, it does not follow that any positive statutory requirement can be omitted, on the ground that it is unimportant. They are condi-

tions precedent to acquiring a statutory right, and none can be dispensed with by the court. What is a substantial, rather than a literal, compliance, may be illustrated from the cases. In *Ex parte Spring Valley Waterworks*, 17 Cal. 132, the certificate stated the place of business, but did not describe it as the "principal place of business," as required. The court said: "The statement that San Francisco was the place of business would seem to imply that it was not only the principal, but the only, place of business." In *People v. Stockton & V. R. Co.*, 45 Cal. 306, the affidavit required in such cases to be attached to the certificate stated that 10 per cent. of the amount subscribed had been actually paid in, omitting the words "in good faith," which the statute required. In the certificate it was stated that more than 10 per cent. had been actually in good faith paid in. It was held sufficient, and it would seem that, if it was actually paid in cash, it must have been paid in good faith; and it was further held that payment by checks drawn against sufficient funds in a bank, which was ready to accept and pay the checks, was substantially payment in cash. In *People v. Cheeseman*, 7 Colo. 376, the acknowledgment taken by the notary omitted to state that the persons whose acknowledgments were taken were personally known to the notary. The certificate did state that the persons who signed appeared before him and acknowledged it. The statute did not prescribe what the acknowledgment should contain, and it was held a substantial compliance with the requirement, although the form prescribed for acknowledgments to deeds was not followed. It was acknowledged. In all these cases it will be seen that the thing required was done, but not literally as directed; but there was no omission of any requirement. No case has been cited where the entire omission of a thing prescribed has been excused, unless it be the case of *Larrabee v. Baldwin*, 35 Cal. 155. That was not an action instituted by the state to disincorporate on the ground of noncompliance. As we have seen, unless the state complains, a de facto corporation must be considered, under our Code, as possessing a corporate character; and the stockholders, when sued upon their individual liability, should not be allowed to make the point that they did not comply with the law. In that case the certificate was signed by five directors, but two failed to acknowledge it. Other questions are discussed at great length in the opinion, but in regard to the point made on the certificate it was simply remarked: "It is not clear that any fatal defect exists in the certificate of incorporation. If so, it is cured by the act of April 1, 1864." Plainly it was unnecessary to consider the question. The curative act referred to declares: "All associations or companies heretofore organized, and acting in the form and manner of corporations, and that have filed certificates for the purpose of being incorporated, but whose certificates are in some manner defective, or have been improperly acknowledged before a person not authorized by law to

take such acknowledgments, are hereby declared to be, and to have been, corporations from the date of the filing of such certificates, in the same manner and to the same effect and intent as if such certificates were without fault, and properly acknowledged before the proper officer; and all such certificates are hereby validated, and declared to be legal, and shall have the same force and effect as if such certificates were free from all fault or defect, and were properly acknowledged," etc. St. 1863-64, p. 303. Section 292 of the Civil Code requires the articles to be subscribed and acknowledged by each. As this is an express condition precedent to a valid incorporation, it is not of consequence to the court whether it be a wise or necessary requirement or not. Still, it is easy to see a reason for it. The certificate secures the state, and all concerned, against the possibility of any fictitious names being subscribed to the articles, and furnishes proof of the genuineness of the signatures. If the acknowledgment can be dispensed with as to one, why not as to two or three, or all? Ordinarily, no doubt, the state would not be expected to institute a proceeding of this character for such a defect alone, and we must presume that the attorney general would not have instituted this inquiry if he were not convinced that there were reasons sufficient to justify it. Other reasons are alleged; but, as the statute authorizes a proceeding to forfeit the charter where the statute has not been complied with, although the corporation is acting in good faith, and is a de facto corporation, the complaint must be held to state a cause of action, and the demurrer should be overruled. The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

97 Cal. 283
JOURNAL PUB. CO. v. WHITNEY, Tax
Collector. (No. 19,110.)

(Supreme Court of California. Feb. 11, 1893.)

COUNTIES—PUBLICATION OF TAX LIST—LOWEST
BIDDER—MANDAMUS.

1. Under St. 1891, c. 216, § 25, subd. 23, providing that the board of supervisors shall fix the price of all county advertising, and each county officer shall procure such advertising, at a price no greater than is so fixed, mandamus will not lie to compel a tax collector to publish a delinquent tax list in a certain newspaper, even though such newspaper has tendered the lowest bid for such publication.

2. St. 1891, c. 216, § 25, subd. 23, providing that the board of supervisors shall fix the price of all county advertising, repeals Pol. Code, § 3766, providing that county advertising must be contracted for with the lowest bidder.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Mandamus at the relation of the Jour-

nal Publishing Company to compel A. B. Whitney, tax collector, to publish a delinquent tax list in relator's newspaper. From a judgment dismissing the petition, entered upon an order sustaining a demurrer to it, relator appeals. Affirmed.

E. A. Meserve, for appellant. Stephen M. White, for respondent.

PER CURIAM. This appeal is taken from a judgment of dismissal of a petition for a writ of mandate, after sustaining a demurrer to said petition. The object had in view by the petitioner was to compel the defendant, who is the tax collector of the county of Los Angeles, to advertise and publish the delinquent tax list in the newspaper of the plaintiff, a publishing company. The demurrer is general in its nature, and is to the effect that the complaint does not show facts sufficient for a good cause of action. The whole matter turns upon the question whether or not, under the law of this state, it is the duty of the tax collector to publish the delinquent tax list about which this controversy has arisen, in such newspaper as has tendered the lowest bid to do such advertising. Prior to the enactment of the county government act of 1891, section 3766 of the Political Code, as to such publication, ran thus: "The publication must be made once a week for three successive weeks in some newspaper, or supplement thereto, published in the county; and the publication must be contracted for with the lowest bidder, and after ten days' public notice that such will be let. The bidding must be by sealed proposals. If there is no newspaper published in the county, then by posting a copy of the list in three public places in each township." Section 3764 of the Political Code provides, among other things, that the tax collector must publish the list, and that such publication is a charge against the county. These two sections, among others, were construed by the supreme court in *Publishing Co. v. Alameda Co.*, 64 Cal. 469, 2 Pac. Rep. 246, before the county government act of 1891 became a law; and it was there held to be the duty of the board of supervisors, and not that of the tax collector, to advertise for proposals to print the delinquent tax list, and to contract for the publication of such list; the duty devolved on the tax collector being held limited to preparing the list for publication, and causing it to be published as contracted for by the board of supervisors. But the new statutory provision (subdivision 23 of section 25 of the county government act, just mentioned) defines the duties of the board of supervisors in such a matter thus: "The board of supervisors shall annually fix the price at which the county shall be supplied with job printing and blank books, and also the price of all county advertising; and each county officer shall procure such blank books, job printing, and advertising at a price no greater than is so fixed, and certify the bills therefor to the board of supervisors." This changes the rule as declared in section 3766 of the Political Code, and the board of supervisors, of the

own motion, now are to fix the price of county advertising, such as here involved, without advertising for bids or sealed proposals. When that duty is performed by them, the tax collector must "procure" some newspaper to do the advertising, not by any bid which may have been made, but at the price previously fixed by the board of supervisors in their discretion. Such being the force and effect of the statute, the tax collector, against whom this petition is filed, is not shown to be violating any law in not procuring the advertising in question to be published in the paper of the plaintiff. Its bid and his advertisement for sealed proposals amounted to nothing. The tax collector could, notwithstanding this unnecessary proceeding, select any paper he saw fit in the county, and procure the advertising to be done, provided it was done at the price fixed by the board of supervisors, and he cannot be compelled to publish the delinquent tax in any other way.

The argument of the appellant that the county government act does not operate to repeal any part of section 3766 of the Political Code is without force, in view of the decision of the appellate court in *Mendocino Co. v. Bank of Mendocino*, 86 Cal. 255, 24 Pac. Rep. 1002, and *Ex parte Benjamin*, 65 Cal. 310, 4 Pac. Rep. 23.

The judgment is affirmed.

97 Cal. 286

YOAKAM et ux. v. WHITE et al. (No. 19, 114.)

(Supreme Court of California. Feb. 11, 1893.)

MORTGAGES—RIGHTS OF MORTGAGEE—FORECLOSURE ON NONPAYMENT OF INTEREST.

Code Civil Proc. § 726, provides for an "action for the recovery of any debt, or the enforcement of any right, secured by mortgage," and that the court may "direct the sale of the incumbered property," and apply the proceeds to the payment of "the amount due to the plaintiff." Section 728 provides that if the mortgage debt is not all due the sale must cease as soon as enough is realized to pay the amount due, and afterwards, as often as more becomes due, the court may order more property to be sold. *Held*, where the mortgage note was payable five years after date, with interest payable annually, "and, if not so paid, to be compounded annually," and the mortgage provided for payment of the note "according to the terms and conditions thereof," and, "in default of the payment of the note by its terms" the mortgagee might foreclose, that the mortgagee could foreclose for the first year's interest on nonpayment thereof when due. *Broadribb v. Tibbets*, 58 Cal. 6, distinguished.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by George B. Yoakam and wife against W. Y. White and others. From a judgment dismissing the action without prejudice, plaintiffs appeal. Reversed.

Clarence A. Miller, for appellants. Burnett & Gibbon, for respondents.

BELCHER, C. On February 10, 1891, the defendant White executed to the plaintiffs his promissory note and mortgage to secure payment of the same. The note was for \$7,800, and was payable five years

after date, "with interest at the rate of eight per cent. per annum from date until paid; interest payable annually, and, if not so paid, to be compounded annually, and bear the same rate of interest as the principal." The mortgage stated that it was given as security for the payment of the note, a copy of which was set out in *hæc verba*, and then contained the following agreement: "And the mortgagor promises to pay said note according to the terms and conditions thereof, and, * * * in default of the payment of note by its terms, the mortgagees or their assigns may foreclose this mortgage, and may include in such foreclosure a reasonable attorney's fee, to be fixed by the court." After the mortgage was executed, and on the same day, the mortgagor conveyed the mortgaged premises to the defendants Childress and Park; and as a part of the consideration for the conveyance, the grantees covenanted and agreed to pay, according to its terms, the said mortgage, and to do and perform the covenants and agreements upon the part of the said White in said mortgage mentioned and contained. On February 13, 1892, the plaintiffs commenced this action to foreclose their mortgage, and they alleged, among other things, that no part of the principal or interest of the note had been paid; that the sum of \$624, being one year's interest upon the note, was due, owing, and unpaid from the defendants to plaintiffs, though demanded by plaintiffs after the same fell due; and that the property described in the mortgage could not be sold in portions without injury to the parties. Wherefore, they prayed for a decree of foreclosure for the entire debt evidenced by the note. The defendants demurred to the complaint, and their demurrer was overruled. They, however, failed to answer, and their defaults were duly entered. When the case came on to be heard the plaintiff introduced the formal proofs usual in such cases, and moved the court for a decree granting the relief demanded in their complaint. This motion was denied, and they then asked for so much relief as the court would grant upon the pleadings and evidence; but the court refused to grant them any relief, and entered judgment dismissing the action without prejudice. From the judgment so entered the plaintiffs appeal.

In Jones, Mortg. (section 654) it is said: "A provision for the payment of interest annually, and that if not so paid it shall be compounded, is in waiver of the right to enforce payment when due." Respondents, in effect, admit that this is a correct statement of the law, and that there was no right of election on their part to pay the interest when it became due, or to let it be compounded, and have its payment deferred until the maturity of the note. They, however, contend—and this is the only point made—that the note and mortgage, when properly construed according to the intention of the parties, gave no right to foreclose for nonpayment of an installment of interest. In support of this position counsel cite *Broadribb v. Tibbets*, 58 Cal. 6. In the case cited the mortgage was given "as security for the

payment to said mortgagee of the sum of twenty-one hundred dollars * * * on the 16th day of September, A. D. 1881, with interest thereon, according to the terms and conditions of a certain promissory note of even date of this mortgage, in the words and figures following." The note was dated September 16, 1879, and was payable two years after date, "with interest thereon, in like gold coin, at the rate of ten per cent. per annum from date, payable monthly until paid." An inspection of the transcript in the case shows that the mortgage contained no provision for foreclosure. It was said by this court, sitting in department: "By the terms of the mortgage the lien was to be foreclosed only when the principal sum named in the promissory note became due. The parties might have agreed that the mortgage should be foreclosable, to the extent of the interest due, whenever any installment should become due. But they have not so agreed in terms or by implication." And after rehearing in bank it was said: "Neither the note nor mortgage contains any agreement for foreclosure of the mortgage on default of the payment of interest. In the absence of such an agreement the mortgage cannot be foreclosed until the note shall become due." This decision does not seem to be in harmony with the general current of authority upon the subject; but, assuming it to be correct, it is not, as we think, in point here. In this case the mortgagor promises to pay the note "according to the terms and conditions thereof," and that, "in default of the payment of the note by its terms, the mortgagees might foreclose. The terms of the note were that the interest should be payable annually, and the principal at the end of five years. The words, 'by its terms,' cannot be construed to mean that there must be a default in the payment of the whole note, principal and interest, before a foreclosure can be had, but only that there must be some default in paying the note by or according to its terms. At the end of the first year the interest for that year became due and payable, and was a debt secured by the mortgage. Section 726 of the Code of Civil Procedure provides for an 'action for the recovery of any debt, or the enforcement of any right, secured by mortgage,' and that 'in such actions the court may, by its judgment, direct a sale of the incumbered property,' and the application of the proceeds of the sale to the payment of 'the amount due to the plaintiff.' And section 728 of the same Code provides: 'If the debt for which the mortgage, lien, or incumbrance is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But, if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid; there being a rebate of interest, where such rebate is proper.' In our opinion the plaintiffs were entitled to a foreclosure for the interest then due; but

whether, under section 728 of the Code, above cited, they were entitled to all the relief asked, is a matter which must be determined by the court below on a rehearing of the case. We advise that the judgment be reversed, and the cause remanded.

I concur: HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded.

(3 Cal. Unrep. 783)

LOS ANGELES CEMETERY ASS'N v. CITY OF LOS ANGELES. (No. 19,028.)

(Supreme Court of California. Feb. 11, 1893.)

DEDICATION—WHAT CONSTITUTES — ACCEPTANCE.

1. In an action to quiet title to a strip of land, it appeared that plaintiff company filed for record a map of its land, platted as a cemetery, on which map the strip in question, 40 feet wide along the west side of the tract, was left blank, with an entrance indicated therefrom into the cemetery. Subsequently, in cutting the land up into cemetery lots, the company left another strip, 20 feet wide, adjoining the former strip, and the whole was known as "E. Avenue," which was used by the public for three years without objection. *Held*, that the facts showed an intention to dedicate the strip to the public for street purposes.

2. User by the public of a strip of land as a street for four years is sufficient to show acceptance of a previous offer to dedicate the land for street purposes.

Commissioners' decision. Department

1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

(Not to be published in California Reports.)

Action by the Los Angeles Cemetery Association against the city of Los Angeles to quiet title. Judgment for defendant. Plaintiff appeals. Affirmed.

A. H. Judson and M. C. Hester, for appellant. C. McFarland, for respondent.

BELCHER, C. This is an action to quiet the plaintiff's title to a strip of land, 40 feet wide and 1,256 feet long, in the city of Los Angeles. The court below gave judgment for the defendant, from which, and from an order refusing a new trial, the plaintiff appeals. The facts found by the court are in substance as follows: On October 26, 1877, the plaintiff, a corporation, was the owner of a tract of land in the city of Los Angeles, which included the land in controversy, and on that day it filed for record a map of the tract, on which were delineated the usual plats and avenues of cemetery grounds, and along the southerly and westerly sides of which were left blank colored strips, 40 feet in width, the one on the southerly side being now a portion of First street, and the one on the westerly side being the land in controversy. The map also showed that the only entrance to the cemetery was from the strip in controversy, and that the strip opened out at one end into First street, and at the other end into Broderick avenue, public streets of the city. About the time of the filing of this map, plaintiff planted along the easterly and inner line of the street in controversy a hedge fence, leaving an

opening therein where the entrance to the cemetery was located, and also planted pepper trees for a short distance on each side of such entrance, which hedge fence is still intact, and is now, and has been since the year 1885, a good and substantial fence. In 1885 plaintiff moved a fence which had been erected upon the outer or westerly line of the strip into the inner line thereof, and adjoining the hedge fence on the easterly side thereof. Some time about the year 1885, the lands adjoining the strip in controversy on the west side were laid out in lots, and spaces between them for streets, and among other spaces was one 20 feet in width, the full length of and adjoining the said strip, and making therewith a 60-foot strip, known as "Evergreen Avenue." Previous to and since 1885, plaintiff has sold to divers persons a great number of lots in its cemetery, and the only carriage entrance thereto fronts on the strip of land in dispute, about midway between the north and south ends thereof. Since the year 1885, the said strip of land has been continuously used and traveled by the public as a public street, which use has been with the knowledge and consent of plaintiffs. On December 15, 1890, the city council of the city of Los Angeles duly passed an ordinance accepting all streets theretofore dedicated, or offered to be dedicated, by property owners for public use. And, as conclusions of law, the court found that the said strip of land was a part and portion of a public street in the city of Los Angeles, known as "Evergreen Avenue;" that the plaintiff had no right to its possession; and that the defendant was entitled to its possession as a public street. Judgment was entered in accordance with these conclusions.

In support of the appeal it is claimed that the findings that the plaintiff moved the fence which had been erected along the westerly line of the disputed strip in the year 1885; that the lands adjoining the strip on the west were laid out in lots, etc., about the same year; and that since that year the said strip had been continuously used and traveled by the public as a public street,—were not justified by the evidence, in so far as the year named is concerned; and it is said that the evidence clearly shows that none of the acts referred to were done or commenced before the year 1887. It is admitted that the fence on the south side of the tract was removed in 1885, and there was some evidence that the fence on the west side was removed about the same time, and that the use of the strip for public travel commenced shortly after the fence was taken away. But whether the findings were right as to the year named or not is, in our opinion, not material. The only real question is, do the findings show a dedication of the strip, or offer to dedicate, for the purposes of a street, and an acceptance by the public? And if they do, it can make no difference whether the dedication or offer to dedicate was in 1885, or not till 1887.

It is further claimed that the first conclusion of law was erroneous, and not justified, for the reason that the plaintiff,

having been organized as a corporation for cemetery purposes, "had no power, directly or indirectly, to dedicate its land to the public for street purposes." This claim is sufficiently met and answered by the decision of this court, reported in 95 Cal. 420, 30 Pac. Rep. 523. That case was between the same parties as this, and the question involved related to the dedication of the 40-foot strip along the south side of the plaintiff's track. It was held that the dedication was made and accepted, and that the strip formed a part of First street.

It is also claimed that, admitting an offer to dedicate was made by the plaintiff, still there was no direct finding, and no sufficient evidence to show, that the offer was ever accepted by the public. The court found, as we have seen, that, after the fence was removed, the strip was continuously used by the public as a public street, and with the knowledge and consent of the plaintiff. The correctness of the finding in this respect is not questioned, nor could it be here, there being ample evidence to support it. The user then commenced as early at least as 1887, and was continued up to the time of the trial in 1891. This was sufficient to show an acceptance without the formal ordinance passed by the city council in 1890. The question of the admissibility of that ordinance in evidence need not therefore be specially considered.

Did, then, the plaintiff intend to dedicate the strip to the public for street purposes? It is true that the law is well settled in this state and elsewhere that, where there is no grant in writing, a dedication of land can only be established by proof of acts on the part of the owner which manifest clearly and unequivocally the intention of the owner to make such dedication; but, in our opinion, the probative facts found do show acts and conduct on the part of the plaintiff from which the ultimate fact that there was an intention to dedicate the strip must necessarily result. If not, why was the strip marked out on the map, extending the whole length of the tract, with an entrance therefrom into the part laid out for cemetery purposes? The surveyor who laid out the grounds and made the map says he was simply told to leave a 40-foot strip on the south and west sides, and "I supposed they were left for streets." And why did the owners of the adjacent land on the west leave an additional 20-foot strip? Judson, who had been president of the corporation, testified that he was one of such owners, and that they "left twenty feet along there for street purposes. There is a twenty-foot strip left there." So, after the hedge had been growing for 8 or 10 years, why was the fence removed, and the strip, in connection with the additional 20-foot strip, left open so that it could be used and traveled over by the public? And why was the public permitted to use the strips which had become known as "Evergreen Avenue" for more than three years at least without objection on the part of the plaintiff? It seems to us that these undisputed facts can be rationally account-

ed for only upon the theory that there was a clear intention to dedicate the strip for the purposes of a street.

The offer on the part of the plaintiff to prove that the fence was removed "because it had become out of repair, and for the purpose of using it in repairing the breaks in the hedge," does not require serious consideration. Surely, if the fence needed repairs, the repairs could have been made more cheaply and better where it had stood for 8 or 10 years than by moving the whole line of it a distance of about 40 feet; and if there were breaks in the hedge, which does not appear, they could have been protected by the fence in its original location, as they had been ever since the hedge was planted in 1878. We see no error in the ruling of the court upon this offer. It follows, in our opinion, that the conclusions of the court below were warranted, and were correct, and that the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(3 Cal. Unrep. 788)

In re WILLIAMS' ESTATE. (No. 15,012.)

Appeal of MAGEE.

(Supreme Court of California. Feb. 14, 1893.)

SALE BY EXECUTOR UNDER POWER — CLAIM AGAINST ESTATE—APPEALABLE ORDER.

1. An executor, as devisee in trust, acting under the provisions of the will, sold property of the estate, and applied to the probate court for a confirmation. Plaintiff filed an advanced bid with the court, whereupon the executor conveyed the property to the first bidder. The court denied confirmation, and ordered and confirmed a sale to plaintiff, he paying the amount of his bid to the executor. The first bidder appealed from the order of confirmation, which was reversed. Plaintiff then filed a petition to compel the return from the estate to him of the money paid to the executor. *Held*, that plaintiff held no debt or claim against the estate.

2. An appeal cannot be taken to the supreme court from an order dismissing the petition, under Code Civil Proc. § 903, subd. 3, which provides for an appeal from a judgment or order refusing, allowing, or directing the payment of a debt or claim against an estate.

3. In such case plaintiff's remedy is in an action against the executor individually.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge. (Not to be published in California Reports.)

Proceeding by Thomas Magee against the executor of the estate of Thomas H. Williams to recover money paid. From an order dismissing the petition, plaintiff appeals. Affirmed.

W. S. Goodfellow, John A. Stanley, and George R. B. Hayes, for appellant. Adams & Adams, for respondent.

TEMPLE, C. This appeal is from an order denying and dismissing the petition of appellant for an order that the executor of the estate of Thomas H. Williams restore to him \$11,000 purchase money paid for the

interest of the testator in certain real estate in pursuance of an order of the court confirming the sale. The executor filed a report of a sale made by him under a power of sale contained in the will. Appellant's agent and assignor thereupon filed in the probate court an advanced bid. The matter was postponed for some time, but the sale was finally confirmed to appellant's assignor, who thereupon paid \$11,000—the amount of his bid—to the executor, who executed and delivered to him a deed in due form. By the will, the real estate had all been devised to the executor, in trust. After the advanced bid was filed, but before the confirmation of the sale to appellant's assignor, the executor, in his capacity of trustee, conveyed the property to the first bidder, who, after appellant had paid his money and had received his deed from the executor, appealed from the order of confirmation to this court. This court held (92 Cal. 183, 28 Pac. Rep. 227, 679) that under the circumstances the sale was properly made by the devisee in trust, and therefore reversed the order of confirmation. The remittitur having been filed in the court below, this petition was presented.

The respondent now makes the point that the order dismissing the petition is not appealable. I think the point well taken. If an appeal is allowed in such case, it must be on the ground that appellant has a claim or debt against the estate for the amount so paid to the executor, and that the order dismissing his petition is an order refusing to allow, or refusing to direct the payment of, a debt or claim, within the meaning of the third subdivision of section 963 of the Code of Civil Procedure. It may well be doubted whether appellant's demand is a claim or debt against the estate in any sense. After the order of confirmation was reversed, and the property had been legally sold, and the proceeds accounted for to the estate, it is difficult to see how the executor can be made to account for this amount. But if we examine the section of the Code alluded to we shall find that it contains no general language giving this court jurisdiction of appeals from probate rulings, but the appellate jurisdiction is conferred by specially enumerating certain orders and judgments from which appeals may be taken. All refer to acts which the Code expressly authorizes, and very nearly in the order in which such action is likely to be taken in the course of administration. Such an enumeration is necessarily a limitation. The words "claim" and "debt" are used interchangeably in the Code, as in section 1497, Code Civil Proc., and elaborate provision is made, running through many sections, for their presentation, allowance, rejection, and finally for an order directing their payment. Section 1647 et seq. Manifestly, in the subdivision of section 963 reference is made to debts and claims which can be so allowed, rejected, or ordered paid. It will not be contended that the demand of petitioner is of that character, even if it be conceded that it is a demand against the estate. In the case of *Stuttmeister v. Superior Court*, 72 Cal. 487, 14 Pac. Rep. 35, it was held that a demand

for an attorney's fee for services rendered the administrator was not a claim within the meaning of section 963, Code Civil Proc. In that case the appellate jurisdiction was sustained on the ground that the demand had in fact been presented and allowed, and therefore ranked among the acknowledged debts of the estate. The court said: "In this instance it is apparent the demand was presented, allowed, and ordered paid as a claim against the estate, to be paid, not as costs, but in the due course of administration. When so allowed, it became one of the 'acknowledged debts of the estate, to be paid in due course of administration.' Code Civil Proc. § 1497. When thus treated, an order for its payment was appealable, under section 963, supra." The order was held appealable as an order directing the payment of a debt. Whether it was thus rightly held to be a debt or not, in view of section 1643, Code Civil Proc., and other sections, may be doubted, but the case is express authority for the proposition that to authorize an appeal under section 963 the order allowing, refusing to allow, or directing the payment of a debt refers to debts and claims, which by the Code are expressly mentioned as debts to be allowed, rejected, or ordered paid. Courts may always order the expense of managing trust funds paid from the estate held by the trustee. The debts of an estate, which include all other payments authorized, are classified in section 1643, Code Civil Proc. The debt of appellant—if it be one—is not included in that section, unless in the fifth class, which supposition would be absurd. The word "claim" is applied to a demand against an estate, in the Code, after it has been allowed as well as before. Sections 1636, 1645, 1649. In section 1636 it is provided that an heir may contest a claim against an estate upon final settlement of the account of the administrator or executor. If this be a claim against the estate, it should not be ordered paid until the final settlement, after the heirs or devisees have had an opportunity to contest the appellant's right to it. Whether the payment was voluntary or not raises a question not passed upon by this court on the former appeal.

Whether the probate court had jurisdiction to confirm the sale or not, the money is not now held by the executor for the estate. To recover it from him by suit it would not be necessary to make the estate a party. Any property in the hands of the executor, which is not a legal asset, may be recovered by the rightful owner, without presenting a claim against the estate. So held in *People v. Houghtaling*, 7 Cal. 348, *Gunter v. Janes*, 9 Cal. 643; *Myers v. Reinsteint*, 67 Cal. 89, 7 Pac. Rep. 192; *In re Allgier*, 65 Cal. 228, 3 Pac. Rep. 849; *Stanwood v. Sage*, 22 Cal. 517. The decisions seem to be uniform upon this point. Property, though lawfully possessed by the administrator as assets, may be recovered in an action against him individually by one who asserts title adverse to the estate. *Merrick's Estate*, 8 Watts & S. 402; *Beach v. Forsyth*, 14 Barb. 499. At first impression, *Vallengin v. Duffy*, 14 Pet. 282, may seem to be an authority to the effect that a claimant may

elect to sue the administrator individually or in his representative capacity. Decedent had been vested by the claimant with the legal title to personal property, which was afterwards taken from him wrongfully. After his death his administrator recovered the value of it. The claimant sued to recover the money. Pending the suit the administrator died. The question was whether the suit could be continued against the administrator *de bonis non*. It was held that it could be, on the ground that the money constituted assets of the estate, and that the administrator *de bonis non* could recover it as such from the estate of the administrator. It was said the defendant would not be held liable unless he so recovered it, or failed through his neglect. After all, then, it was against the administrator individually, and the decision is in accord with those quoted from this state. A trustee cannot make the estate liable for his own wrongful act. Suppose the executor had absconded with the money, could it then have been recovered from the estate? Are the beneficiaries of a trust sureties for their trustee? They did not procure the erroneous order. Evidently the mere custody of the funds would not make the beneficiaries of the trust responsible. To hold them it must not only appear that it came to the hands of their trustee, but that it has been actually paid to them, or used for the benefit of their estate. There is no mode in which an action could be brought against the estate upon this demand. Section 1500, Code Civil Proc. No mode is provided in which it could be paid in course of administration. Unless, therefore, it be a claim which could be enforced against the executor individually, the claimant has no remedy. The only ground upon which it could be plausibly argued that the court had the power to grant the relief prayed for is that the executor is an officer of the court. This is suggested in the briefs, but, if that be the basis of the power to grant the petition, this order is not appealable. I think the appeal should be dismissed.

McFARLAND and FITZGERALD, JJ.
For the reasons given in the foregoing opinion the appeal is dismissed.

DE HAVEN, J. I concur in the judgment. The order from which this appeal is taken is not appealable.

(97 Cal. 296)

RALPHS v. HENSLER et al. (No. 19,012.)
(Supreme Court of California. Feb. 14, 1893.)

PRINCIPAL AND AGENT—RATIFICATION—EVIDENCE
—ACTION BY EXECUTOR—WHEN MAINTAINABLE
—JUDICIAL NOTICE.

1. In an action to foreclose a mortgage executed by M. as defendant's attorney, defendant answered that the power of attorney given by her to M. did not give authority to execute mortgages or notes; and also that M., as her agent, and on her behalf, made a written agreement with the mortgagee, whereby he agreed to extend the time of payment of the sums mentioned in the mortgage on certain conditions; that as her agent, and on her behalf, M. had performed those conditions, and that by

reason thereof the mortgage did not become due till after the commencement of the action. Held that, in the absence of evidence that defendant ever repudiated the execution of the notes or mortgage by M., her averment that she authorized the procurement of the agreement for the extension of time was *prima facie* sufficient evidence of her ratification of such execution.

2. Whether or not the power of attorney was sufficiently specific to authorize the execution of the notes and mortgage, it was admissible to strengthen the other evidence of a ratification by showing the relation between defendant and M.

3. An action to foreclose a mortgage, brought by an alleged executor of the mortgagee, cannot be maintained when there is no evidence as to when the mortgagee died, or to prove that his will, if he made one, was ever admitted to probate, that letters testamentary were ever issued to plaintiff, or that he was in any way qualified to act as executor.

4. A court's judicial knowledge does not extend to the contents of its records in former actions.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by George A. Ralphs, executor of Kimball Hardy, deceased, against Mrs. L. E. Hensler and J. Irving Weed, to foreclose a mortgage. From a judgment for plaintiff, defendant Hensler appeals. Reversed.

Willis & Appel, for appellant. Jones & Carlton, for respondent.

VANCLIEF, C. Action to foreclose a mortgage on defendant Hensler's real property, given to secure the payment of three several promissory notes. It is alleged in the complaint that the notes and mortgage were executed by defendant Hensler to Kimball Hardy in his lifetime, (on July 9, 1887;) that on or about February 16, 1889, Hardy died; that his will was admitted to probate on March 12, 1889; that letters testamentary were duly issued to plaintiff on March 18, 1889; and thereupon, that the plaintiff duly qualified and entered upon his duties as such executor. By her answer the defendant Hensler specifically denied each of the above allegations. Weed, who was made a party defendant on the ground that he had or claimed some interest in the mortgaged property, failed to answer, and his default was duly entered. The court found upon all the issues in favor of plaintiff, and decreed a sale of the mortgaged property in the usual form, ordering that a judgment be docketed against the defendant Hensler for any deficiency of the proceeds of the sale to pay the amount found due on the notes. The defendant Hensler appeals from the judgment, and from an order denying her motion for a new trial.

When the notes and mortgage were offered in evidence they were objected to by defendant on the ground that they appeared to have been executed through the agency of James P. McCarthy, as attorney in fact, being signed as follows: "Mrs. L. E. Hensler by her attorney in fact, James P. McCarthy." To prove the authority of McCarthy the plaintiff then offered the following instrument, the execu-

tion of which in the state of New York was properly attested: "Know all men by these presents that I, Mrs. L. E. Hensler, of the state of New York, have made, constituted, and appointed, and by these presents do hereby make, constitute, and appoint, James P. McCarthy, of the city and county of Los Angeles, and state of California, my true and lawful attorney for me and in my name, place, and stead, in all transactions of whatsoever nature which may effect any property situate in the said state of California which I may now hold, or which I may hold at any time hereafter; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, and hereby ratifying and confirming all that my said attorney, James P. McCarthy, shall lawfully do or cause to be done by virtue of these presents. In witness whereof I have hereunto set my hand and seal the 19th day of February, one thousand eight hundred and eighty-seven. [Seal.] Mrs. L. E. Hensler." This instrument was objected to on the ground that it conferred no authority to make the notes, nor to mortgage defendant's real property. To obviate this objection, the plaintiff claimed that the acts of McCarthy in making the notes and executing the mortgage had been ratified by defendant on the 28th day of December, 1888, and that such ratification was shown by the following paragraph of defendant's answer: "And for another, further, and separate defense to said action defendant alleges that prior to the commencement of this action, to wit, on December the 20th, 1888, Kimball Hardy, the deceased named in plaintiff's complaint, for a valuable consideration paid to him by James P. McCarthy, as agent of and for and on behalf of defendant, agreed to and with said McCarthy for and on behalf of this defendant that he would extend the time for the payment of the sum of money mentioned in said promissory notes and mortgage to May the 1st, 1890, upon payment to said party by said McCarthy for and on behalf of this defendant, each two months after said agreement was executed, of the accrued interest on the said mortgage and notes, and which then and there amounted to \$860 given with said interest. That defendant is informed and believes that her said agent, James P. McCarthy, acting for her and on her behalf, has well and truly performed the conditions of said agreement, and the terms thereof, for and on behalf of this defendant, and has fully paid and satisfied, as defendant is informed and believes, all of the said payments and interest within the time required to be paid in said agreement aforesaid. That by reason thereof the said notes and mortgage became due and payable on May the 1st, 1890, and after the commencement of the said action." The court overruled defendant's objection, and admitted the power of attorney, notes, and mortgage, as evidence; to all which defendant excepted.

1. Appellant contends that the court erred in admitting the power of attorney, notes, and mortgage; and also contends that the finding that defendant executed the notes and mortgage is not justified by the evidence. Conceding, without deciding, that the power of attorney was not sufficiently specific to authorize the execution of the notes and mortgage, yet defendant was not injured by the rulings of the court excepted to, if she had ratified the acts of McCarthy in executing the notes and mortgage; since such ratification was equivalent to original authority, and justified the finding that defendant executed the notes and mortgage. I think the paragraph of defendant's answer above quoted, and the deposition of McCarthy to the same effect, substantially tend to prove the ratification claimed. They show that in the lifetime of Kimball Hardy the defendant knew that the notes and mortgage had been executed and remained unpaid. In her answer she alleges that "McCarthy as agent of and for and on behalf of defendant," made a written agreement with Hardy, whereby he agreed to extend the time of payment "of the sums of money mentioned in said promissory notes and mortgage to May the 1st, 1890," on certain conditions; that, as her agent, and on her behalf, McCarthy had performed those conditions; and "that by reason thereof the said notes and mortgage became due and payable on May the 1st, 1890, and after the commencement of the said action." The alleged agreement is attached to McCarthy's deposition, and is as follows: "Los Angeles, Cal., Dec. 29, 1888. Received from James P. McCarthy, agent, the sum of fifty dollars, to apply on interest on mortgage of Mrs. L. E. Hensler, now all due; the said mortgage being given to secure balance of payment on the five acres sold James P. McCarthy off from my place on south side of Pico street, 'Arlington Heights,' and for value received, to wit, above payment. I agree to extend time for the payment of the said mortgage to May 1, 1890, upon payment each two months hereafter of the accrued interest on the said mortgage notes, now amounting to \$860.00 balance. [Seal.] Kimball Hardy. James P. McCarthy, witness." There was no evidence tending to disprove the genuineness of this writing, or the signature of Hardy; but the testimony of McCarthy that the interest had been paid was disputed by the testimony of the plaintiff. But for the purpose of the question now being considered (that of ratification) it is immaterial whether the defendant paid the interest or not, for, whether she complied with the conditions upon which Hardy agreed to extend the time of payment or not, her averment, in her answer, that she authorized the procurement of the agreement for the extension of time, in the absence of evidence that she ever repudiated the execution of the notes or mortgage by her assumed agent, is *prima facie* sufficient evidence of her ratification of such execution. In *Taylor v. Association*, 68 Ala. 229, Brickell, C. J., said: "We do not mean that it was shown that there was assent to and confirmation of the transaction

expressed in words. That is not essential, for ratification is more often implied from the acts and conduct of parties having an election to avoid or confirm than expressed in words; and it is implied whenever the acts and conduct of the principal, having full knowledge of the fact, are inconsistent with any other supposition than that of previous authority, or an intention to abide by the act though it was unauthorized." See, also, Mechem, Ag. §§ 146-157. I think the power of attorney was admissible as a circumstance tending at least to strengthen the other evidence of a ratification, by showing the relation between defendant and McCarthy. It showed that McCarthy was not a stranger to defendant; that he was authorized to act as her attorney to some extent in regard to all her real property in this state, even though he may not have been authorized to mortgage it. "All the authorities," says Mr. Mechem, (section 160,) "agree that the relations of the parties have much to do in determining whether or not there has been a ratification." Where an authorized agent transcends his authority, the liability of the principal to be held to have ratified the unauthorized acts by mere acquiescence is much greater than it would be in case an utter stranger had assumed to act as agent without any authority for any purpose whatever; because, "in general, where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, * * * else he will be bound by the act as having ratified it by implication." Ward v. Williams, 26 Ill. 447. But where an utter stranger assumes to act as agent, without any authority for any purpose, the assumed principal is not required to repudiate so promptly, in order to repel the charge of having ratified the unauthorized acts by acquiescence; since in the latter case the assumed agent bears no ostensible relation as agent to the person for whom he assumes to act, and therefore third persons are not so liable to be deceived by his pretensions, it being their own fault if they deal with him as agent without some apparent evidence of his authority. And since the undisputed evidence made a prima facie case of ratification, the finding that the notes and mortgage were executed by defendant was thereby justified, the ratification being equivalent to original authority.

2. Appellant further contends that the evidence does not justify the findings that Hardy died before the commencement of this action, that his will was admitted to probate, that letters testamentary were issued to the plaintiff, or that plaintiff ever qualified to act as executor. I think these points should be sustained. While the evidence tends to show that Hardy died before the trial of the action, it does not show when he died. There is no evidence tending to prove that his will (if he made a will) was ever admitted to probate, or that letters testamentary were ever issued to plaintiff, or that plaintiff was in any way qualified to act as execu-

tor. It is not claimed by counsel for respondent that there was any evidence of these alleged facts; but it is claimed that the court took judicial notice of them, inasmuch as the probate proceedings in the matter of the estate of Hardy were in the same court. In the first place, there is no evidence of any such proceedings in any court; and, in the second place, it is too clear to admit of question that the judicial knowledge of the court does not extend to the contents of its records in former actions or proceedings. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; HAYNES, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

DE HAVEN, J. I concur in the judgment and in the foregoing opinion. The amended complaint is defective, as the mortgage therein referred to is not set out in terms or according to its legal effect, nor does the amended complaint contain any description of the property described in the mortgage. The allegation of the amended complaint as to the mortgage is that a copy of "said mortgage, with the indorsements thereon, is annexed to the original complaint herein, marked 'Exhibit A,' and made a part of this complaint." This is not sufficient. Records and papers cannot be made a part of a pleading by referring to them in this manner.

3 Cal. Unrep. 792
SAN DIEGO FLUME CO. v. CHASE. (No. 19,083.)

(Supreme Court of California. Feb. 14, 1893.)

CONTRACTS—PAROL EVIDENCE TO EXPLAIN.

Where a contract has been interpreted on an appeal to this court, such contract is not ambiguous or uncertain, and on a new trial parol evidence cannot be introduced to show the intention of the parties, under Civil Code, § 1649, and Code Civil Proc. § 1864, authorizing parol evidence in cases of doubtful and ambiguous contracts; for these sections do not apply when the courts are able to declare the true intent of the parties.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

(Not to be published in California Reports.)

Action by the San Diego Flume Company against Levi Chase for the reformation of a contract. From the judgment, defendant appeals. Affirmed.

For prior reports, see 25 Pac. Rep. 756, and 26 Pac. Rep. 825.

Levi Chase and Hunsaker, Britt & Goodrich, for appellant. Shaw & Holland, for respondent.

TEMPLE, C. This is an appeal from the judgment, with a bill of exceptions, and is the second appeal in the case. See 87 Cal. 561, 25 Pac. Rep. 756, and 26 Pac. Rep. 825. The nature of the case, and

most of the facts necessary for understanding it, are there stated. As stated, the action was brought to have a contract reformed to accord with the alleged intention of the parties, which, it was averred, was to sell $2\frac{1}{4}$ inches of water, miners' measure, under a 4-inch pressure, whereas, by the fraud of defendant, the contract was so drawn as to entitle defendant to all the water which would run through two connections of a 2-inch iron pipe, entering the side of plaintiff's flume near the bottom, to be carried through $1\frac{1}{2}$ inch standard pipes. The defendant answered, and filed a cross complaint asking for a specific performance of the agreement, and a restoration of the pipes which had been removed by plaintiff, etc. Upon the first trial he had judgment, and the plaintiff appealed to this court, when it was held that the contract meant, and could only mean, without rendering some part of it inoperative, that "two and one quarter inches of water, miners' measure, under a four-inch pressure, it is the privilege of the defendant to take and distribute daily, as he pleases, over his land, through his pipe system attached to plaintiff's flume." It was also said of the two provisions, one in regard to the pipes, and the other in regard to the quantity of water: "The one clause refers to the amount of water to be taken; the other, to the manner of taking." After the remittitur was filed in the lower court, the defendant, on due notice, asked leave of the court to amend his cross complaint by adding thereto an allegation to the effect that at the time the contract was executed both parties understood, and plaintiff knew that defendant understood, that the true interpretation of the contract was that defendant was entitled to have all the water he might need for uses specified, and might draw from the pipes, regardless of the amount that might be required, and was not limited to $2\frac{1}{4}$ inches mentioned as a water right. Leave to so amend was refused, and defendant excepted. Evidence was offered at the trial to prove the facts stated in the proposed amendment. The evidence was rejected, and defendant again excepted. Whether these rulings were correct is the question on this appeal.

These rulings are attacked as a violation of section 1649¹ of the Civil Code, and section 1864² of the Code of Civil Procedure. These two sections seem intended to accomplish the same purpose, although expressed in different words; and if they authorize the introduction of parol evidence to ascertain the intention of the parties, where the contract is ambiguous or uncer-

tain, this does not mean whenever the proper interpretation of a contract is a difficult matter, or one about which men may differ. They are qualified by section 1639 of the Civil Code and section 1859 of the Code of Civil Procedure. If, after a full consideration, with a full knowledge of the surrounding circumstances, the court is able to declare with certainty what the intention of the parties was, from the writing itself, no matter how difficult the task may be, it is not ambiguous or uncertain, within the meaning of the rule, and the court cannot, as it is said, travel outside the four corners of the instrument. That the instrument in question here can be so interpreted is manifest from the fact that its meaning was clearly ascertained and determined by this court. That counsel have held different views, or courts have otherwise decided, or have held divers views upon the subject, does not tend even to establish such ambiguity or uncertainty. No matter how much this court may have doubted what the true construction ought to be, if finally satisfied that the intent can be certainly ascertained from the writing, parol evidence cannot be introduced, as to the intention of the parties, on the ground that its terms are ambiguous or uncertain.

I concur: VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

97 Cal. 292

HARRIS v. FOSTER. (No. 19,104.)

(Supreme Court of California. Feb. 14, 1893.)

MORTGAGE—FORECLOSURE—LEASE OF PROPERTY BY MORTGAGOR—RIGHTS OF PURCHASER AT SALE.

1. Where the owner of land mortgages it, and, after a judgment of foreclosure, leases it for five months, and receives the rent in advance, the purchaser at the foreclosure sale, after the time of redemption expires, can compel the tenant to pay again the rent accruing after the foreclosure sale, when his mortgage is recorded, since the case is not governed by Civil Code, § 1111, providing that no tenant who, before notice of grant, shall have paid rent to the grantor, shall suffer any damage thereby, but by Code Civil Proc. § 707, providing that the purchaser from the date of the sale until redemption shall be entitled to receive the rents from the tenant in possession.

2. Where, in such case, the tenant holds over, he does not cease to be a tenant in possession, or acquire any right to use the purchaser's property without paying for it.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Harris against Foster to recover for use and occupation of land. Judgment for plaintiff. Defendant appeals. Affirmed.

B. F. Thomas, for appellant. A. C. Freeman, for respondent.

DE HAVEN, J. On March 12, 1888, L. D. Stone and his daughter Harriet each owned an undivided half of the Sisquoc rancho in Santa Barbara county. Upon that day the father mortgaged his interest therein to the plaintiff in this action. In

¹Civil Code, § 1649, provides: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

²Code Civil Proc. § 1864, provides: "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail, against either party, in which he supposed the other understood it, and, when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

January, 1890, the plaintiff commenced an action to foreclose this mortgage, and at the same time filed and recorded a notice of the pendency thereof. Stone was thereafter declared insolvent, and one Bush was appointed his assignee, and as such was made a party to the foreclosure suit. Judgment of foreclosure was entered in that action September 1, 1890, and, two days thereafter, Bush, the assignee of Stone, and F. W. Burke, as the guardian of Stone's daughter Harriet, executed to the defendant a lease of lots 4 and 6 of the Sisquoc ranch, giving him the right to pasture his stock thereon from that date until January 1, 1891; and the defendant went into possession under his lease, paying the rent in advance, in accordance with its terms, and occupied the premises until February 1, 1891, and thereafter until April 1, 1891, under an agreement made with the guardian of Harriet Stone, as to her undivided interest therein. On October 6, 1890, the land described in the mortgage made by Stone to the plaintiff was sold under the judgment of foreclosure, and the plaintiff became the purchaser at such sale; and, as there was a failure to redeem from this sale, he received the sheriff's deed therefor April 14, 1891. This action was brought to recover from the defendant, as tenant in possession, one half the value of the use and occupation of the property from the date of the sale under the judgment of foreclosure until April 1, 1891. The court below found the facts as above stated, and gave judgment in favor of plaintiff for one half the value of the use and occupation of the land from the date of his purchase until February 1, 1891; the value of its use during the time it was occupied by defendant under the lease made to him on September 3, 1890, by the assignee of Stone and the guardian of Harriet Stone, being the amount reserved in that lease. The defendant appeals, and claims that the findings do not sustain the judgment appealed from.

1. The defendant contends that as he leased the land before it was purchased by the plaintiff at the foreclosure sale, and paid to the then owners the rent in advance for the whole term, in accordance with the agreement contained in the lease, he is not liable to the plaintiff, as successor in interest of one of his lessors, for any portion of the value of his use and occupation of the premises under that lease; and, to sustain this position, defendant cites section 1111 of the Civil Code, which is as follows: "Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage hereby." The language of the section just quoted is plain, and, as held in the case of *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. Rep. 193, the last clause thereof affords "protection to the tenant who pays rent to his landlord before notice of the grant of the reversion;" but it has no application to the facts as presented here. Not only was the mortgage of plaintiff on record, but a judgment foreclosing it, as against one of defendant's lessors, had been entered before the defendant obtained his lease or paid any rent thereunder.

This being so, it must be held that the defendant was not without notice of the rights of plaintiff under his mortgage and the judgment foreclosing it; but, on the contrary, that he accepted the lease, and paid the rent, with knowledge that plaintiff then had the right to have an undivided half of the land so leased sold to satisfy the judgment of foreclosure, and that "the purchaser, from the date of the sale until a redemption," would be "entitled to receive from the tenant in possession the rents of the property, or the value of the use and occupation thereof." Code Civil Proc. § 707. The plaintiff having become the purchaser of the land, under a decree foreclosing a mortgage made long before the date of defendant's lease, and of which mortgage the defendant had notice, it is no defense to this action that defendant paid the rent in advance. The lessor, to whose title plaintiff has succeeded, was not entitled to the rent accruing, or to the value of the use and occupation of the property, subsequent to the sale under the judgment of foreclosure, unless such lessor effected a redemption from the sale; and the payment of rent for the period extending beyond the date of such sale was made by defendant at his peril. This necessarily results from the well-established rule that a subsequent grant or lease of mortgaged premises is subject to the prior mortgage, if the purchaser or lessee had either actual or constructive notice of such mortgage. If the law were otherwise, it would be in the power of the mortgagor to materially diminish the value of the mortgaged property, as security for the debt for which the mortgage was given, by simply leasing it for a long period and collecting the rent in advance, or by leasing it for such period for a nominal rent. It was held in the case of *McDevitt v. Sullivan*, 8 Cal. 593, in accordance with the views we have here expressed, that where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant, the purchaser under the mortgage sale can require the tenant to pay the rent over again. We think the court below was clearly right in holding that the defendant was liable to the plaintiff for his proportion of the value of the use and occupation of the premises during the time defendant was in possession under the lease made to him by Stone's assignee and the guardian of the other cotenant.

2. The defendant continued in possession for one month after the expiration of the lease just referred to, and the court below found the value of the use and occupation for that period to be \$100, and also gave judgment against defendant for one half that sum. This ruling of the court was right. The defendant did not, by holding over, cease to be a tenant in possession, or acquire any right to use the plaintiff's property without paying for it.

As to the other points made by appellant, it is only necessary to say that the findings are within the issues made by the pleadings, and fully sustain the judgment. Judgment affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

(97 Cal. 280)

COALTER v. HURST. (No. 14,961.)

(Supreme Court of California. Feb. 14, 1893.)

APPLICATION OF PAYMENTS.

Where, in an action to recover for services, payment is averred as a defense, plaintiff may show that defendant was indebted to him on other transactions had between them prior to the performance of the services, and that the money so paid was not in settlement of any specific demand, and, if there is nothing to show the date at which such payment was made, the court will presume that it was in extinguishment of the obligations maturing prior to the debt due for services, and apply such payment thereon; Civil Code, § 1479, providing that where a debtor owing several debts makes a payment which is applicable to either of them, and indicates no intention as to which debt it shall be applied, such payment must be applied to the one earliest in date of maturity.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Coalter against Hurst to recover for services performed by him for defendant. Judgment for plaintiff. Defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. Taylor & Craig, for respondent.

HARRISON, J. The statement of the account between the parties upon all of their transactions with each other which the court made in its findings was not a finding upon issues not presented by the pleadings, but was a direct finding upon the issue of payment presented by the defendant's answer. The defendant had alleged in his answer that he had fully paid for the services for which the plaintiff brought the action. Under this averment he showed that he had paid to the plaintiff various sums of money, amounting in other aggregate to more than the court found to be the value of the services; but, as the plaintiff had alleged in his complaint that he had not been paid for his services, there was an issue upon this averment, and the plaintiff was at liberty to show that the moneys had in fact been paid upon other transactions. The court, in its findings, stated the account between the parties, and in effect found that \$1,090 of the amounts paid by the defendant was upon other transactions, \$800 of which was for moneys that had been received by the defendant from the plaintiff before any services were rendered. As the defendant did not make application of any of the moneys paid by him to a discharge of his obligation for the services rendered by the plaintiff, or to any specific demand of the plaintiff, the court was at liberty to apply them to the extinction of the obligations earliest in date of maturity, (Civil Code, § 1479, subd. 3, par. 3;)¹ and, as the record does not disclose the dates

at which the respective payments were made, we may assume that it appeared from the evidence that all of the obligations matured prior to those dates, and that the court applied the payments thereon. The judgment is affirmed.

We concur: **GAROUTTE, J.; PATERSON, J.**

(3 Cal. Unrep. 795)

KLAUBER et al. v. VIGNERON et al. (No. 14,869.)

(Supreme Court of California. Feb. 14, 1893.)

CONVEYANCE IN CONSIDERATION OF MARRIAGE — VALIDITY—MORTGAGES.

1. A conveyance by the owner of mortgaged premises, in consideration of marriage and money received, of his interest in the premises, to his intended wife, is valid.

2. Where such mortgagor, after marriage, substitutes for the previous mortgage, which is canceled, one of larger amount, the last-named mortgage is void.

3. If the mortgagee is entitled to any relief, he should declare on the previous mortgage, and ask to have the satisfaction set aside on the ground that it was made through mistake, accident, or fraud.

Commissioners' decision. Department 2. Appeal from superior court San Diego county; George Puterbaugh, Judge.

(Not to be published in California Reports.)

Action by A. Klauber and another, partners as Klauber & Levi, against George Vigneron and another, and Joanna Vigneron, to foreclose a mortgage. Judgment for plaintiffs. Joanna Vigneron appeals. Reversed.

Hunsaker, Britt & Goodrich, for appellant. A. E. Cochran, for respondents.

BELCHER, C. The material facts of this case are as follows: On December 16, 1887, the defendant George Vigneron executed to John A. Watson his promissory note for \$300, and a mortgage to secure its payment on certain real property which he then owned. This note and mortgage were subsequently assigned to the plaintiffs. On January 26, 1888, Vigneron executed to the plaintiffs his promissory note for \$700, due one year after date, and a mortgage to secure its payment on the same real property. On July 16, 1888, Vigneron, for the expressed consideration of one dollar, executed, acknowledged, and delivered to Joanna Ford a deed conveying to her the mortgaged property, which deed was duly filed for record on October 1, 1888, and was thereafter duly recorded. On July 17, 1888, Vigneron and Joanna Ford were married, and have ever since been husband and wife. On May 7, 1889, Vigneron executed to the plaintiffs his promissory note for \$1,200, due six months after date, and a mortgage to secure its payment on the same real property mortgaged and conveyed as before stated; and on the same day the plaintiffs marked "paid" their \$700 note, and delivered it to the maker, and also satisfied of record the mortgage given to secure its payment. On January 1, 1890, Vigneron and his wife, Joanna, executed to C. H. Hill their promissory note for \$3,500, due one year after date, and a mortgage to secure its payment on the same real property.

¹Civil Code, § 1479, provides that when a debtor, under several obligations to another, does an act by way of performance, in whole or in part, which is equally applicable to two or more such obligations, and it does not appear that the debtor intended to apply such performance to the extinguishment of any particular obligation, it must be applied to the obligation earliest in date of maturity.

Each of the before-mentioned mortgages was duly recorded on the day or the day after its date. On June 27, 1890, the plaintiffs commenced this action to foreclose their \$300 and \$1,200 mortgages; and Vigneron, Mrs. Vigneron, and Hill were made parties defendant. The complaint, among other things, alleged that the \$1,200 mortgage "was given in lieu of, and substitution of, and in renewal of" the \$700 mortgage which had been satisfied, and that neither of said mortgages had been paid; and that Mrs. Vigneron claimed an interest in the mortgaged property by virtue of the conveyance to her of July 16, 1888, but that the said deed was accepted by the grantee "with full knowledge of the existence of said debt, and of its nonpayment," and her interest or claim was subsequent to the lien of the plaintiffs' mortgage. And the prayer was that plaintiffs have judgment for the amounts due for principal and interest on the \$300 and \$1,200 notes, together with attorneys' fees and costs; that the deed from George Vigneron to Joanna Ford be ordered delivered up, and canceled, and that plaintiffs be subrogated to the rights of the payees of the \$700 note; that the mortgaged land be decreed to be subject to and sold under the \$1,200 mortgage, and that the proceeds of the sale be applied in payment of the amount due the plaintiffs; that the defendants, and all persons claiming under them, be barred and foreclosed of all rights and claims in and to the said premises, and every part thereof; and that the plaintiffs have judgment and execution against George Vigneron for any deficiency, etc. George Vigneron failed to answer, and judgment was rendered against him by default. Mrs. Vigneron answered, and admitted that she claimed an interest in the mortgaged premises under and by virtue of the conveyance made to her on July 16, 1888; denied that her interest in the premises was subject to the lien of plaintiffs' \$1,200 mortgage, but, on the contrary, averred that it was prior and paramount to said mortgage; denied that said deed was made or accepted by her with any knowledge of the existence of the said debt, or its nonpayment; and, upon information and belief, denied that the \$1,200 mortgage was given in lieu of, substitution of, or renewal of the \$700 mortgage; and also, in like manner, denied that the last-named mortgage had not been paid. Hill answered, making substantially the same denials and averments as are made by Mrs. Vigneron in her answer, and then, by way of cross complaint, set up his note and mortgage, and asked for a foreclosure. The case was tried, and the court found the facts as to the notes and mortgages, the conveyance, and the marriage of defendants, to be as before stated. It also found that the \$1,200 mortgage was given in lieu of, substitution of, and as renewal of the \$700 mortgage, and that all the allegations and averments of the plaintiffs' complaint were true, and all the denials and allegations of the defendants' answer were untrue. It further found the amount due Hill upon his note and mortgage.

And as conclusions of law it found, among other things, that the plaintiffs were entitled to the relief sought under the note and mortgage for \$1,200, to the extent of the amount due upon the note and mortgage for \$700, with interest thereon to the date of the decree, making in all \$965.08, for which amount plaintiffs had a priority of lien over the claims of defendants Hill and Joanna Vigneron. A decree was accordingly entered in favor of the plaintiffs, and from that decree, and an order denying her motion for a new trial, Mrs. Vigneron appeals.

When the deed of July 16, 1888, was executed, the parties to it intended to be, and were in fact, married on the next day. The consideration for the deed, as stated therein, was one dollar, but the real consideration, as shown by the uncontradicted testimony, was the proposed marriage, and about \$1,000 in money advanced and paid by the grantee to the grantor. Marriage alone is a good and sufficient consideration for an antenuptial settlement, and such a settlement will not be set aside, in the absence of the clearest proof of fraud, participated in by both parties. *Prewitt v. Wilson*, 103 U. S. 22. The deed was therefore not a fraudulent transfer, and the contention of respondents on this point cannot be sustained.

When the deed was delivered and accepted, it operated to vest the title to the premises conveyed in the grantee, subject, of course, to any valid subsisting liens thereon; and the grantor had thereafter no power to convey, mortgage, or incur the same. As said in *Barber v. Babel*, 36 Cal. 20, after citing numerous authorities, the cases "establish the principle that after a conveyance of the mortgaged premises, or the transfer of an interest therein, the mortgagor has no power to create, revive, renew, or prolong a charge upon the premises, or interest therein, so conveyed or transferred, while such interest remains in another party." The mortgage to secure the \$1,200 note was therefore void; and whether or not it was given in lieu of, substitution of, and in renewal of the \$700 note and mortgage, is a matter entirely immaterial for the purposes of this case. If the plaintiffs were entitled to any relief by reason of the last-named mortgage, they should have declared upon it, and asked to have the satisfaction set aside upon the ground that it was made by or through mistake, accident, or fraud. The judgment rendered upon the \$1,200 mortgage cannot be sustained; and we advise, therefore, that the judgment and order appealed from be reversed, and the cause remanded for a new trial, with leave to the plaintiffs to amend their complaint, if so advised.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial, with leave to the plaintiffs to amend their complaint, if so advised.

(3 Cal. Unrep. 803)

TOWNSEND v. BRIGGS. (No. 14,889.)¹
(Supreme Court of California. Feb. 21, 1893.)

DAMAGES FOR PERSONAL INJURIES — EVIDENCE — INSTRUCTIONS—EXAMINATION OF WITNESS—NEW TRIAL—PREJUDICE OF JURORS.

1. In an action for personal injuries it appeared that plaintiff entered defendant's shop and was ordered out; that, as plaintiff stepped back to the door, defendant struck him several times on the head with a mallet and with his fist, which caused plaintiff to fall on a cutting machine, and injure his left arm so that it had to be amputated. *Held*, that a verdict for plaintiff was justified by the evidence.

2. In such action, a verdict of \$9,000 was not so excessive as to show bias or prejudice.

3. It was not prejudicial error to allow plaintiff to answer the preliminary question: "You may state whether or not you have ever received any injury caused by * * * defendant," when there follows, without objection, a narration of how the injury was received, and what was said and done by defendant.

4. It was proper to allow plaintiff to testify that he had formerly lost two fingers on his right hand, and to show his hand to the jury, since they should know to what extent the loss of his left arm had deprived him of his earning power.

5. It was proper for plaintiff's physician to testify that he told plaintiff of his condition, and that it was necessary to amputate his arm; since the mental suffering resulting therefrom was attributable to defendant, if he was the cause of the injury.

6. Where a life insurance agent was called to testify that the mortuary tables in an encyclopedia are in general use, and was not asked on his examination in chief to whom the tables

applied, but stated on cross-examination that they applied only to insurable persons, it was not proper cross-examination to ask him "what insurable persons are."

7. Defendant's questions: "Do you know his [plaintiff's] habits as to sobriety?" and "Do you know what his reputation is for sobriety?" were incompetent, as they called for the witnesses' knowledge at the time of the trial, which was two years after the injury was received.

8. In such action it was proper to charge that, "if the jury find from the evidence that defendant, from malicious motives, and a wrongful disregard of" plaintiff's rights, "assaulted him and beat him wrongfully," and plaintiff was injured, "directly or approximately, then plaintiff is entitled to recover all damages he has suffered thereby," and the amount of damages is for the jury alone to determine.

9. Where a new trial was asked for because two of the jurors were prejudiced against defendant, and affidavits are read as to statements made by the jurors showing their prejudice, which statements are denied by the jurors in counter affidavits, the action of the court in denying the new trial will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

(Not to be published in California Reports.)

Action by Charles Townsend against J. S. Briggs for personal injuries. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Brousseau & Thomas, (Blackstock & Shepherd, of counsel,) for appellant. Barnes & Selby and H. L. Poplin, for respondent.

BELCHER, C. This is an action to recover damages for personal injuries received by the plaintiff. It is alleged in the complaint that on the 18th day of June, 1889, at San Buenaventura, in this state, the defendant wrongfully, wantonly, and maliciously assaulted the plaintiff, struck him several blows on the head with a mallet, and also with his fist, and beat, pushed, and knocked him over upon the knife of an apricot pitting machine, and thereby cut, bruised, and injured his head and left arm; that by reason of the injuries so received plaintiff lost his left arm, it being necessary to amputate the same above the elbow, and he was caused to suffer great bodily pain and mental agony, and was permanently disabled from doing any work or business, to his damage in the sum of \$20,000, for which he asked judgment. The answer denied all the averments of the complaint, and alleged that the injuries complained of were received by the plaintiff through his own wrongful acts, carelessness, and negligence, while he was willfully and unlawfully trespassing upon the property of defendant, and not by or through any wrongful act of defendant. On the first trial of the case a verdict was returned in favor of the plaintiff for \$500 damages. A motion for new trial was made by the plaintiff and granted by the court, and on appeal to this court the order was affirmed. *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. Rep. 108. On the second trial, 11 special interrogatories were submitted to the jury and answered in favor of the plaintiff. A general verdict was also returned awarding the plaintiff

¹Rehearing granted.

\$9,000 damages, for which sum judgment was entered. From this judgment, and an order denying his motion for new trial, the present appeal is prosecuted by defendant.

It was proved that defendant and one Leach had a shop in San Buenaventura, in which they were manufacturing and testing machines for pitting apricots and peaches; that there were three machines standing on the floor of the shop, two of them finished and one unfinished; that about 6 o'clock in the afternoon of June 18, 1889, the plaintiff entered the shop through an open front door to see one Barnard, an acquaintance of his, who was working there; that on entering plaintiff spoke to Barnard, and immediately stepped to the machine which was nearest the door, and commenced turning the wheel of it rapidly, and then stepped to another machine and turned the wheel of that; that the turning made a rattling, loud noise, which was heard by defendant in an adjoining room, and that he at once went into the shop, and told plaintiff to let the machines alone, and to get out from there, or he would pound his head; that plaintiff stepped back near the door and said, with an oath, "I would like to see you pound me;" that defendant then seized a mallet and went up to plaintiff and struck him on the head with it; that the blow caused plaintiff to fall back against the door, but that he gathered himself up and stepped forward, and as he did so defendant again struck him with the mallet several times, and then struck him with his fist; and that, while plaintiff was moving about, he fell on one of the machines, and his left arm was so badly cut by the knife of the machine that to save his life it became necessary a few days later to amputate it above the elbow. It is claimed by appellant that the verdict was not justified by the evidence, and therefore that the judgment should be reversed. In answer to this claim, it is sufficient to say that there was evidence clearly tending to support the verdict and to justify the answers to all of the special interrogatories. It is true that the testimony was in many respects conflicting, but under the well-settled rule in such cases the judgment cannot, in our opinion, be disturbed on this ground.

It is also claimed that the damages allowed were excessive. But the rule is that, where damages are asked for personal injuries committed from wanton or malicious motives, the measure of damages is left largely to the discretion of the jury, and courts will not disturb the verdict on the ground that the amount allowed is excessive, unless it is so disproportionate to the injury received as to make it clear that the jury must have been influenced by passion or prejudice. Here the injury sustained was serious and lasting, and we do not think it can be said that the sum awarded was an excessive compensation for it.

It is further claimed that the court committed several errors in its rulings upon the admission of evidence which were prejudicial to the defendant. The rulings complained of were as follows: After the

plaintiff had taken the stand as a witness in his own behalf, his attorney said to him: "You may state to the jury whether or not you have ever received any injury caused by Mr. Briggs, the defendant in this action." The question was objected to as incompetent, because it called for a conclusion, an ultimate fact, to be determined by the jury, and not by the witness. The objection was overruled, and the witness answered, "I have received it." We see no prejudicial error in this ruling. The question was merely preliminary, and the answer was followed, without objection, by a narration of the facts showing how the injury was received, and what was said and done by the defendant. The attorney also said to the same witness: "You may state to the jury the condition of your other hand prior to and at the time you received this injury." The answer was: "I have only two fingers and a thumb. I lost them in 1869." The attorney then said, "Hold your hand up, and show to the jury." It was objected that the evidence sought was immaterial, irrelevant, and incompetent, and it is argued that the purpose and effect of it was to excite the sympathy and prejudice of the jurors. But the plaintiff was entitled to have the jury informed as to his physical condition, and to what extent the loss of his left arm had deprived him of the means of earning a livelihood. For this purpose, as we understand it, the evidence was introduced, and it seems to have been competent and proper.

Dr. Bard was called as a witness for the plaintiff, and testified that he was a physician and surgeon, and was called upon to dress the plaintiff's wounds; that 10 days after the injuries were received he, with other consulting physicians, decided that it was necessary that the arm should be amputated, and that on the next day he amputated it. He said: "His condition at the time of the amputation was very critical. It was necessary to amputate the arm to save his life. He received proper medical attention and good nursing." He was then asked: "Did you notify Mr. Townsend of his critical condition that you have mentioned?" and the answer was: "I did notify him of his critical condition, and obtained his consent to the amputation." The question was objected to by defendant as incompetent and immaterial, and it is now urged by his counsel that the doctor's expression of his opinion to his patient was incompetent as against the defendant, because, as they say, "it may be that it had a depressing effect on the plaintiff's mind at the time, but such suffering cannot be attributed to the defendant." We see no merit in this objection. It was natural and proper for the doctor to tell the plaintiff of his condition, and that it had become necessary to amputate his arm; and the physical and mental suffering resulting therefrom was clearly attributable to the defendant, if he was the cause of the injury.

John H. Reppy was a witness for plaintiff, and testified that he had been engaged in the life insurance business as agent of the Mutual Life of New York for four years, and that the American Mortuary Tables

were used by the leading life insurance companies; that he had compared the American Mortuary Tables, of which he had a copy, with the American Experience Tables, found in volume 3 of Johnson's New Universal Encyclopedia, so far as they related to the age of 46,—the plaintiff's age at the time he received the injury,—and that they were identically the same. Plaintiff then offered and read in evidence, over the objection of defendant, the page in the encyclopedia showing the probable duration of life at the age of 46 to be 23.81 years. On cross-examination the witness stated that he had been a soliciting agent in the life insurance business, but had made no examinations of applicants for policies; and that the table referred to applied only to insurable persons. He was then asked, "Can you tell us what insurable persons are?" The question was objected to by plaintiff as not proper cross-examination, and the objection sustained. It is argued that this ruling was erroneous, because, if the witness had answered in the affirmative, and had said that plaintiff was not an insurable person, defendant would then have been entitled to demand that all his evidence be stricken out; and, if he had answered in the negative, defendant could properly have made the same motion. But the witness was called to prove simply that the mortuary tables found in the encyclopedia were in general use, and on his direct examination had been asked no questions as to whom the tables applied, or as to who were or were not insurable persons. And the general rule is that a witness cannot be cross-examined except as to facts and circumstances connected with matters testified to by him on his direct examination. There was no error, therefore, in the ruling of the court. The objection that the mortuary tables were not admissible in evidence is not insisted upon, nor could it be successfully. It had already been proved that plaintiff was in good health at the time he received the injury; and the rule seems to be general that, in an action to recover damages for an injury to a healthy person, caused by the negligence or wrongful act of the defendant, where the injury has resulted in the death of the injured party, or in practically destroying his earning capacity, standard mortuary tables are admissible to show what was his probable duration of life, and thus to assist in determining what amount of damages would be reasonable and proper in the case. *Gallagher v. Railway Co.*, 67 Cal. 16, 6 Pac. Rep. 869; 15 Amer. & Eng. Enc. Law, p. 881, note 3, and cases cited.

When defendant was making his own case he asked one of his witnesses, "Do you know his [Townsend's] habits as to sobriety?" and another witness, "Do you know what his reputation is for sobriety?" Both questions were objected to as incompetent, and the objection sustained. The questions called for the knowledge of the witnesses at the time of the trial, which was two years after the injury complained of was received, and they were therefore clearly immaterial and incompetent.

It is next claimed that the court erred in giving to the jury certain instructions asked by the plaintiff. The first instruction complained of reads as follows: "If the jury find from the evidence that the defendant, from malicious motives, and a wrongful disregard of the rights of the plaintiff, assaulted him and beat him wrongfully, and in so beating the plaintiff was injured thereby, directly or approximately, then plaintiff is entitled to recover all damages he has suffered thereby, and the measure of damages and the amount thereof would be for you alone to determine under the evidence and instructions given by the court in this case." It is said that "this instruction assumes the fact that, if the defendant did assault the plaintiff, such assault was from malicious motives, and the wrongful disregard of the rights of the plaintiff." We fail to see any such assumption; on the contrary, the instruction seems properly to leave to the jury the determination, from the evidence, of all the matters referred to. Similar objections are made to other instructions, but we see no merit in them, and therefore pass them without special notice. The instructions asked by the defendant were all given, and when read, as they must be, in connection with those given at the request of the plaintiff, the law applicable to the case seems to have been fully, fairly, and correctly stated.

Finally, it is claimed that a new trial should have been granted, because two of the jurors before whom the case was tried were prejudiced against the defendant, and had made statements showing that they were wholly disqualified to act as jurors in the case. The jurors referred to were E. P. Cook and P. K. Miller, and the defendant, in an affidavit made by himself, stated that he "did not know before said jurors were called and sworn, touching their qualifications to serve as jurors in said case, or before they were so accepted as such, that they were so prejudiced against him. And that he had no means of knowing of such prejudice and ill will." He did not state, and there was no proof, that the prejudice of the jurors, if any existed, was not known to him and his attorneys before the trial was concluded and the case submitted. Such proof, however, should have been made. But, waiving that, we do not think the action of the court in denying the motion for new trial can be disturbed on this ground. It is true that several affidavits were read in support of the motion, in which the affiants stated that in conversations with Cook and Miller, at times and places named, the latter had made statements to them, which, if true, clearly showed that they entertained prejudice and ill feeling against Briggs. But, on the other hand, counter affidavits made by Cook and Miller were read, in which they denied that at the times or places named, or at any time or place, or at all, they had ever made to the affiants, for defendant, or in conversation with them, the statements charged, or any statements of like or similar import, nature, substance, or character. Counsel for appellant suggest that the counter affidavits are insufficient, be-

cause they only deny that the affiants ever made the statements charged to or in conversation with the affiants on the other side. And it is said that the statements may have been made in the hearing of, if not to, or in conversation with, the parties deposing to them. But, in our opinion, there was a real and substantial conflict as to whether the said statements or any like statements were ever made, and, after carefully reading all of the affidavits, we cannot say that the conclusions of the court below, as shown by its action in denying the motion, were not reasonable and proper. We advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 314)

WASHBURN v. LYONS et al. (No. 19,008.)
(Supreme Court of California. Feb. 16, 1893.)

MUNICIPAL IMPROVEMENTS—NOTICE—SUFFICIENCY OF CONTRACT.

1. St. 1885, p. 147, § 3, as amended by St. 1889, p. 157, provides that before ordering any work done or improvements made on streets, as authorized by section 2 of the act, the city council shall pass a resolution of intention so to do, which shall be published "and" posted for two days in the manner prescribed by section 34 of this act. Held, that since such statute refers to section 34, which provides for the "posting" of the notice of the resolution, it must be construed to mean that "publication" of notice alone is sufficient, where there is a paper in which publication may be made; and, if there is no paper, then the notice must be "posted" as provided in section 34.

2. Where the complaint in an action to enforce an assessment for street repairs fails to show that the contract under which the work was done fixed the time for the commencement and completion of the work to be done thereunder, in accordance with the requirements of Act March 18, 1885, § 6, such omission will be fatal to the complaint. Libbey v. Ellsworth, (Cal.) 32 Pac. Rep. 228, followed.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Washburn against Lyons and others to enforce payment of an assessment for street repairs. There was a judgment for defendants on a demurrer to the complaint, and plaintiff appeals. Affirmed.

Jones & Carlton, for appellants. Julius Lyons, for respondents.

DE HAVEN, J. The court below sustained a demurrer to the complaint, and thereupon gave judgment for the defendants, and the plaintiff appeals. The complaint does not allege that the resolution of intention was posted, but it does aver that such resolution was published for two days in a daily paper, printed in the city, and designated by the city council for that purpose. The first sentence of section 3 of the act "to provide for work upon streets * * * within municipali-

ties," (St. 1885, p. 147,) as amended by the act of March 14, 1889, (St. 1889, p. 157,) is as follows: "Before ordering any work done or improvements made, which is authorized by section 2 of this act, the city council shall pass a resolution of intention so to do, * * * which shall be published and posted for two days in the manner prescribed by section 34 of this act." It is claimed by defendants that, under this provision, the resolution itself should have been posted, as well as published; but we do not think so. The reference to section 34 of the act, and a consideration of the subsequent part of section 3, which provides for the posting of the notice of the passage of the resolution, make it very clear that the word "and," as used in the clause "published and posted," in the sentence above quoted, should be construed to mean "or." Thus construed, the statute requires the resolution of intention to be published the prescribed length of time, if there is a paper printed in the city; and, if there is no such paper printed, that then it shall be posted in the manner prescribed by section 34 of the act. The objection of defendants, therefore, to this part of the complaint, is not well taken.

But in another respect the complaint is defective. It fails to show that the contract, which is the foundation for the assessment sought to be enforced, fixed the time for the commencement and completion of the work to be done thereunder, in accordance with the requirements of section 6 of the act of March 18, 1885, before referred to. In the recent case of Libbey v. Ellsworth, 32 Pac. Rep. 228, we held this to be an omission fatal to the complaint in this class of actions; and, upon the authority of that case, the judgment must be affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

(99 Cal. 493)

BURBRIDGE v. LEMMERT. (No. 14,920.)
(Supreme Court of California. Feb. 20, 1893.)

CONTRACT—INTERPRETATION—ILLEGALITY.

An agreement, with sureties, executed contemporaneously with a mortgage, binding the mortgagor to pay all taxes assessed against the mortgage, evinces a clear intention of the parties that the mortgagor shall pay the taxes; and such intention will govern, though the agreement is thereby rendered unlawful, and though it is seemingly inconsistent with a provision in the mortgage apparently making it the duty of the mortgagee to pay such taxes.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.
(Not to be published in California Reports.)

Action by Sarah R. Burbridge against P. H. Lemmert to foreclose a mortgage. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

J. A. Donnell, for appellant. A. W. Hutton, for respondent.

VANCLIEF, C. Action to foreclose a mortgage on real property to secure the payment of a promissory note, dated January 29, 1889, for \$12,000, made by defendant, payable to plaintiff, or order, five

years after date, with interest at the rate of 10 per cent. per annum, payable annually; and, if not so paid annually, then the whole principal and interest to become immediately due and payable, at the option of the holder of the note. The defendant failed to pay interest for the first year; and, about six months after it became due, (September 1, 1890,) this action to foreclose for both principal and interest was commenced. The answer of the defendant denied that the principal or any interest thereon had ever become due on said note or mortgage, by reason of facts affirmatively alleged in the answer as follows: "For a second and separate defense the defendant alleges that at the city and county of Los Angeles, Cal., on the 29th day of January, 1889, at the time of the execution of the note and mortgage set forth in the complaint, the plaintiff demanded of the defendant the execution of the agreement hereinafter set forth as a part of the said note and mortgage, and, in accordance with said demand, the defendant, with the said W. C. Furrey, at said city, on said 29th day of January, A. D. 1889, at the time of the execution of said note and mortgage, and as a part thereof, made, executed, and delivered to the plaintiff an agreement in writing, and in the words and figures following, to wit: 'Southern California National Bank, Los Angeles, Cal., Jan. 29, 1889. It is hereby agreed by P. H. Lemmert, as principal, and W. C. Furrey, surety, that, in consideration of Mrs. Sarah R. Burbridge lending P. H. Lemmert twelve thousand (\$12,000) dollars, at 10 per cent. interest, we, the undersigned, agree to and bind ourselves and our assigns and heirs to pay all taxes of whatever nature which may be assessed against said mortgage of twelve thousand (\$12,000) dollars, and that said Mrs. Sarah R. Burbridge, or her assigns, shall be to no costs or expense on account of taxes on said mortgage. P. H. Lemmert, Principal. W. C. Furrey, Surety. Witness: H. M. Russell.'" The court found all these affirmative allegations in the answer to be true, and, as a conclusion of law therefrom, found "that the written agreement set forth in defendant's answer was and is in contravention of section 5 of article 13 of the constitution of this state, and renders null and void all the provisions of the said note and mortgage as to the payment of any interest specified therein;" and, consequently, that no interest ever accrued or became due, so as to give plaintiff the right by election to treat the principal as due prior to the expiration of five years from the date of the note, and thereupon rendered judgment dismissing plaintiff's complaint. The plaintiff appeals from the judgment, and also from an order denying a new trial.

1. It is contended by counsel for appellant that the findings of fact as to the instrument set out in the answer by which the defendant agreed to pay the taxes on the mortgage are not justified by the evidence. It is claimed that this instrument

was not demanded nor authorized by plaintiff, and was not executed at the same time the note and mortgage were executed, nor as a part of the same transaction. Upon these issues the evidence is conflicting, but the preponderance thereof seems to be in favor of the respondent, and amply sufficient to justify the findings of the court. The evidence touching these issues covers 75 pages of the transcript, and cannot fairly be so condensed as not to occupy more than reasonable space in this opinion; and for this reason a statement of it is omitted.

2. The mortgage contains the same provision as the note as to the consequence of a failure to pay the annual interest, and also authorized the mortgagee, if necessary to protect the mortgaged property, to insure it, and to pay the taxes thereon, "other than the taxes of this mortgage or the money hereby secured," and provides that the sums so paid, with interest at the same rate, shall be deemed to be secured by the mortgage. Counsel for appellant contends that the express exception of the taxes on the mortgage from the taxes which the mortgagee may pay and recover from the mortgagor, with conventional interest, is inconsistent with a stipulation in the same mortgage that the mortgagor is, nevertheless, to pay the taxes on the mortgage; that is to say, it is inconsistent for mortgagor and mortgagee to agree that the mortgagee may pay the taxes on the interest of the mortgagor in the land, and recover it back with interest, and at the same time agree that the mortgagor shall pay the taxes on the mortgagee's interest in the land. That the latter part of the agreement is unlawful is clear; but that the two parts of the agreement are necessarily inconsistent with each other I am unable to perceive. But, however this may be, all the provisions of the mortgage, including the concurrent agreement that the mortgagor should pay the taxes on the mortgage, must be read together, and seeming inconsistencies reconciled, if they can be without violence to the language, for the purpose of ascertaining the intention of the parties. If, when thus read and construed, the intention be found to be clear and certain, such intention must prevail, though the agreement be thereby rendered unlawful. The agreement that the mortgagor should pay the taxes on the mortgage was prepared with distinct care and deliberation, and a surety was required to sign it; and its language is so unequivocal and certain as to the intent that the mortgagor should pay the taxes on the mortgage that there is no doubt that such was the intention of the parties. This view of the case renders all other points discussed by counsel immaterial. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

97 Cal. 318
FARMERS' & MERCHANTS' BANK OF LOS ANGELES v. BOARD OF EQUALIZATION OF LOS ANGELES. (No. 14-873.)

(Supreme Court of California. Feb. 17, 1893.)

TAXATION—EQUALIZATION—NOTICE—WRIT OF REVIEW.

1. An order of the board of equalization finding that a bank has omitted property from the list of its taxable property, and should be assessed thereon, and directing the assessor to add such property to its assessment, is not an attempt by the board to add property to the list, and exercise assessorial powers, but is a direction that the assessor make such addition, though the order specifies the value of the property to be added, and is authorized by Pol. Code, § 3681, requiring the assessor, at the request of the board, to list and assess property which he has failed to assess.

2. Pol. Code, § 3681, under which the assessor is required, at the request of the board of equalization, to list and assess property which he has failed to assess, which section the city charter of Los Angeles makes applicable to the common council, sitting as a board of equalization, does not conflict with the constitutional provisions which define the powers and duties of state and county boards of equalization, and which do not give the power to cause property to be added to the assessment list, since it merely extends the power and duty of the assessor.

3. A notice to a bank to appear before the board of equalization, and show cause why its "assessment on solvent credits should not be increased from \$2,774 to \$275,000," sufficiently informs it that it is proposed to add property to the assessment.

4. A person appearing before the board of equalization in response to a notice, and submitting to the action of the board, waives any defect in the notice.

5. A finding by the board of equalization that a person has omitted taxable property from his list to a certain amount is conclusive on the courts on writ of review, since Code Civil Proc. § 1074, provides that the review on such writ cannot be extended further than to determine whether the inferior tribunal or board has regularly pursued its authority.

6. Even if the fact that property has been so omitted is necessary to give the board jurisdiction, the court cannot review the evidence to determine whether there was evidence to show such fact, since the fact is one to be determined by the board.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Petition by the Farmers' & Merchants' Bank of Los Angeles for a writ to review an order of the board of equalization of Los Angeles directing property to be added to petitioner's assessment. From a judgment annulling the order the board appeals. Reversed.

C. McFarland, for appellant. Graves, O'Melveny & Shankland, for respondent.

TEMPLE, C. This appeal is from a judgment of the superior court of Los Angeles county annulling an order made by the common council of the city of Los Angeles, sitting as a board of equalization. The judgment was rendered in a proceeding under a writ of review, issued upon a petition and the affidavit of John Milner, the cashier of the plaintiff, a corporation, doing a general banking business at Los

Angeles. No return to the writ was made; but it was stipulated that "the said petition, and the matters stated therein, shall be treated and considered as the certified transcript of the record and proceedings of the city council, sitting as a board of equalization, in the matter of the assessment complained of." This stipulation is not altogether satisfactory. Questions raised upon such a proceeding are to be determined by an inspection of the record, and, in general, not upon pleadings or evidence. It is perfectly manifest that many matters stated in the petition were not, and could not have been, in the records of the board of equalization. The only course open to us would seem to be to regard only those matters as transcripts of the record which are stated to be such or are such orders as were required to be entered in the minutes of the board. For instance, the petition sets forth what petitioner claims was the evidence taken before the board. It is not stated that this evidence is set out in the minutes of the board, and the law did not require it to be done. We are not bound to consider this evidence as something apparent upon the face of the record.

The proceeding before the board was taken for the purpose of ordering the assessor to add certain property to the assessment roll, and an objection is made that the city of Los Angeles has not power to assess, levy, or collect taxes, because the legislature has not granted such authority by a general law, as required by the constitution. This question was decided adversely to respondent in the recent case of Trust Co. v. Hinton, (Cal.) 32 Pac. Rep. 3, and need not be again considered.

The petition shows that petitioner duly made and returned to the city assessor a list of all the personal property which was in its possession or under its control on the first Monday of March, 1891. That all its personal property, except mortgages, at that date, subject to assessment for city taxes were: Money, \$21,465.33; vaults and safe, \$4,000. That the city assessor listed and assessed to petitioner: Money on hand, \$21,465.33; solvent credits unsecured, \$2,774; vaults and safe, \$4,000. That the city council, sitting and acting as a board of equalization, August 5, 1891, ordered notice to be given petitioner to show cause August 12, 1891, before the board, why its assessment of solvent credits should not be increased from \$2,774 to \$275,000. The notice given was in writing, as follows: "Los Angeles, Cal., Aug. 5, 1891. To Farmers' and Merchants' Bank—John Milner, Cashier: You are hereby notified to appear before the board of equalization of the city of Los Angeles on Wednesday, the 12th day of August 1891, at 10 o'clock A. M., in the council chamber in the city hall, and show cause why your assessment on solvent credits should not be increased from \$2,774 to \$275,000. By order of the board of equalization. Freeman G. Teed, City Clerk and Clerk of said Board. By Geo. E. Seip, Deputy." That no other notice was given, but petitioner appeared before the board, by the affiant, and submitted

itself to the board, answering such interrogations as were propounded to it or to the affiant touching its property. What is averred to be the testimony is set out in the petition, and it is alleged that no other evidence was taken at such hearing. It is claimed that this testimony does not show, or tend to show, that the petitioner had any solvent credits or any which had escaped assessment. Nevertheless, the board made and entered in its minutes the following order, which, it is claimed, the board had no jurisdiction or power to make: "The Farmers' and Merchants' Bank having been notified to appear on August 12th, to show cause why its assessment for solvent credits should not be increased from \$2,774 to \$275,000, and John Milner, cashier of said bank, having appeared in response to said notice, was sworn and testified in regard to the assets of said bank; and it appearing to the board that said bank has returned a false and incomplete list of its taxable property, and that said bank should be assessed for solvent credits to the amount of \$270,774, and that it had escaped assessment for solvent credits to the amount of \$268,000, on motion of Mr. Tufts, it is ordered that the assessor be directed to add to the assessment of said bank for solvent credits the sum of \$268,000, and assess the bank for solvent credits in the total sum of \$270,774." That the assessor did, in pursuance of the order, enter upon the assessment roll an addition to the assessment of petitioner the sum of \$268,000, solvent credits, making the total of solvent credits assessed to petitioner \$270,774, instead of \$2,774, as listed and returned by the assessor.

1. The first point made upon the record is that it is apparent therefrom that the proceeding was not to equalize the values of property which had been listed and assessed by the assessor, but was an attempt by the board to add other property to the list which had not been listed or valued by the assessor. This it is claimed the board could not do, as it is not vested with assessorial power. But, plainly, the board did not attempt to add property to the assessment roll, or to exercise assessorial powers. It simply directed the assessor to list and assess \$268,000 of solvent credits, which it found had escaped assessment. In this case it is no objection to the order that it states the value of the item to be added, instead of simply directing the assessor to add the property to the list and assess its value. Respondent itself claims that solvent debts, like gold coin, must necessarily be assessed at their face value. To describe the property, therefore, is to fix its value. The board was authorized to make the order by section 3681 of the Political Code, which the city charter expressly makes applicable. It is claimed that this section of the Code is unconstitutional, because the state constitution expressly defines the powers and duties of both the state and county boards of equalization, and the power to cause property to be added to the assessment roll is not there given. The premise is admitted, but I can see no force or logic in the conclusion. It is not claimed that

the power comes from the constitution, but from the act of the legislature. Section 3681, Pol. Code, simply extends the power and duty of the assessor, enabling and requiring him, at the request of the board, to list and assess property which he had failed to assess, notwithstanding the time for assessments had passed, and the roll was no longer in his possession; and the exercise of this power is directly in accord with the policy and express provisions of the constitution, which requires all property not exempt from execution to be taxed. Section 1, art. 13: "If any property subject to taxation should escape assessment in any year, the taxation for that year would not be equal and uniform; nor would all property in this state be taxed in proportion to its value, and the behest of the constitution would not be obeyed." *Biddle v. Oaks*, 59 Cal. 94. The exercise of this power by the board of equalization does not obstruct the performance by the board of any duty enjoined upon it by the constitution, but is in aid of the functions there created; nor does it disturb the division of powers made by the constitution between the state and county boards. The cases of *Wells, Fargo & Co. v. Board of Equalization*, 56 Cal. 194, *People v. Sacramento Co.*, 59 Cal. 320, and *People v. Dunn*, Id. 328, have no bearing upon this subject. In those cases the construction of section 9 of article 13 of the constitution was considered, and the distinct powers and duties of state, and county boards to some extent pointed out. Of course no valid law could be made disturbing this division of power made by the constitution, and perhaps it would follow that functions or powers given to one board are thereby denied to the other. So far the provisions would constitute a limitation upon legislative power, but it constitutes no argument against the power of the legislature to grant other powers, or to impose other duties upon either board so long as these implied limitations are not violated. *People v. Hastings*, 29 Cal. 449, has no application to the new constitution. One of the chief arguments in favor of constitutional revision was the necessity of getting rid of the provision requiring property to be assessed by assessor elected by the electors of the district in which he exercised his powers. The new constitution contains no such limitation. Besides, as we have seen, the board did not make an assessment, but directed the assessor to do so. The propriety of this course was recognized under the old constitution, when assessorial powers could not be conferred upon any other officer than an elected assessor. *People v. Reynolds*, 28 Cal. 107.

2. It is next contended that the board had no power to act in the matter, because the notice was insufficient. It is said that it gave no information that it was proposed to add other property to the assessment. The position of respondent upon this matter is not quite consistent. Under another point it contends, and quite properly, I think, that to increase the assessment of solvent credits is necessarily to increase the subject of taxation, as was

said in regard to money in *People v. Dunn*, 59 Cal. 328. That being so, the notice in question could only have meant that other solvent credits might be added. The listing of property, however, is part of the process of assessing. The assessment roll includes the list with the values added, and the result is often spoken of as the assessment. The assessment may mean the completed tax list. *Cooley, Tax'n*, 352. Besides, it is averred that the petitioner appeared and submitted itself to the action of the board, and furnished all required evidence as to its property. If the notice was ambiguous or imperfect, the defect was waived by such appearance. *Spring Val. Waterworks v. Schottler*, 62 Cal. 69; *Wade, Notice*, 1358.

3. The next contention is that the order is void, because there was no evidence before the board that any property had escaped assessment. The board had no power to order a new assessment to be made without evidence. *City and County of San Francisco v. Flood*, 64 Cal. 504, 2 Pac. Rep. 264. The order recites that testimony was taken, and, in effect, that the conclusion was reached from the evidence that the bank had returned a false list of its property, and had escaped assessment for solvent credits to the amount of \$268,000. This must be held conclusive. "It is not a proper function of the writ of review to add to or modify the record with reference to jurisdictional facts determined therein, but to test the question of jurisdiction on the facts on the face thereof." *Freem. Judgm.* §§ 263, 619; *In re Grove St.*, 61 Cal. 453; *Ex parte Sternes*, 77 Cal. 156, 19 Pac. Rep. 275; *De Pedronena v. Superior Court*, 80 Cal. 144, 22 Pac. Rep. 71. In *Hagenmeyer v. Board*, 82 Cal. 214, 23 Pac. Rep. 14, it is said: "The record does not show by affirmative proof that the board did not act upon evidence before it. Therefore its order in the premises is conclusive that it did act on such evidence as was necessary." Counsel have cited cases, and no doubt many more could be found from other states in which the writ of review has been used for the correction of errors. Our Code provides: "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer." Section 1074, Code Civil Proc. It has been held that this language is equivalent to the phrase in section 1068 authorizing the court to inquire whether the tribunal, board, or officer has exceeded the jurisdiction of such tribunal, board, or officer. *Central Park R. Co. v. Placer Co.*, 43 Cal. 365. But, where the writ is understood as affording a remedy for mere errors, it has been held that the question must be determined by an inspection of the record, unless the statute has provided for a bill of exceptions. In *Birdsall v. Phillips*, 17 Wend. 464, the common-law rule was elaborately considered by Judge Cowen. After citing numerous cases, he says: "From these authorities and others I collect the following general rule: Wherever, were the suit at common law, the matter alleged for error is of such a nature that a bill of exceptions would be essential to its

review by writ of error, a certiorari will not reach it unless some statute has enlarged the effect of that writ in the particular case." It is true the petition sets out certain evidence alleged to have been submitted to the board, and avers that no other evidence was taken. This can certainly have no greater effect than an offer to impeach the record by evidence de hors. It is not stated that the record of the proceedings of the board discloses the evidence, though, if it did, I cannot see how that would help the matter. The board had jurisdiction to inquire as to whether any property of petitioner had escaped assessment. If I am right on the other points disposed of, it had jurisdiction both as to the subject-matter and the person. This being granted, its procedure within its jurisdiction is no more open to question than it would be were it a court of general jurisdiction. Certainly it was its province to decide as to the effect of the testimony, and that includes the necessity of determining whether it tended to show and did show that property belonging to petitioner had escaped assessment. All its acts after having acquired jurisdiction constituted the exercise of such jurisdiction, none the less that such acts were erroneous. *Central Park R. Co. v. Placer Co.*, supra, is similar to this. It was a proceeding before a board of equalization to have an assessment reduced. It was claimed that the board acted upon illegal testimony. It is said that the board acted within its jurisdiction, and its rulings could not be reviewed. *Barber v. San Francisco*, 42 Cal. 630, is a similar case. It was a writ to review the action of the board of supervisors in regard to a street assessment. It was claimed that the evidence did not justify the conclusion of the board. The court said: "The board, therefore, had jurisdiction to entertain, hear, and determine the appeal upon the proofs introduced; and, if it committed an error in its conclusions as to the facts, the error would not affect their jurisdiction, and could not be reviewed on certiorari. The return of the board to the writ purports to contain the evidence given on the hearing of the appeal, but there is nothing in the record to show what facts the board considered proved; and if there was, and if we should be of opinion that the board found the facts contrary to the evidence, we could not correct the error in this form of proceeding." See, also, *People v. Dwinelle*, 29 Cal. 632. But, if it can be claimed that the fact as to whether the petitioner had property which had escaped assessment was in any sense jurisdictional, it was, nevertheless, a fact as to the existence of which the board was authorized and required to determine in that proceeding. It is said by Wells on Jurisdiction, (section 62:) "Where the jurisdiction of even an inferior court is dependent on a fact which that court is required to ascertain and settle by its decision, such decision is held conclusive." In *Railroad Co. v. Evansville*, 15 Ind. 395, the same doctrine is declared, and numerous authorities cited to the same effect. *Britain v. Kinnaird*, 1 Brod. & B. 432, was trespass for taking a vessel by magis-

trates. The owner had been convicted under a statute called the "Bum Boat Act." Evidence was offered to show that the conviction was void, as the court had no jurisdiction, as the vessel was not a "boat" within the meaning of the act. Chief Justice Dallas considered the case at great length, and concludes that, conceding that the fact were jurisdictional, still it was a fact the court had jurisdiction to determine, and such determination was conclusive. I do not think, however, the fact was jurisdictional. Jurisdiction was conferred by the statute, the claim that the petitioner had property which had escaped assessment, and the service of the notice. If the board had determined that the evidence did not tend to prove the existence of property which had escaped taxation, it would not be doubted that such determination was an act within its jurisdiction. A contrary conclusion must be equally an act within its power. Jurisdiction to determine an issue involves the power to determine it erroneously. Jurisdiction to determine the effect of evidence involves the power to draw erroneous conclusions from it. I think the judgment should be reversed, and the court below directed to sustain the demurrer.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to sustain the demurrer.

97 Cal. 203

RILEY v. NANCE. (No. 19,093.)

(Supreme Court of California. Feb. 17, 1893.)

Concurring opinion. For majority opinion, see 31 Pac. Rep. 1126.

BRATTY, C. J. The result of the decision of the department in this case is to confirm the validity of the title derived under the attachment, and is therefore, in my opinion, correct; but I cannot concur in the reasoning upon which the judgment of reversal is based, and, while I do not dissent from the order denying a rehearing, I desire to state briefly the views which have led me to the same conclusion reached by other members of the court. The question whether an attachment lien merges in the lien of the judgment, or in the lien created by levy of the execution so completely that the filing of a stay bond on appeal will not only release the property from the levy of the execution, and cause the lien of the judgment to "cease," (Code Civil Proc. § 671,) but will also discharge the attachment lien, cannot, in my opinion, be ignored in this case, because the land was conveyed by the attachment debtor before judgment docketed, or execution levied. That circumstance appears to me to be wholly immaterial. A debtor cannot convey land

subject to attachment so as to exempt it from the judgment lien; and the case of *People v. Irwin*, 14 Cal. 434, does not affirm, either in terms or in effect, that he can. If the law is that the attachment lien merges in the judgment lien when the property is conveyed by the debtor after the docketing of judgment against him, and if the filing of a stay bond on appeal in such case extinguishes the judgment lien without reviving the attachment lien, I do not think a conveyance before judgment docketed could prevent the same effect from following; but, in my opinion, the effect of the filing of a stay bond on appeal is to extinguish only the liens resulting from the judgment, and from process thereunder. The sureties on an appeal bond do not undertake to pay any judgment that may be recovered in the action, but only the judgment appealed from in case it is affirmed, or the appeal dismissed. The security of the appeal bond is therefore no security at all for the judgment that may ultimately be recovered by the plaintiff, after a reversal of the first judgment and an order for a new trial. In such a case, on the assumption that the attachment lien is extinguished by the stay bond on appeal, together with the judgment or execution lien, the creditor would lose the security of his lien by the appeal, and the security of the stay bond by the reversal of the judgment, and if, in the mean time, the land had been sold by his debtor, would have no security for a judgment afterwards recovered. This being so, and the declared object of the attachment law being to give the creditor security for any judgment that may be recovered, (Code Civil Proc. § 537,) I do not think it can be held that an attachment lien is discharged by a stay bond on appeal. There is no express provision of the statute to the effect that the filing of such a bond discharges an attachment lien, and it is only by construction that that result is worked out. It has been decided that the attachment lien merges in the judgment lien, and therefore it is argued that when the judgment lien ceases, in consequence of the filing of the stay bond, the attachment lien must also cease. But in the case relied on (*Bagley v. Ward*, 37 Cal. 121) the effect of the decision is merely that the attachment lien is so far merged in the judgment lien that when the latter expires, by lapse of the two-years limitation, the former is also at an end, and this conclusion is based upon the absurdity of supposing that there is no limitation to an attachment lien, and the impossibility of fixing its duration unless it is held to merge in the judgment lien. It is not at all inconsistent with the reasoning to hold that when, instead of expiring by lapse of time, the judgment lien is extinguished by the act of the defendant within the two years, the attachment lien which it superseded is thereby revived; and, in order to give effect to the statute, this conclusion is necessary. Upon these grounds, I concur in the judgment.

97 Cal. 329

LOS ANGELES COUNTY v. ORANGE COUNTY. (No. 14,917.)

(Supreme Court of California. Feb. 17, 1893.)

DIVISION OF COUNTY — APPORTIONMENT OF DEBT.

Const. art. 11, § 3, provides that every county created from territory taken from any other county shall be liable for a just proportion of the existing debts of the last-named county. Act 1889, March 11, creating the county of O. from the territory of L., provides that commissioners shall ascertain the indebtedness of the county of L., "existing at the time this act takes effect," and certify the amount due from the county of O. to the county of L. *Held*, that the county of O. is not chargeable with moneys expended on its territory by the county of L. between the date of the act and the organization of the county of O.

Department 1. Appeal from superior court, Ventura county; B. F. Williams, Judge.

Action by the county of Los Angeles against the county of Orange to recover the amount of moneys expended on the territory of the county of O. between the date of the act creating it and the time of its organization. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

James McLachlan, Dist. Atty., B. M. Marble, and Waldo M. York, for appellant. F. W. Sanborn, Dist. Atty., and A. W. Hutton, for respondent.

HARRISON, J. The county of Orange was created under the provisions of an act of the legislature approved March 11, 1889, and its organization was completed August 2, 1889. By the provisions of section 7 of the act, commissioners were appointed to adjust the respective liabilities of the two counties; and they made their report, fixing the amount of the liability of Orange county to the county of Los Angeles as of the 11th day of March, 1889, and also made a supplemental report, that, in addition to the indebtedness found to exist on that date, "moneys had been advanced after March 11, 1889, by Los Angeles county to Orange county, in the sum of \$11,375.42, and that, as a matter of equity, that amount should be refunded by Orange county to Los Angeles county. These advances consisted of moneys expended in the construction of a bridge, and of certain transfers to different road-district and school-district funds within the boundaries of Orange county. The county of Los Angeles presented its claim for this sum to the board of supervisors of Orange county, and, its payment being refused, brought this action for their recovery, as for moneys paid and advanced by it in behalf of Orange county. A demurrer to the complaint was sustained, and from the judgment rendered thereon the plaintiff has appealed.

Counties are merely local subdivisions the state, created by the legislature for governmental purposes, and are denominated "public corporations" for the reason that they are but parts of the machinery employed in carrying on the political affairs of the state. The legislature, except as restrained by constitutional limitations, may change their

boundaries and extent, consolidate two or more into to one, or divide and create new counties out of the territory of one or more previously existing ones. It has been established by an unvarying line of decisions that, upon the creation of a new county out of the territory of another, the legislature, in the absence of constitutional restrictions, may make such provision with reference to the public property and debts, or their division, as to it may seem just, and that, in the absence of any provision in reference thereto, the old county will be entitled to retain all public property and assets, except such public buildings and structures as lie within the territory of the new, and will also be liable for all its prior obligations. *Hampshire v. Franklin*, 16 Mass. 86; *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Depere v. Bellevue*, 31 Wis. 120; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. Rep. 1067; *Dill. Mun. Corp.* §§ 188, 189. Article 11, § 3, of the constitution of this state, provides that "every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken." The mode of determining the "just proportion" of the debts and liabilities for which the new county shall be liable is not prescribed in the constitution, but is left to the determination of the legislature in each particular case; and by section 7 of the act under consideration the legislature provided that commissioners should be appointed from each of the two counties, who should determine the indebtedness of Los Angeles county, existing at the time the act took effect, in the following manner: "They shall ascertain the total amount of indebtedness of Los Angeles county, existing at the time this act takes effect, and also the total value of all assets of said county, including real estate, buildings, and bridges, erected or in progress of erection, money and solvent credits of whatever nature, and any other property belonging to the said county of Los Angeles. They shall also ascertain the assessed value of all property in Los Angeles county under the assessment made in 1888, and also the assessed value of the property under the same assessment assessed in the territory hereby set apart to form Orange county. They shall then find the balance of the total assets and indebtedness of Los Angeles county, and, if there is a balance of indebtedness against said county, the same shall be divided between the two counties according to the following proportion: As the total assessed value of the property of Los Angeles county at the time of the taking effect of this act is to the total assessed value of the property in Orange county, so is the balance of said indebtedness, so as aforesaid ascertained, to the amount of said indebtedness to be assumed and paid by Orange county to Los Angeles county. Said commissioners shall then certify forthwith to the respective boards of supervisors of said counties of Orange and Los Angeles such amounts of the said indebtedness due from Orange county, to-

gether with the ascertained value of all bridges and other property, reckoned among the assets of Los Angeles county as aforesaid, erected or purchased by county funds, and situated in Orange county, which property shall be charged to the new county; and the amount thereof shall be an indebtedness to Los Angeles county, and shall thereupon become the property of said Orange county. In case said commissioners shall find a balance of assets of Los Angeles county over and above its liabilities, they shall belong to Orange county by the proportion aforesaid, and shall certify the same to the said boards of supervisors, together with the value of the purchases and other property aforesaid; and, if the amount of said balance of assets belonging to Orange county is less than the value of said property, then the difference between the two amounts shall be assumed and paid by Orange county to Los Angeles county. But, if said amount is greater than the value of said property, then said Los Angeles county shall pay the difference between the two amounts to said Orange county."

As the provision of the constitution relates only to the indebtedness of the county, and does not require any division of the assets or property of the old county, the disposition of these matters remains within the scope of legislative provision; and, in the absence of any such provision, the effect of creating a new county would be to give to the old county all the public property, except such as was situated in the territory embraced within the boundaries of the new county. As the legislature could divide the public property and assets of the county in such mode as it might choose, it was competent for it to fix upon any date which it might select as the time for ascertaining their amount and value, as well as for determining, in connection therewith, the "just proportion" of the debts and liabilities to be assumed by the new county. In the present instance the legislature fixed the time when the act took effect as the proper period for ascertaining the amount of these assets and liabilities; and it cannot be held that the constitutional provision was violated in selecting that as the point of time at which to properly determine what would be a "just proportion" of the debts and liabilities to be assumed by the new county. It is not claimed that any of the indebtedness of the county accrued after that date, or that the amount of its debts or liabilities was greater at the organization of the new county than it was at the passage of the act.

The items for which the present action is brought were expenditures made between the date of the passage of the act and the organization of the new county, but during all that time the territory within which these expenditures were made was a portion of Los Angeles county; and we must assume that the expenditures were made in the wise exercise of its control over that territory. It does not appear at what date after March 11, 1889, the moneys were expended; and it must be borne in mind that, until after the elec-

tion upon the question of a division of the county, it could not be known that any new county would be authorized. Until that time it was the duty of Los Angeles county to expend such moneys within the territory that afterwards became Orange county as might be needed. Until after the election upon the question of a division had been had, the moneys which were expended were for the benefit of Los Angeles county, and cannot be said to have been paid or advanced to or for the benefit of the county of Orange. The legislature may have considered that it would be necessary for the county of Los Angeles to expend money for municipal purposes within this territory; and, as it was within its discretion to determine that Los Angeles county should bear the burden of any of the expenditures which it might thus make, the fact that it has made no provision for its reimbursement is indicative that it was not its intention that it should be reimbursed therefor. It would violate all rules of construction to hold that, when the legislature fixed the time when the act took effect as the point of time for ascertaining the amount of indebtedness, it intended those words to apply to the date when the county of Orange was organized. The commissioners are directed, in express language, to determine the indebtedness of said county, "existing at the time this act takes effect;" and the statute itself declares that the act "shall take effect and be in force from and after the date of its passage and approval." There is nothing in the act itself, or in the subjects to which it relates, which requires, or would permit, any different construction to be given to those words from that which they express. The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

97 Cal. 400

PEOPLE v. JAMES. (No. 20,950.)

(Supreme Court of California. Feb. 18, 1893.)

CRIMINAL LAW—FORMER JEOPARDY.

On a trial for assault, the court instructed the jury to return a verdict of not guilty, but that they were not bound by his instruction. When the jury were brought into court, and asked if they had agreed on a verdict, the foreman said that they disagreed; that they did not wish to render a verdict, but that the court would discharge them; that, if they were discharged without a verdict, it would leave the case for the district attorney and the court to handle; and that they did not wish to be placed in the position of acting as a scapegoat. *Held*, that the failure of the jury to agree, and their consequent discharge, avoided a plea of once in jeopardy; Pen. Code, § 1140, providing that the jury may be discharged if, "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Walter James was convicted of an assault with intent to commit rape. From the judgment of conviction, and from an order denying a new trial, he appeals. Affirmed.

J. S. Clark, Rowell Irwin, and R. F. Roth, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The appellant was convicted of an assault with intent to commit rape, and he appeals from the judgment, and from an order denying a new trial. There had been a former trial of the case, at which the jury had been discharged by the court for a failure to agree, and at the second trial the appellant pleaded once in jeopardy. On the issue of jeopardy the jury found in favor of the people, and the main contention of appellant is that the verdict ought to have been in his favor on that issue. At the first trial the record shows, after the statement of the jury that they could not agree, as follows: "Whereupon the court, after an examination of the jury separately, and it appearing that it was impossible for the jury to agree, ordered that they be discharged from further consideration of this case." Section 1140 of the Penal Code provides that such an order may be made, if, "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree;" and this clause has been held to be not violative of the provision of the constitution as to jeopardy. *Ex parte McLaughlin*, 41 Cal. 211; *People v. Cage*, 48 Cal. 323; *People v. Soto*, 65 Cal. 621, 4 Pac. Rep. 664. But appellant contends that this rule does not apply to the case at bar, on account of certain things which transpired at the time the jury was discharged.

The appellant was charged in the indictment with having committed the alleged crime upon the person of a girl under 14 years old; that being the legal age of consent, under our statute. After the jury had been regularly impaneled at the first trial, the district attorney put the father and mother of the girl, and also the girl herself, upon the witness stand; and, evidently to the surprise of the prosecution, they all testified that the girl was 14 years old several months before the date of the alleged crime. The district attorney then stated to the court that, as the case of the prosecution depended upon proof of the fact that the girl was under 14, it was useless to introduce further evidence, and no further evidence was introduced. The court then instructed the jury to return a verdict of not guilty, but also, pursuant to the provision of section 1118 of the Penal Code, that they were not bound by his advice. The jury then retired, and, after some time, the exact period not being shown, they were brought into court, and asked if they had agreed upon a verdict. The foreman said that they disagreed; and some conversation then took place between the court and the foreman of the jury, upon which the appellant mainly rests on the point of once in jeopardy. The substance of said conversation was in brief this: The foreman said that they did not want to render a verdict in the case, and would ask the court to dis-

charge them; that, if they were discharged without a verdict, it would leave the case for the district attorney and the court to handle; that they did not want to be placed in the position of acting as a scape-goat, etc. Counsel for the appellant insisted that the court should instruct the jury, absolutely, to acquit the appellant. But the court said it had no power to compel the jury to render a verdict, and sent them back to their room with the instruction that no evidence had been introduced tending to prove the guilt of the appellant, and advising and instructing them that it was their duty to acquit him. In the course of a couple of hours more, the jury were again brought into court, and were again asked if they had agreed upon a verdict. The foreman answered: "We have not, and we cannot, and ask the judge to discharge us." Counsel for appellant then moved the court to discharge the defendant, and dismiss the action, on the ground that he had been tried, and there was an absence of any evidence against him; and the motion was denied. The court then polled the jury, and asked each one of them, individually, if there was any probability of their arriving at a verdict, and they all answered, "No." One of the jurors, Mr. Bacon, first answered: "Yes, sir; I could arrive at a verdict in a minute." But when the court said: "What I mean by that, can you get the jury to agree with you?" he answered, "No, sir; I think it is impossible;" saying, further, "nine of us one way, and three the other." Whereupon the court made the order discharging the jury, as hereinabove stated.

No doubt it would have been the duty of the jury to have acquitted the appellant, under these circumstances, at the first trial; and, if they had returned a verdict of guilty, the court would no doubt have granted a new trial. But we do not see that appellant is in a position different, in point of law, from that of any other defendant whom the jury should have acquitted, but failed, through erroneous notions of some of the jurors, to agree upon a verdict, and after a reasonable time were discharged. We do not see that the conversation between the foreman and the court puts any different phase on the matter, or makes any stronger case for appellant, on his plea of jeopardy, than if the jury had merely said they were not able to agree, without assigning any reason. Therefore the present case cannot be taken out of the rule that the failure of the jury to agree, and their consequent discharge, avoids the plea of once in jeopardy.

With respect to the motion for a continuance, without considering the evidence in detail upon the subject, we do not think that the court committed any error in denying it. There are no other points necessary to be specially noted. The judgment and order appealed from are affirmed.

We concur: De HAVEN, J.; FITZGERALD, J.

97 Cal. 370

FRAZIER v. LYNCH et al. (No. 19,063.)

(Supreme Court of California. Feb. 20, 1893.)

ACTION TO RECOVER POSSESSION OF LAND — EVIDENCE.

In an action to recover possession of land, where there is evidence that defendants entered thereon and ordered plaintiff off, and, by threats or force, prevented her from plowing the land, but thereafter exercised no control over the land, and were not in possession, the court erred in instructing the jury that they might infer defendant's possession because of the former trespass, since it is not presumed that a trespass continues from its commission to any subsequent date.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by one Frazier against one Lynch and others to recover possession of certain land, with damages for the withholding thereof. From a judgment for plaintiff, defendants appeal. Reversed.

Z. Montgomery & Son, for appellants. A. E. Nutt and F. W. Ewing, for respondent.

HARRISON, J. Action to recover possession of certain land in San Diego county, with damages for the withholding thereof. The possession of the land by the defendant at the time when the action is commenced is a necessary element of the plaintiff's right to recover in an action of this nature, and must be alleged in the complaint; and, being an issuable fact, must, if denied in the answer, be established at the trial. Under the common-law system, in which the declaration consisted of only a series of fictions, the tenant was not permitted to defend the action, except upon entering into the "consent rule," whereby he consented to plead the general issue, and at the trial to admit his possession, and also the lease, entry, and ouster of the plaintiff, and to insist only on his title, so that the only matter which was tried by the court was an issue not presented by the pleadings or alleged in the declaration, viz. whether the plaintiff's lessor had any title to the land. When these fictions were abolished by the reform in pleading, and the pleader was required to state in ordinary and concise language the facts which constitute his cause of action, inasmuch as the withholding of the possession by the defendant at the time of commencing the action is one of the facts which constitute the plaintiff's right to a recovery, it is essential that it be averred, (*Payne v. Ireadwell*, 16 Cal. 244;) and, being an issuable fact, if denied, that it be proved. This action, being only for the recovery of the possession of certain real property, cannot, in a case where the defendant is not in possession, be substituted for an action to determine whether the plaintiff or the defendant has the title to the land. The gravamen of the action is the withholding of the possession from the plaintiff, and the very essence of the plaintiff's cause of action is lacking, if the defendant is not

shown to be in such possession. Accordingly it has been invariably held that, if the plaintiff fails to show that the defendant was in possession of the land sued for at the commencement of the action, he is not entitled to judgment. *Garner v. Marshall*, 9 Cal. 268; *Owen v. Fowler*, 24 Cal. 192; *Hawkins v. Reichert*, 28 Cal. 535; *Pope v. Dalton*, 31 Cal. 218. The jury in the present case were instructed by the court in accordance with the foregoing rule, but the defendants assign as one of the errors committed at the trial that the evidence was insufficient in this respect to sustain the verdict. The evidence presented on the part of the plaintiff of any possession of the land by either of the defendants had reference to certain acts done by them on the land a few days before the action was commenced, and tended more to show a trespass, or a prevention of the plaintiff from going thereon, than an actual possession thereof by the defendants. It was testified on behalf of the defendants that from that time until the commencement of the action neither of them was in possession, or exercised any control of the land, and the record does not contain any evidence of any subsequent act by either of them with reference to the land, nor has the respondent called our attention to any evidence which shows that the defendants were either of them in possession of the land at the commencement of the action, or for several days prior thereto. The court instructed the jury that, "if from all the evidence in this case you should find that a few days before the commencement of this action the defendants, or some or any of them, were upon the premises described in the complaint, or entered thereon and ordered and drove the plaintiff and her agents and employes off from said premises, and prevented them from plowing said premises by threats or force, such acts on the part of such defendant or defendants were acts of possession on the part of such defendants; and, if there is no evidence to the contrary, you have a right to presume and to find that such defendant or defendants so ordering, driving, preventing, or threatening, were in possession of the said real estate at the time of the commencement of this action." In this instruction the court erred. The possession of the land by the defendants was a fact to be shown by the plaintiff, and, while it may be sufficient in some cases to show a constructive, as contradistinguished from an actual, possession, (*Crane v. Ghirardelli*, 45 Cal. 235,) yet the evidence presented in this case did not tend to establish a constructive possession; and it is not a presumption of law that a trespass continues from the time of its commission until any subsequent date, nor should the jury have been instructed that they might infer the possession of the defendants from the fact that they had previously committed a trespass upon the possession of the plaintiff. The judgment and order are reversed.

We concur: PATERSON, J.; GAROUTTE, J.

97 Cal. 335

JOYCE v. SHAFER et al. (No. 19,026.)
(Supreme Court of California. Feb. 17, 1893.)
VENDOR AND VENDEE—RECOVERY OF PURCHASE MONEY.

After default in the last installment of the purchase money due under a land contract, the vendor's conveyance of the land to a third person is not such a breach of the contract as will enable the purchaser to recover the installments already paid, without tendering the last installment due.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Thomas F. Joyce against A. C. Shafer and F. D. Lanterman to recover the first installment paid on a contract for the sale of land. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

W. I. Foley, for appellant. M. W. Conkling, for respondents.

TEMPLE, C. This appeal is from a judgment upon demurrer to the complaint. It is an action to recover the first installment paid upon an executory contract for the sale of land. The demurrer is general that the complaint does not state a cause of action. From the complaint it appears that on the 26th of July, 1887, Miss S. A. Popplewell entered into an agreement with defendants, in writing, whereby she agreed to pay them \$1,250 in three installments,—one at the execution of the agreement, one in one year, and the third two years from date,—in consideration of which they sold and agreed to convey to her certain lands. The contract contained the usual covenants, making time of the essence of the contract, and providing for a forfeiture of installments paid, as liquidated damages, in case of failure to make any of the payments as stipulated. The first installment was paid, but no more. December 18, 1889, about five months after the last payment fell due, defendants, without having tendered a deed to Miss Popplewell, or demanded payment from her, without her consent, conveyed the land for a valuable consideration to one J. H. Bryant. July 23, 1891, Miss Popplewell duly assigned said contract, and all rights, legal and equitable, under said agreement, to plaintiff. Neither plaintiff nor his assignor has ever tendered to defendants the amount due on their contract, or offered to perform their agreement, but it is contended that the defendants, by conveying the land which was the subject of the contract, have put it out of their power to comply with their agreement, and that therefore an offer of performance on the part of the purchaser would be unavailing, and plaintiff is therefore at liberty to consider the contract as abandoned, and sue to recover the money paid. Therefore, having made due demand, he brings this action.

Plaintiff bases his claim upon the rule laid down in *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. Rep. 749; and *Phelps v. Brown*, 95 Cal. 572, 30 Pac. Rep. 774. So far as ap-

plicable to the facts of this case, the rule laid down in those authorities is simply that, when the parties to a contract have abandoned it, or it has been rescinded by mutual consent, either party may recover money paid under it; but it was not intended in those cases to hold that a purchaser may, upon his own default, recover money paid by him, when the vendor has not refused to complete the sale, and the vendee still declines to do so. The conveyance by the vendors was not a breach of the contract. One may sell land which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the mean time the purchaser would not be at liberty to disaffirm the contract, on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title. It may be added that it is at least doubtful whether the assignment of the contract of sale would carry with it the right to maintain this suit, even if it were conceded that plaintiff's assignor could have maintained a suit for money she had paid. The action is based upon the theory that, by abandonment or rescission, the contract of sale became non-existent, and therefore moneys which have been paid before its cancellation may be recovered as money paid for the use of the person who paid it. This action is not therefore an action arising under the contract of sale. The judgment and order should be affirmed.

We concur: **BELCHER, C.; VANCLIEF, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

97 Cal. 343

STERLING v. SMITH. (No. 14,911.)
(Supreme Court of California. Feb. 17, 1893.)

PLEADING AND PROOF—RIGHTS OF PRINCIPAL AGAINST AGENT.

1. Under Code Civil Proc. § 462, which provides that the statement of new matter in the answer in avoidance, or constituting a defense or counterclaim, must on the trial be deemed controverted by the opposite party, plaintiff is at liberty to prove fraud at the trial to overcome the new matter set up in the answer, though no allegation of fraud is contained in the complaint.

2. An agent who invests his principal's money in a corporation of which he is a member, and which is largely indebted, without informing her either of his membership or of the debt, is guilty of fraud, though there may be no actual wrongful intent; and the principal may recover such sum from the agent in the absence of a ratification by her of such investment.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Margaret T. Sterling against James Smith for the recovery of money. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Gould & Stanford, for appellant. Anderson, Metcalf & Anderson, for respondent.

McFARLAND, J. In her complaint the plaintiff averred that during a certain period defendant was her confidential agent in purchasing and selling real estate, and in transacting other business for her; that as such agent, and for such business, he received from her during said period the sum of \$11,920 or thereabouts; that during said period he paid out and expended for her the sum of \$6,225 or thereabouts, leaving a balance of \$5,695, with interest, due her from him; and for this last sum she prays judgment. The defendant answered, admitting the agency as alleged in the complaint, but denied that he had received of plaintiff's money more than \$9,920.70. The court found that defendant had received of plaintiff's money only the said amount of \$9,920.70. But the defendant averred that, in addition to the said sum of \$6,225 paid out by him for plaintiff, as averred in the complaint, he also paid out for her the further sum of \$3,600. He averred that this latter sum of \$3,600 had been paid out by him for her in purchasing certain interests in what is called generally the "Kansas Street Syndicate," which afterwards became a corporation, and was engaged in the purchase and sales of land, principally at Pasadena, Cal. The facts as to this syndicate and the expenditure of money of plaintiff, by defendant in connection with the same, are stated in great detail in the answer. The court found against the defendant as to the said \$3,600 alleged to have been expended with said syndicate, and refused to allow defendant for the same, and entered judgment for plaintiff upon the basis of allowing defendant as against said sum of \$9,920.70 only the sum of \$6,503.75. Defendant appeals from the judgment, and the only point made by him for a reversal of the judgment is the refusal of the court to allow him for said amount paid out in said syndicate. The court found that prior to the time when defendant made the purchase of interests from said syndicate for plaintiff, "he had already become a member of said syndicate, and was one of the joint owners of the property of said syndicate, and of the interests so purchased by him for her; that he did not inform her, and she did not know, at the time she made said purchase, that he was a member of said syndicate, and a part owner of the interests he was about to purchase for her, but led her to believe he was not a member of said syndicate;" and that at the time defendant made said purchase for plaintiff the syndicate was indebted in a large amount, exceeding \$55,500, which defendant had been instrumental in incurring, and that he did not notify her of said debt, but represented to her that she would not have any calls to pay if she became a member of the syndicate.

The main contention of appellant is that the findings above referred to are entirely outside of any issues made by the pleadings, for the reason that the complaint does not contain any allegation of facts constituting fraud of any character,

or any allegation that appellant was a member of the syndicate, or that she did not know of his having an interest therein, etc., which allegations appellant contends were absolutely essential in order to admit evidence upon the subject. This position, however, is not tenable. Our system of pleading does not include a replication, and under section 462, Code Civil Proc., "the statement of new matter in the answer in avoidance, or constituting a defense or counterclaim, must on the trial be deemed controverted by the opposite party." The averments in the answer as to the investments in the syndicate constituted new matter; and, if a replication were allowable, the plaintiff, by such a pleading, could have set up the facts found by the court as aforesaid. But under our system of pleading she is deemed to have set up such facts. No doubt, when a cause of action rests upon fraud, the facts constituting the fraud must be set up in the complaint; but such was not the case here, for the necessity of proving fraud appeared only after the answer of the defendant. And a plaintiff is in that position with respect to all new matters set up in the answer. *Williams v. Dennison*, 94 Cal. 540, 29 Pac. Rep. 946; *Association v. Clark*, 84 Cal. 204, 23 Pac. Rep. 1081; *Colton L. & W. Co. v. Raynor*, 57 Cal. 588; *Curtiss v. Sprague*, 49 Cal. 301; *Canfield v. Tobias*, 21 Cal. 349. In *Colton L. & W. Co. v. Raynor*, supra, the court, in speaking of said section 462, say: "This has always been regarded as allowing a plaintiff, in reply to such new matter, to introduce on the trial any evidence which countervails or overcomes it, as if it were inserted in a replication, and pleaded with all the precision and fullness which the strictest rules of law ever required." With respect to respondent's criticism of the findings, it is sufficient to say that, in our opinion, they are full and specific enough, and that no further findings were necessary.

As to the merits of the case, it was not necessary for the respondent to prove or for the court to find expressly that the acts done by appellant were done with a fraudulent and wrongful intent, because the acts themselves were of such a character, considering the relationship of the parties, that the law imputes fraud. In *Pom. Eq. Jur.* § 959, the rule, as between principal and agent, is stated as follows: "Equity requires and treats this relation in the same general manner, and with nearly the same strictness, as that of trustee and beneficiary. The underlying thought is that an agent should not unite his personal and his representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal. In dealings without the intervention of his principal, if an agent, for the purpose of selling property of the principal, purchases it himself, or an agent, for the purpose of buying property for the principal, buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable. It will always be

set aside at the option of the principal. The amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial. Nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts." See, also, *Burke v. Bours*, 92 Cal. 108, 28 Pac. Rep. 57.

The objection that the findings are insufficient to support the judgment because they do not contain an express statement that the respondent did not ratify the investment in the syndicate, cannot be maintained. The findings clearly go upon the theory that there was no such ratification; and, moreover, there was no evidence tending to show any ratification after respondent had learned all the facts about the transaction. Appellant was not entitled, upon the evidence, to a finding that there had been such ratification. Neither do we think that the stipulation of counsel referred to in finding 14 can be held as estopping the respondent from attacking the invalidity of the investment in the syndicate, and the trial was not conducted upon any such theory. There are no other points which we deem it necessary to notice in detail. Judgment affirmed.

We concur: DE HAVEN, J.; PATERSON, J.

97 Cal. 348

SMITH v. SUPERIOR COURT OF LOS ANGELES. (No. 15,106.)

(Supreme Court of California. Feb. 17, 1893.)

RECEIVER—APPOINTMENT—CERTIORARI.

1. An action on a note by a bank against a railroad company is an action at law, and the court has no power to appoint a receiver for the railroad company, though it consents to such appointment, and though the complaint alleges that it is insolvent, that other creditors are threatening to sue, that defendant has no property out of which to satisfy such judgment, and that the action is brought in behalf of all other creditors willing to come in as plaintiffs.

2. Certiorari will not lie to review a judgment after the expiration of the time limited for appeal, unless circumstances of an extraordinary character intervene.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Petition for a writ of certiorari to review an order made by the superior court of Los Angeles county appointing a receiver for the Los Angeles & Pacific Railroad Company. Petition dismissed.

Thomas L. Winder, for appellant. Wilson & Lamme and Anderson & Anderson, for respondent.

DE HAVEN, J. It appears from the return to the writ of certiorari issued herein that the superior court of Los Angeles on September 30, 1889, made an order appointing one Silver receiver for the Los Angeles & Pacific Railway Company. The order was made in an action then pending in that court, wherein the California Bank, a corporation, was plaintiff, and the Los Angeles & Pacific Railway Company and others were defendants. The petitioner here claims that the order ap-

pointing the receiver was in excess of the jurisdiction of the superior court, and the object of this proceeding is to procure the judgment of this court, annulling such order. It is stated in the complaint in the action in which the receiver was appointed that the plaintiff therein brings the action in behalf of itself and all other unsatisfied creditors of the Los Angeles & Pacific Railway Company who shall come in, and contribute to the expenses of the action. The complaint then proceeds to state a cause of action in favor of the plaintiff therein, and against the defendant railroad company, upon two unsecured promissory notes, and further alleges that the defendant railroad corporation is indebted to various persons in sums amounting in all to \$225,000; that this indebtedness is long past due, and that the numerous holders thereof are "pressing for payment of such indebtedness, and threatening to, and will, commence suits, attachments, and other proceedings" against said corporation; that the road of the defendant corporation is completed, but that the rolling stock is not owned, but only leased, by said defendant; that there is a mortgage upon record which purports to secure a lien of \$240,000 upon the property of said railway company, "and all the rolling stock and motor power of the said company being so leased, as aforesaid, the said defendant corporation has no property, of any kind or character, out of and from which said plaintiff's claim could be met, and a judgment at law and execution would not avail this plaintiff, nor any of the other unsecured creditors; that the said defendant railway company is wholly insolvent, and unable to pay its debts and liabilities, and there is great danger that by reason of attachments and other legal proceedings the property of the said company will be wasted in costs and expenses." There are other averments, not necessary to be here set out, which tended to show that the plaintiff in that action was entitled to an injunction against one Wicks and his wife, who were made defendants in the action. The prayer of the complaint is for an injunction against defendant Wicks and his wife, and "that the court appoint a receiver to take possession of all the property, rights, effects, rents, tolls, issues, and incomes of the said defendant railway corporation, * * * and retain the same, under the direction of this honorable court; that the court issue an order restraining and enjoining the said defendant railway company * * * from claiming any interest in said property, or interfering in the management thereof, except under the orders of this court; that the court ascertain the amount of all the indebtedness of the said railway company, and to whom owing, and adjust and settle the amounts due each,"—and for general relief. The order for the appointment of the receiver was made with the consent of the defendant the Los Angeles & Pacific Railway Company, and directed said receiver "to continue the operation of said roads in accordance with the usual modes and methods of operating railroads."

1. We are unable to distinguish the ac-

tion in which the order under review was made from that of the French Bank Case, 53 Cal. 495. It was there held that the appointment of a receiver in such an action was unauthorized and void, and should be annulled on certiorari. The only relief to which the plaintiff in the case of *The California Bank v. The Los Angeles & Pacific Railway et al.* was entitled to was a judgment against the defendant railroad company for the amount alleged to be due upon the promissory notes of which the plaintiff therein was alleged to be the owner, and in such an action the court was without power to appoint a receiver. The allegations of the complaint to the effect that the corporation was insolvent, and that other creditors were threatening to sue the defendant railroad, and that said defendant had no property out of which the plaintiff would be able to satisfy any judgment it might obtain, and that the action was brought in behalf of the plaintiff, and all other creditors of the defendant railroad who were willing to come in as plaintiffs, did not change the essential character of the action from one at law, to recover upon an unsecured indebtedness, to one in which, according to the usages of courts of equity, a receiver may be appointed; nor would the consent of the defendant railroad to the appointment of the receiver at all affect the right of any creditor aggrieved thereby to have the order appointing such receiver annulled in a proceeding of this character.

2. It appears from the record before us that, more than two years after the date of the order appointing the receiver, the petitioner, on his own application, was permitted to intervene in the action in which that order was made, and to join as a plaintiff therein. In his petition for intervention he demanded a judgment against the Los Angeles & Pacific Railway Company for an alleged indebtedness due him from that corporation, and that its land be sold by the receiver already appointed, and the proceeds thereof applied to the payment of the debts of that defendant. This action upon the part of the petitioner was, in effect, a consent to the order now sought to be overruled; but whether such consent would be of itself sufficient to defeat the present proceeding need not be determined, as we are of opinion that the further contention of respondent, that petitioner has by delay lost the right to the relief now sought, must be sustained. The petition herein was not filed until July 22, 1892, nearly three years after the making of the order sought to be annulled, and no circumstances are shown which in any manner tend to excuse the long delay in making this application. In the case of *Reynolds v. Superior Court*, 64 Cal. 372, 28 Pac. Rep. 121, it was held that delay in commencing proceedings of this character for a period exceeding one year, unless excused by circumstances, was sufficient to defeat the application for such relief. In that case the court said: "By means of certiorari the petitioner seeks to call in question the validity of a judgment, and an order made under it, considerably more than one year before the presentation of his peti-

tion. In *Keys v. Marin Co.*, 42 Cal. 256, it was held that, unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of certiorari should be held to be barred by the lapse of the same length of time that bars an appeal from a final judgment." We regard the case just cited as conclusive of this, and upon its authority the writ must be discharged, and proceeding dismissed.

We concur: McFARLAND, J.; HARRISON, J.

97 Cal. 339

In re BEDELL'S ESTATE. (No. 15,179.)
(Supreme Court of California. Feb. 17, 1893.)

ADMINISTRATOR—WHO ENTITLED TO LETTERS.

1. Under Code Civil Proc. § 1365, which fixes the relative order in which persons interested in the estate of an intestate are entitled to administration, and section 1379, which authorizes the appointment of a person not entitled to administration at the written request of the person entitled, the nominee of a person entitled has a preference over one who belongs to a class subsequent in rank to the person making the nomination.

2. Where there has been a waiver of the right to administer an estate by the person entitled, and a written request by him for the appointment of another, the court is not required to pay any attention to his subsequent request for the appointment of the public administrator.

Department 1. Appeal from superior court, city and county of San Francisco; *J. V. Coffee*, Judge.

Petition for the appointment of an administrator of the estate of Bedell. From an order appointing *E. W. Gunther*, the public administrator appeals. Affirmed.

J. D. Sullivan and *James G. Maguire*, for appellant. *William F. Herrin* and *Arthur Rodgers*, for respondents.

HARRISON, J. The question presented on this appeal is whether the public administrator, or the nominee of the father and mother of the deceased, is entitled to letters of administration upon her estate. The deceased left a will which was admitted to probate, but, the person named therein as executor having renounced his right to serve, the father and mother of the deceased severally requested that the court appoint *E. W. Gunther* as administrator with the will annexed, and a petition for such appointment was thereupon filed by him. The public administrator also filed a petition that administration on the estate be granted to him. Both petitions were heard by the court at the same time, and, at the conclusion of the hearing, the court made its order appointing *Gunther*, and denying the application of the public administrator, from which order the public administrator has appealed. The appellant claims that he is entitled to the administration by virtue of the provisions of section 1365, Code Civil Proc.; while the respondent claims that under the provisions of section 1379, *Id.*, the court was authorized to appoint him in preference to the appellant. Section 1365, *Id.*, is as follows:

"Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are respectively entitled thereto in the following order: (1) The surviving husband or wife, or some competent person whom he or she may request to have appointed; (2) the children; (3) the father or mother; * * * (8) the public administrator; * * * (10) any person legally competent." And it is alleged on behalf of the appellant that the several classes named therein have the respective right to be appointed in the order in which they are named in the section, and that, with the exception of the nominee of the husband or wife, the persons named in the section must be preferred in their respective rank to the nominee of any other prior class; in other words, that in the present case the court could consider only the nominee of a husband of the deceased, and that the public administrator has a preferred right to the administration over that of the nominee of the father. This construction would, however, deprive the provisions of section 1379, *Id.*, of the effect to which its language is entitled. That section provides that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court." If the relative right of appointment is to be determined by the order in which the parties entitled are enumerated in section 1365, and the nominee of any of the classes therein named, other than that of the husband or wife, is not to be regarded by the court, this provision of section 1379 would lose all effect. The fact that the person entitled is permitted to make a request that administration be granted to a person "not otherwise entitled" must receive some consideration in the construction of the statute, for it is not to be supposed that the legislature has given such permission merely to have the request denied. The evident purpose of the provision is to give to the one entitled to administration the power to select some competent person to discharge the duties of the office; but to hold that his request is not to be considered when resisted by one who belongs to a class subsequent in rank to his own would be to confine his selection to some person falling within the class immediately after his own. The provision in section 1365 giving to the surviving husband or wife the right to nominate some competent person does not restrict the right of requesting an appointment to them, but makes a special provision for the appointment of their nominee, irrespective of whether they are themselves entitled to administration. *Estate of Stevenson*, 72 Cal. 164, 13 Pac. Rep. 404. But the provisions of section 1379 are general, and apply with equal effect to each of the classes named in section 1365, the difference between the two sections being that by section 1365 a non-resident husband or wife, though himself

incompetent to serve, may confer upon any other competent person the right to be appointed in preference to any one of the subsequent classes; while by section 1379 only the nominee of one who is himself competent to serve can be considered by the court. *Estate of Beech*, 63 Cal. 458; *Estate of Hyde*, 64 Cal. 228, 30 Pac. Rep. 804. The provision in this section, being general in its terms, and having no qualifications except the conditions named therein, must be construed as giving to the court the discretionary power to grant administration to any competent person who otherwise would not be entitled thereto, at the written request of a person who would be so entitled. The only conditions necessary for invoking the discretion of the court are that there be a written request from some one who, if applying, would himself be entitled to receive letters of administration, and that the person for whom the request is made be a competent person. In the present case the father was entitled to administration, and the respondent, being a competent person, gave to the court the right to exercise its discretion in making the appointment. This construction finds confirmation in the provision of section 1383, *Code Civil Proc.*, that declares that "when letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him." If the court could, immediately upon having appointed the public administrator, revoke his letters, at the request of a nominee of the father, it is reasonable to suppose that the legislature intended by section 1379 to give to it the same discretion in the original appointment of the administrator. The request of the father for the appointment of the respondent, and the application thereon for administration, was not rendered ineffective by the subsequent request of the father for the appointment of the public administrator. Having once waived and relinquished his right to administration in favor of the respondent, the court was not required to pay any regard to his subsequent request for the appointment of the public administrator. *Estate of Kirtlan*, 16 Cal. 162. The order is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

97 Cal. 360
SCARF v. ALDRICH. (No. 19,070.)

(Supreme Court of California. Feb. 18, 1893.)

SALE OF WARD'S REALTY—JURISDICTION—PETITION—ORDER OF SALE—COLLATERAL ATTACK—GUARDIAN'S DEED.

1. Code Civil Proc. § 1782, provides that on petition by a guardian to sell his ward's land the probate court must make an order for

the appearance of "the next of kin of the ward, and all persons interested in the estate, * * * not less than four, nor more than eight, weeks from the time of making such order, to show cause why an order of sale should not be granted." *Held* that, though an order of sale made 23 days after the order to show cause was erroneous, the sale was valid, since the court acquired jurisdiction, when the petition was presented, as the proceeding was not adverse to the ward.

2. Code Civil Proc. § 1783, providing that a copy of the order to show cause must be personally served on all persons interested, or must be published, does not require that the order shall be served on a ward, since he is in court by the filing of the petition, and submits his property to the jurisdiction and order of the court. *Townsend v. Tallant*, 33 Cal. 45, distinguished.

3. A petition for a sale of land by a guardian, and an order to show cause, described the land as "a part of lot number 5, in block number 12, of the town of San Bernardino, Cal." In the order of sale the description was specific, giving a precise starting point, and describing the land by metes and bounds. *Held*, that the defective description in the petition and order to show cause did not affect the jurisdiction of the court, or the validity of a sale by the correct description. *Wilson v. Hastings*, 5 Pac. Rep. 217, 66 Cal. 244, distinguished.

4. Irregularities in a proceeding by a guardian to sell his ward's land, occurring after the court acquires jurisdiction, which would have required a reversal on appeal, do not affect the validity of a sale on collateral attack.

5. A ward's title to land passes by his guardian's deed therefor, and not by the confirmation of the sale by the court.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action to quiet title by Henry S. Scarf, an infant, by W. L. G. Soule, his guardian ad litem, against J. B. Aldrich. From a judgment for plaintiff, defendant appeals. Reversed.

Willis, Cole & Craig, for appellant. C. W. Rowell and E. E. Rowell, for respondent.

HAYNES, C. This action is to quiet title, and involves the validity of a sale of the premises in question, by the guardian of the plaintiff, to the defendant. The complaint is in the usual form, alleging ownership in fee, that plaintiff is entitled to the possession, that defendant claims an interest adversely to the plaintiff, and that such claim is without right. Findings and judgment passed for the plaintiff, and defendant appeals from the judgment upon the judgment roll, and a bill of exceptions setting out the evidence. Elizabeth Wagner, the guardian of the plaintiff, filed a petition in the probate court on November 20, 1879, praying for an order to sell the premises in controversy. This petition set out facts showing the necessity for the sale of the premises, which consisted of a part of a lot in the city of San Bernardino; and no question is made as to its sufficiency, except as to the description of the premises sought to be sold. Upon this petition the court on the same day made an order requiring all persons interested to show cause before the court on the 13th day of December, 1879, why an order of sale should not be granted; and, no objection having been made, an order

of sale was granted on the day last named. The premises were subsequently sold to the defendant under this order, and the sale was confirmed March 5, 1880, and on the next day the guardian executed and delivered to the defendant a deed of conveyance therefor. The respondent's principal contention is that the order to show cause did not conform to the statute; that, therefore, the court did not acquire jurisdiction; and that all subsequent proceedings were void, and did not divest the title of the plaintiff.

Section 1782 of the Code of Civil Procedure then provided, as it does now, that the time fixed in the order for the hearing should not be "less than four, nor more than eight, weeks from the time of making such order to show cause why an order should not be granted for the sale of such estate." Sections 1783 and 1784 of the Code of Civil Procedure, as they then existed, were as follows: "1783. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county, or, if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published. 1784. The probate court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner and of the next of kin, and of all other persons interested in the estate, who oppose the application." This order was published four times,—the first publication on November 21st, and the last, December 12th. The statute requiring three weeks' publication was therefore complied with. From the date of the order to and including the day of hearing, there were but 23 days, while there should have been not less than 4 weeks, or 28 days; and for that reason respondent contends that the order was void, and that the court acquired no jurisdiction. That the order was erroneous, is evident, but the sole question is whether the court had jurisdiction to order the sale; for whatever errors may have occurred in the proceedings, if the court acquired jurisdiction, the sale of the real estate was not void, and the title passed to the purchaser. It is contended by respondent that proceedings by a guardian for the sale of the ward's estate are adverse to the ward, that the order to show cause is in the nature of a summons, and that a substantial compliance with the statute is a prerequisite for obtaining authority to proceed. Respondent's principal error lies in the first part of his contention, viz. that the proceedings are adverse to the ward; for in fact the proceedings are by the ward, and for his benefit. Our statute does not require that notice shall be given to or served upon the ward, thus emphasizing what is apparent from

the nature and object of the proceeding, and clearly distinguishing it from a proceeding by an administrator to sell the real estate of the intestate to pay debts, which is clearly adverse to the heir; and therefore a valid and sufficient notice to the heir is essential to give the court jurisdiction over him, as a party to the proceeding. But in the case of guardians' sales the minor is in court by the filing of the petition, and submits his property to the jurisdiction and order of the court. An order for the sale of the property is not an order against or adverse to the minor, but is a granting of his request. It is not a judgment in personam, but operates only on the property, and is therefore in rem.

In the case of *Gager v Henry*, 5 Sawy. 243, the order to show cause was directed to be published "for four successive weeks," while the proof of publication showed that it was only published three weeks. The court said: "This, at least, is a serious irregularity; and if the jurisdiction of the court did not attach upon the filing of the petition, but until due service of the prescribed notice of the time and place of the hearing on the petition, the subsequent proceeding would probably be void. * * * But the better opinion seems to be that the proceeding by a guardian to obtain a license to sell his ward's land is not one between adverse parties, and of which the court does not acquire jurisdiction until due service is made of the notice of application, but rather a proceeding in rem, carried on by and in the interest of the ward through his legal representative,—his guardian." That court, after citing several authorities, and among them *Fitch v. Miller*, 20 Cal. 381, concluded that the county court had acquired jurisdiction by the presentation of the petition, and therefore its judgment could not be questioned collaterally on account of any errors committed in the course of its subsequent proceedings. In *Mohr v. Manierre*, 101 U.S. 418, a case originating in the state of Wisconsin, the guardian of a lunatic petitioned for the sale of his ward's property to pay debts. The order to show cause why the application should not be granted was required to be published at least four successive weeks. The order was not published for the full time. The order of sale was granted, and the property sold. After the recovery of the lunatic, he brought a suit in ejectment to recover the land. The supreme court held: "(1) That the publication of the notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. (2) That, so far as the rights of the lunatic are concerned, the jurisdiction of the court attached upon filing the guardian's petition setting forth the facts required by the statute. (3) That, as against the lunatic, a license to sell is not rendered invalid by reason of an insufficient publication of notice of the hearing." See syllabus. In another case where property of a minor had been sold by guardian, the same court said: "In this form of proceeding the guardian sufficiently and fully represented

the infants, and no notice to them was required by the statute of Maryland, or by any general rule of law." *Thaw v. Ritchie*, 136 U.S. at page 548, 10 Sup. Ct. Rep. at page 1044. See, also, *Fitzgibbon v. Lake*, 29 Ill. 176; *Mulford v. Beveridge*, 78 Ill. 458; *Mohr v. Porter*, 51 Wis. 487, 8 N.W. Rep. 364. Respondent's citations from *Freeman's Void Judicial Sales* all refer to "proceedings in probate to obtain a sale of real estate as an independent adversary proceeding in personam;" but in the latter part of section 15 the author seems to concur in the views we have endeavored to express, and cites *Mohr v. Manierre*, supra, and other cases. *Haws v. Clark*, 37 Iowa, 355, cited by respondent, is not applicable. There the statute required notice to be served upon the minor, and to be returned and heard upon a regular term day. It was clearly in the power of the legislature to limit the exercise of jurisdiction by the court to a day in the regular term; and, as to service of the notice upon the minor, the case can have no application here, as our statute does not require such notice. *Kendall v. Miller*, 9 Cal. 592, and *De la Montagne v. Insurance Co.*, 42 Cal. 292, were cases of the sale of personal property without any order of court. *Halleck v. Moss*, 17 Cal. 340, was a sale by executors upon insufficient notice. *Stilwell v. Swarthout*, 81 N.Y. 109, was an action by creditors of an estate against the administrators and heirs, and involved a question as to the validity of a sale of real estate by the administrators. The inapplicability of the foregoing cases cited by respondent is clear. The case of *Townsend v. Tallant*, 33 Cal. 45, cited by respondent several times, is not in point. That was an action in ejectment by a minor, by his guardian ad litem, to recover real estate. But in that case the land had been sold by the administrator to pay debts. *Schellenberger* was the general guardian of the infant, as well as administrator of the estate. Section 159 of the probate act required a copy of the order to be served on the general guardian. It was contended that as *Schellenberger* was the petitioner, and also the guardian, he, as guardian, had notice. But it was held that *Schellenberger* could not represent both sides; that the minor had no guardian quoad the petition; and that, therefore, the knowledge of the guardian was not equivalent to the notice required, the proceeding being hostile to the minor, as heir of the estate. The question we are considering was not before the court in that case, and was not decided, but the reasoning of the court is entirely consistent with the view we have taken of the case at bar.

The petition of the guardian for the sale of these premises alleged that the property was unproductive, by reason of being in bad repair; that it was the only property of any character belonging to the minor; that there was no fund out of which the property could be put in repair, or to pay the taxes thereon; that it would be sold for taxes unless sooner converted into money; that the minor was then but seven years of age; and that a sale was necessary to provide him with the common necessities of life. These facts are

nowhere contradicted in the record, and it may therefore be safely asserted that, if the guardian had not sold the property, it would have been lost to the plaintiff by a sale for taxes, and that during his earlier years, at least, he would have been compelled to subsist upon the charity of strangers, or become an inmate of an almshouse. No question is made, either in the complaint or in the evidence, but that the full value of the property was realized, or that fraud of any character intervened, nor that he has not had the full benefit of the proceeds, though, if it were otherwise, it would not affect the question here. While courts of equity are zealous in their efforts to protect the rights and property of infants, and all others who are not sui juris, they are equally unwilling, unless compelled by some strict rule of law, to make their incapacity a shield or ground for doing wrong. Certainly in this case there is nothing to commend the respondent to the sympathies of a court of equity to which he has resorted. It may be that the next of kin, or others interested in the estate of the minor, (if there are such,) are not bound, for want of proper notice, but that does not aid the plaintiff. Nor would the court subvert the best interests of wards by making the titles of purchasers at guardian's sales so uncertain as to prevent the obtaining of a fair price when necessity compels a sale.

Another ground upon which respondent contends that the court had no jurisdiction requires notice, viz. that the petition and order to show cause were void because of an insufficient description of the real estate sought to be sold. The description was as follows: "A part of lot number five, in block number twelve, of the town of San Bernardino, Cal." In the order of sale, however, the description was specific, giving a precise starting point, and describing the premises by metes and bounds. In the complaint in this case the starting point, instead of being "at the northeast corner of the lot owned by L. Caro," as in the order of sale, is fixed, by reference, to a certain corner of lot 5. There is no allegation or evidence that the premises sold under the description given in the order of sale are not identical with those described in the complaint; and hence, if the court had jurisdiction to sell the premises described in the order, there can be no partial recovery by the plaintiff. That the defective description in the petition and order to show cause did not affect the jurisdiction of the court, or the validity of the sale by the correct description, see *Fitch v. Miller*, 20 Cal. 352; *Estate of Boland*, 55 Cal. 312; *Richardson v. Butler*, 82 Cal. 174, 23 Pac. Rep. 9; *Gager v. Henry*, 5 Sawy. 239. The case of *Wilson v. Hastings*, 66 Cal. 244, 5 Pac. Rep. 217, cited by respondent, was one where the sale was by the executor of an estate, and as to the heir was an adverse proceeding; and hence is widely distinguished from this case, where the proceeding was ex parte by the minor, for his own benefit. There was no inconsistency between the general description

in the petition and the definite description in the order of sale. The property mentioned in the petition is the property that was sold.

Other irregularities are pointed out by respondent which would have required a reversal of the proceedings upon appeal; but it is not necessary to notice them, as they occurred after the court acquired jurisdiction, and hence do not affect the validity of the sale upon collateral attack.

Counsel for respondent quotes the concluding part of a stipulation in the case, made to relieve plaintiff of the necessity of proving title to him prior to the guardian's sale, viz.: "And no question is made as to the title of plaintiff and his ownership in all of the premises described in the complaint up to and including March 5, 1880," and contends that this stipulation "lets the defendant out," because, it is said, "if plaintiff was the owner up to and including March 5, 1880, the decree of confirmation cuts no figure whatever." The obvious intention of the stipulation was to concede that prior to the time when title would have vested in the defendant under the sale to him, if the proceedings were valid, the plaintiff was the owner; thus leaving the sole question whether or not his title was divested by these proceedings. This is clearly shown by the body of the stipulation, which admits that the plaintiff was seised in fee "prior to the decree of confirmation, * * * and prior to the execution of the deed of Elizabeth Wagner, then guardian," etc. This deed was made March 6, 1880, and as plaintiff's title was divested by the deed, and not by the confirmation of the sale, the stipulation, even as construed by respondent, cannot aid him. *Doe v. Jackson*, 51 Ala. 514.

All of the proceedings had in the probate court, except the petition, were objected to, as offered by the defendant; and the objections were sustained by the court, as was also the objection to the deed made by the guardian to the defendant. As those objections are fully covered by what has been said, it is not necessary to notice them further. The court erred in sustaining these objections, and the judgment should be reversed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

97 Cal. 232

In re HAAS' ESTATE. (No. 19,107.)

(Supreme Court of California. Feb. 18, 1893.)

In bank. On rehearing.

For former report, see 31 Pac. Rep. 893.

PER CURIAM. Rehearing denied, but judgment modified so as to read as follows: Order reversed, except that part thereof disallowing claim of Ella V. Haas. As to that part, affirmed.

(3 Cal. Unrep. 799)

FLETCHER v. NORTHCROSS. (No. 19,007.)

(Supreme Court of California. Feb. 17, 1893.)

MORTGAGE OR CONDITIONAL SALE.

Foreclosure proceedings were dismissed, and the mortgagor executed a deed to the mortgagee, pursuant to an agreement whereby the mortgagee was to satisfy the mortgage of record, and the mortgagor was to have the privilege of selling the land within six months thereafter, and retain all moneys which he might receive therefor over and above a specified sum, which he was to pay to the mortgagee. *Held* that, in view of the facts that the mortgagor made no promise to pay any sum to the mortgagee, that the sum to be paid the mortgagee in case of a resale was several thousand dollars less than the mortgage debt, that no interest was to be paid by the mortgagor, and that the mortgagee at once took possession of the premises, the transaction must be construed, not as a mortgage, but as a conditional sale, to become absolute on the mortgagor's failure to sell the land within the time specified.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

(Not to be published in California Reports.)

Action by John R. Fletcher against James W. Northcross to recover the possession of real estate. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Anderson & Anderson, F. W. Sanborn, and Julian P. Jones, for appellant. Victor Montgomery and C. C. Hamilton, for respondent.

TEMPLE, C. This action was brought to recover the possession of real estate under section 380 of the Code of Civil Procedure. Two defenses are pleaded. The first simply denies plaintiff's title and right of possession. In the second, it is shown that plaintiff claims title under and from defendant, and it is averred that the deed from defendant, under which plaintiff claims, was intended and received as security for a loan, and is therefore a mortgage. Defendant alleges that on the 1st day of August, 1890, he was indebted to plaintiff in divers sums upon certain notes, secured by mortgage upon the premises described in the complaint. That the amount of the indebtedness was \$21,000. The mortgaged premises were then worth \$35,000. That defendant desired to sell, and from the proceeds to pay plaintiff's demand. That he might be able to give a clear title, it was agreed between himself and plaintiff that the mortgages should be nominally satisfied of record, and, in lieu of them, defendant should execute to plaintiff an absolute deed, and plaintiff would then reconvey to defendant by a deed, which should be placed in escrow, to be delivered to defendant upon payment of \$21,000 to Balcom, who was to hold the deed. That this agreement was carried out, and a deed conveying the premises to defendant was executed, and placed in the hands of Balcom, with written directions to deliver the same to defendant on receipt of \$21,000, on or before February 1, 1891. That it was agreed that, upon sale of said premises, plaintiff should have \$21,000 of the

proceeds, and no more, and that the residue, if any, realized from the sale, should belong to defendant. That defendant diligently endeavored to procure a purchaser for said land, but was unable to consummate a sale. That the plaintiff, in violation of his obligation, has at all times since the execution of the deeds endeavored to discourage, and did discourage, many intending purchasers from purchasing said land, and, in consequence of such acts of plaintiff, defendant has been unable to procure a purchaser. In reference to this defense the court finds that on the 1st day of August, 1890, defendant was indebted to plaintiff in divers sums, evidenced by certain promissory notes, and secured by mortgages upon the land in controversy; that there was due upon the mortgages between \$26,000 and \$27,000, that an action brought by plaintiff was then pending to foreclose the mortgages; that defendant, in consideration of having the indebtedness satisfied and the mortgages discharged, conveyed the land to plaintiff, who thereupon canceled, satisfied, and discharged the indebtedness and the mortgages, and dismissed the suit pending for foreclosure, and at the same time agreed that the defendant should have, for the period of six months thereafter, the right and authority to sell said land, and to retain all moneys he might receive therefor, over and above \$21,000, and might, during that period, retain possession of the house and barn on the premises, and, in pursuance of this agreement, executed a deed conveying the land to defendant, and placed the same in escrow in the hands of Balcom, to be delivered to defendant upon receipt of \$21,000, if paid prior to February 1, 1891, and, in case said sum was not paid by that time, the deed to be surrendered to plaintiff; that no sale was made by defendant, and shortly after the 1st day of February, 1891, the deed was surrendered to plaintiff, in pursuance of the understanding; that all the other allegations in the answer were untrue. Judgment was thereupon entered for plaintiff. The defendant appeals from the judgment, and from an order refusing a new trial.

The question presented is whether the transaction must be considered a mortgage, or an actual sale to plaintiff, with an agreement to resell at a certain price. The difficulty of determining whether the transaction is not a mere device to obtain security for a debt, and at the same time to escape the expense and delay of a foreclosure, has often been recognized. If A conveys to B a tract of land, in consideration of a sum of money, due from or then paid to the grantor, and agrees to reconvey at a specified time, if the money is repaid, with interest, the grantor in the meantime remaining in possession, it is difficult to comprehend a motive for the transaction except upon the theory that the conveyance is security for a debt. Yet it is said: "To deny the power of two individuals capable of acting for themselves to make a contract defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price, and at a

specified time, would be to transfer to the courts of chancery in a considerable degree the guardianship of adults, as well as infants." *Conway's Ex'rs v. Alexander*, 7 Cranch, 237. In *Henley v. Hotaling*, 41 Cal. 22, the negotiations and the agreement were with the agent of the borrower for a loan; but it was discovered that the warrant of attorney did not authorize the agent to execute a mortgage, but did authorize a sale. So it was arranged that the agent should make an absolute conveyance, defeasible on a day named, by repayment, with interest. This court held that it was not a mortgage, on the ground that there was no agreement, express or implied, to pay. It is said: "If there is no debt, there is no mortgage. We look in vain in this case to find any evidence of a promise on the part of Storms to repay the purchase money, or of the existence of a debt of any kind from him to Hotaling." And it is further said that, in case Hotaling brought suit to foreclose, "the answer that there was no promise, either express or implied, on the part of the alleged mortgagor, would have been a complete bar." To the same effect are *Farmer v. Grose*, 42 Cal. 169; *Page v. Vilhac*, Id. 75; *Montgomery v. Spect*, 55 Cal. 352; *Manasse v. Dinkelspiel*, 68 Cal. 404, 9 Pac. Rep. 547. The case at bar is not nearly as close a case upon this point as either of the cases above cited. In all of those cases it was plausibly argued that there was an implied promise to pay, which would create a liability at least to the extent of the property conveyed. There may be a mortgage in which the mortgagee is restricted to his lien, and cannot recover a judgment for deficiency. In this case, in addition to the fact that there is no promise to pay, there are many circumstances which rebut the presumption that either party supposed that the deed was held as security. (1) The payee had commenced suit to foreclose, because he believed the security insufficient. Further time would have been given if further security could have been had. (2) The amount to be paid was not the amount of the debt, but more than \$5,000 less. (3) No interest was to be paid. (4) The grantee took immediate possession. True, the defendant continued to occupy the house and barn under the agreement for six months, but the beneficial use passed at once to the grantee. (5) It was supposed that it would cost \$1,500 to cultivate the orange orchards. As defendant was authorized to sell at any time, plaintiff might not be able to gather the crop. In that case he would lose this expense. And (6) all the circumstances show that the arrangement was simply in pursuance of an agreement to give defendant the exclusive privilege of selling as plaintiff's agent for six months, with the right to retain all over \$21,000 as commissions. Such, indeed, are the allegations of defendant's answer, and such is the testimony. Plaintiff thought the land only worth that sum, and was willing to take that for it. Defendant naturally valued it much higher, and was sure he could get more for it. Nothing was more natural, then, than that plaintiff should employ

defendant to sell. The option was for a limited period. If the presumption which it seems to me naturally arises in such transactions can be rebutted, I think it is in this case. There was no error in not finding whether the land was worth \$35,000 or not. If true, this was a mere probative fact. Nor do I think the record shows that there was any evidence that it was worth that sum. I think the judgment and order should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

that defendant afterwards indorsed on the note a waiver of payment and protest, since such act constitutes a ratification of the indorsement.

3. Money was deposited with defendant, as trustee, to pay off an indebtedness on a note owned by plaintiff, but the payee refused to accept payment, because the note was not then due. He then loaned out the fund without any authority from plaintiff, who, being dissatisfied with the loan, caused defendant to transfer to him the mortgage and note given to secure the loan, defendant indorsing the note. The proceeds of the loan were used by the borrower to pay a debt due by him to defendant, which had been secured on the same land, and this land was at the time declining in value. *Held*, that the court was justified in finding that defendant's indorsement of the note was intended as further security for its payment, and not merely to transfer the title thereto.

4. Where a mortgage given to secure a note has been foreclosed, the land sold, and a deficiency judgment entered up against the mortgagor, an indorser of the note is not entitled to an assignment of such judgment before he has paid the balance due on the note.

Department 1. Appeal from superior court, Los Angeles county; W. J. Clark, Judge.

Action by John Allin, trustee, against R. Williams, to recover a balance due on a note indorsed by defendant. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

John Haynes, for appellant. A. R. Metcalf, for respondent.

HARRISON, J. In February, 1888, 10 individuals, including the plaintiff and the defendant herein, borrowed upon their individual credit the sum of \$10,000, for the use and benefit of the Pasadena Lake Vineyard, Land & Water Company, a corporation in which they were interested, (\$5,000 thereof from the San Gabriel Valley Bank, and \$5,000 from a Mrs. Banta,) for which they gave their joint and several notes. About a month afterwards the corporation paid to the defendant a sufficient sum of money therefor, for the purpose of taking up the notes and repaying the sums thus advanced, and the defendant deposited the same with the San Gabriel Valley Bank, to the credit of "R. Williams et al." He immediately paid the loan that had been made by the bank, but Mrs. Banta refused to accept the money on her note, for the reason that it would not mature for nearly a year, and thereupon the money for its payment, viz. \$5,221.98, was left in the bank to the aforesaid credit. Prior to this time the defendant had contracted to sell to one Webster certain real property in Pasadena, and Webster had contracted to sell a portion of the same property to one Wilson. Webster was owing defendant \$5,000 on his contract of purchase, and Wilson was owing to Webster a little more than this amount on his contract with him; and on April 18, 1888, in pursuance of an arrangement between them for the purpose of liquidating these several obligations, the defendant made a conveyance of the land to Wilson, Webster uniting therein. Wilson executed to the defendant his note for \$5,000, payable February 10, 1889, and secured the same by a mortgage upon the land, made to the defend-

97 Cal. 403

ALLIN v. WILLIAMS. (No. 19,076.)

(Supreme Court of California. Feb. 25, 1893.)

NOTE SECURED BY MORTGAGE—ACTION AGAINST INDORSEE—EVIDENCE.

1. The indorser of a note secured by a mortgage given by the maker is liable, after judgment against the maker in a suit to foreclose, for any deficiency arising on the sale under foreclosure.

2. A contention by defendant that a person who indorsed a note for him had no authority to do so, is untenable where it appears

ant, as trustee for the 10 individuals who had signed the Banta note; and on April 21st the defendant transferred the aforesaid sum of \$5,221.98 from the account of "R. Williams et al." to his own personal account in the same bank. In September of that year several of these individuals expressed a dissatisfaction with his acts relating to the money, and thereupon the defendant, acting through his attorney, Wright, who was one of the 10, surrendered to Wilson the aforesaid note and mortgage, and took from him a new note for \$5,000, maturing February 10, 1889, payable to "R. Williams or order," together with a mortgage on the same property, securing its payment, and on the same day indorsed the note to the order of "John Allin, as trustee," the plaintiff herein, and assigned the mortgage to him, "in trust for the benefit" of the 10 contributors, naming them. After the Wilson note had matured, the plaintiff brought an action thereon, making Wilson and the defendant herein defendants in the action. Wilson suffered default, and the plaintiff, having dismissed the defendant herein from the action, took judgment against Wilson for the amount of the note, and for a sale of the mortgaged property. Upon the sale under that judgment the property was bid in by the plaintiff for the sum of \$2,400, and the sheriff returned a deficiency judgment of \$3,737. Thereupon the plaintiff, as trustee for the benefit of the 10 contributors, brought this action to recover from the defendant the amount of this deficiency.

1. The action against the defendant is for the purpose of enforcing his liability as an indorser upon the Wilson note. The averments of a recovery of judgment in the action against Wilson, and of the proceedings thereunder, are for the purpose of showing that a portion of the note has been paid by subjecting the security given therefor to a sale, and thus determining the amount to be recovered from the defendant. The right to maintain an action against the indorser of a note whose payment has been secured by a mortgage given by the maker, after judgment has been recovered against the maker in a suit to foreclose, was established in *Vandewater v. McRae*, 27 Cal. 596.

2. The court finds that Wright, who was the defendant's attorney, by whom the indorsement was made, was fully authorized to indorse the note, and there was sufficient evidence before it to authorize this finding. Aside from the general power of attorney which he had given him, the defendant directed Wright, at the time he was leaving the state, in September, just after objection had been made by the contributors to his disposition of the money, to fix the matter up to suit those who were making those objections, and while he was absent from the state he sent a telegram to Wright to exercise his best judgment in arranging the matter. In addition to this, the defendant himself, after his return to Pasadena, indorsed upon the note a waiver of payment, presentment for payment, protest and notice of protest, and the court was authorized to treat this act as an affirmance and ratifi-

cation of the prior indorsement by his attorney.

3. The appellant contends that his indorsement of the note to the plaintiff was without consideration, and merely for the purpose of transferring the title thereto, and that he did not incur the liability of an indorser. An indorser may show, as between himself and his immediate indorsee, that the indorsement was made merely for the purpose of transferring the note from a nominal holder to the true owner, as from an agent to his principal; or that the circumstances under which the indorsement was made were such as would render it inequitable to enforce an indorser's liability against him, (*McPherson v. Weston*, 85 Cal. 90, 24 Pac. Rep. 733;) but in any such case the burden of establishing such a defense to the apparent liability attendant upon his indorsement rests upon the indorser. The court below found upon evidence (which we think amply sustains its finding) that the "indorsement on the said note was made for the purpose of making the said defendant liable as an indorser of said note, and giving to the persons for whose benefit the plaintiff prosecutes this action the additional security of such indorsement, and was made and received in settlement of the differences which existed between the defendant and the said persons, and that it is untrue that said indorsement was without consideration." When the money was placed in the hands of the defendant, he was but a mere depository thereof for the purpose of paying the Banta note, and, after Mrs. Banta had refused to accept it until the note should mature, he still held it in trust for the 10 contributors, without any authority to make any other disposition of it. Although some of these contributors expressed an opinion that the money ought not to lie idle, but should earn as much interest as they were paying to Mrs. Banta, still the defendant does not claim to have had any express authority to make a loan of it, but seeks to uphold his action by showing that there was a general desire that it should be loaned. He does not claim to have spoken specifically to more than three or four of the contributors, and they contradicted his statement, and, as well as the others, testified that the loan to Wilson was made without their knowledge. Under this evidence the court was authorized to find that the making of the loan to Wilson was his own act, and those for whom he held the money had the right to hold him responsible for any loss. They had the right to demand of him a transfer to another trustee of all of the money which had originally been placed in his hands for the purpose of paying the Banta note, irrespective of the use which he had made of it; but, instead thereof, they agreed to accept a transfer of the Wilson note and mortgage, with the additional security of the defendant's indorsement. This was a direct advantage to the defendant, as it relieved him from the obligation to make immediate payment of the trust money, and gave him the contingent advantage of having his obligation entirely satisfied out of the mortgage security given by

Wilson. The defendant does not contend that there was any express agreement by which his indorsement of the Wilson note was to be taken in satisfaction of his liability for the money left with him in trust, but insists that the circumstances under which the indorsement was made show that it was so intended. Instead, however, of it appearing in the evidence that it was the intention of the parties to accept the Wilson note and mortgage in satisfaction of the obligation of the defendant, the circumstances and negotiations between them at the time of the transaction show that the parties were dealing at arm's length, and that the contributors were demanding the indorsement of the defendant as an additional security; and the court was justified in finding that it was given for that purpose. It is undoubtedly true that when a trustee holds funds which it is his duty to invest, and when the beneficiaries are interested chiefly in the income resulting from such investment, he will not be held liable for a depreciation of the security, or even for a loss in an investment that was made by him in good faith, and upon suitable security which was ample at the time of the investment. But this rule has no application to the present case. The defendant was a trustee of the moneys placed in his hands for the sole purpose of paying the Banta note, and when that could not be done his duty was merely to hold the money until those for whose benefit he held it should give him definite directions. He was at no time a trustee for the purpose of lending, or with power to lend, the money. The court, moreover, finds that his acts in making the loan were not only not authorized by the contributors, but also that the loan itself was not made in good faith. The land which he took from Wilson as security for the note was at the time held by him as security for an obligation of Webster to himself, and he was pressing Webster for payment. Although several of the witnesses testified that, in their opinion, the land was at that time a sufficient security for the loan, yet they were unable to corroborate their opinion by evidence of a sale of any land in that vicinity at any time between the transaction with Wilson and the time of the trial, and it appeared that within a little more than a year it sold for less than half the amount of the loan. It was also shown that lands were then declining in value, and Webster was himself willing to deduct \$1,200 from the amount due him from Wilson, in order to effect the arrangement by which Wilson should be substituted for himself as the debtor to the defendant. These facts authorized the court to find that the defendant dealt with the trust property for his own profit, in violation of section 2229, Civil Code, and, consequently, that he did not act in good faith in making the loan. Section 2234, *Id.*

4. The judgment in the case of *Allin v. Wilson* is not set forth in the record, and we cannot say that it is of such a character as to constitute a bar to the present action. The mere filing of a dismissal with the clerk, or the entry of an order of

dismissal in the minutes of the court, would not, of itself, constitute such a bar. The facts shown in reference to the dismissal justify the conclusion that it was filed before the hearing of the matter upon the default of Wilson.

5. It was not necessary that the plaintiff should have alleged in his complaint or shown an offer to assign to the defendant the deficiency judgment against Wilson, or that the judgment herein should direct that such assignment be made. Although an indorser is entitled, upon payment of a note which he has indorsed, or of a judgment against the maker rendered thereon, to an assignment thereof, yet such assignment is not a condition of the plaintiff's right of recovery, but is a right accruing to the defendant by reason of his payment.

6. A considerable portion of the brief on behalf of the appellant has been devoted to a discussion of the relative rights of the plaintiff and the defendant in the property bought under the Wilson judgment, as well as in the deficiency judgment, in case he shall satisfy the present judgment; and he argues therefrom that, as he is liable for only his share of the Banta note, there can be no right of action against him until that share shall have been ascertained by a sale of the property bought in under the Wilson judgment, and the means of collecting the deficiency judgment against Wilson shall have been exhausted. It is unnecessary for us, however, to pass upon these questions, as they are not involved in this action. This is an action by the plaintiff, as trustee for the 10 contributors, to recover from the defendant the unpaid amount of the note taken by him from Wilson, and indorsed to the plaintiff. The relative rights and obligations of the defendant towards the several contributors can be presented in an action for their adjustment at the settlement of the trust, after the Banta note shall have been paid. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

3 Cal. Unrep. 782
MAXWELL v. BOARD OF SUP'RS OF
LOS ANGELES COUNTY. (No. 19,109.)
(Supreme Court of California. Feb. 11, 1893.)

MANDAMUS TO COUNTY BOARD—ADVERTISING
CONTRACT.

1. Under St. 1891, c. 216, § 25, subd. 25, providing that the board of supervisors shall fix the price of all county advertising, mandamus will not lie to compel such board to contract for such advertising by giving public notice calling for proposals.

2. Such statute repeals Pol. Code, § 3766, providing that county advertising must be contracted for with the lowest bidder.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Mandamus at the relation of H. M. Maxwell to compel the board of supervisors of Los Angeles county to give public notice calling for proposals for county advertising. From a judgment dismissing the

petition, entered upon an order sustaining a demurrer to it, relator appeals. Affirmed.

E. A. Meserve, for appellant. James McLachlan, Dist. Atty., and B. M. Marble and Waldo M. York, for respondents.

PER CURIAM. This appeal is taken from a judgment of dismissal of a petition for a writ of mandate, after demurrer sustained to such petition on the ground that it did not contain facts showing a cause of action. It depends for its determination upon the construction to be given to subdivision 23 of section 25 of the county government act of 1891, as affecting the provisions of section 3766 of the Political Code as it stood before the passage of the act. It has been held in the case of *Publishing Co. v. Whitney*, 32 Pac. Rep. 237, (this day decided,) that the county government act repeals so much of section 3766, Pol. Code, as requires the board of supervisors to contract for the publication of the delinquent tax list by advertising for sealed proposals to do the same, and awarding the advertising of the list to the lowest bidder. It is plain that the legislature intended to make it the duty of the board of supervisors themselves, in the exercise of a proper discretion, to fix the price of such advertising, without any necessity for giving public notice calling for proposals from those wishing to do such work; but the contract for advertising is to be made by the proper officer, and for a price not exceeding that fixed by the board of supervisors.

Judgment affirmed.

97 Cal. 373

MCCORMICK v. SUTTON et al. (No. 18,053.)
(Supreme Court of California. Feb. 24, 1893.)
TOWN SITES—DEED FROM TOWN—TITLE ACQUIRED—ADVERSE POSSESSION.

1. Where a patent to a town site has issued, a deed from the town authorities, of a town lot, vests in the grantee a title which cannot be afterwards questioned collaterally, if at the time the patent issued no mine had been discovered, and the land was not known to be mineral.

2. Where a person holding the title to a lot has general possession thereof, her constructive possession extends to the whole of the lot, except such parts as are actually occupied by persons holding adversely to her; and they cannot set up title by adverse possession to any parts of the lot except those occupied by them.

Department 2. Appeal from superior court, Tulare county; John M. Corcoran, Judge.

Action by Margaret McCormick against Frederick Sutton and another to quiet title to land. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Reversed.

Wheaton, Kallloch & Kierce, for appellant. J. F. Rooney and F. W. Street, for respondents.

McFARLAND, C. J. This is an action to quiet title to a piece of land described as lot 50 in a certain block in the city of Sonora, county of Tuolumne. The de-

fendants filed separate answers, and each claimed title to a large portion of said lot by virtue of an alleged location and ownership of a quartz-mining claim, called the "San Guiseppi Quartz Mine;" and defendant Sutton further averred that he had been in the adverse possession of that portion of said mine which is embraced in said lot 50 for more than five years before the commencement of the suit, and pleaded the statute of limitations. Judgment went in the lower court for the defendants, and the court decreed that Sutton was entitled to the possession of all that part of said lot 50 which was included within the said alleged mining claim. Plaintiff appeals from the judgment, and from an order denying a new trial.

It appears from the findings that on March 24, 1874, the government of the United States issued its patent of the town site of the city of Sonora to the trustees of said city. Said lot 50 was a part of said town site, and was conveyed by the said trustees on the 6th of August, 1874, to one Oliver Cowan; and by several mesne conveyances the title under the said town-site patent to said lot 50 passed from said Cowan to the appellant before the commencement of this action. About nine years afterwards, to wit, in January, 1883, the respondent Sutton and one Gerlach undertook to locate a certain quartz-mining claim, generally known as the "Guiseppi." They posted and recorded a notice claiming 1,500 feet along a certain quartz ledge, with 300 feet surface ground on either side, properly designated its boundaries, and since then have done sufficient work within said boundaries to comply with the laws of congress upon the subject. The surface location included a large part of lot 50. The apex of the vein located was outside of said lot 50, but the vein, in its dip, extended under the surface ground of said lot. Gerlach afterwards conveyed his interest to Sutton, and the respondent Halsey claims the right of possession under a contract with Sutton.

It is not entirely clear upon what theory the court below decided the case in favor of respondents. It is true that there is a finding to the effect that Sutton held the mining claim adversely for more than five years; and counsel for respondent, in some parts of his brief, seems to found his right upon such adverse possession. But some of the findings of the court and arguments of respondent seem to go upon the theory that the town-site patent did not convey any mines that might be in the land, although not discovered until after the date of the patent of the town site. The court also found that the said Cowan, the original grantee from the town authorities, did not occupy said lot 50 as a residence, or as a place of business, or for any purpose; and from a quotation made by counsel for respondent from the opinion of the court in *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95, and quoted in *Richards v. Dower*, 81 Cal. 44, 22 Pac. Rep. 304, it would seem that both court and counsel were of opinion that mines discovered within the patented town site, before the occupation of a lot for business or residence purposes, could be held against the

grantee from the town site, although not discovered until after patent to the town site had issued. If the judgment of the court went upon any such theory, it is sufficient to say that the law is clearly established to be that a patent to a town site conveys a perfect title, in fee, except as to such land as was known to contain valuable mines before the issuance of the patent. *Smith v. Hill*, 89 Cal. 122, 26 Pac. Rep. 644, and cases there cited; *Deffeback v. Hawke*, supra; *Davis v. Wiebbold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628. *Richards v. Dower*, supra. The expression referred to in the opinion in *Deffeback v. Hawke* is as follows: "A mine is not reserved unless it is not only known, but known to be valuable, at the date of the patent, or discovered to be so before the occupation or improvement of the land containing it for residences or business under the town-site title." It seems to be contended that the meaning of this expression is that although a town-site patent may have issued, and a deed to a lot thereof may have been regularly granted by the town authorities to an individual claiming it, before any known mine had been discovered, still, if a mine had been discovered before the occupancy of the lot for residence or business purposes, then the newly-discovered mine would hold, as against the grantee under the town site. But this is clearly not so. In *Deffeback v. Hawke* the suit was commenced by the holder of a mining claim which had been entered at the land office, and no patent had issued for the town site. The defendants in that case claimed that, although they had no patent under the town site, still they had occupied the lot for business purposes before the location of the plaintiff's mine, and therefore they claimed that their right of possession was superior to that of the mine claimant. It was admitted, however, in that case, that the land was known to be valuable mineral land before its occupation for business or residence purposes, and therefore the court held that the right of the owners of the mine was superior to that of the defendants; and the opinion of the court can be construed to mean nothing else than this: That when a patent to a town site has issued, and a deed made to a lot owner, the latter will hold, as against any claimants of a mine discovered, made subsequent to his original occupancy of the lot for business or residence purposes. But, when a patent has issued to a town site, a deed from the town authorities of a town lot carries to the grantee a perfect title, where no mine had been discovered, and the land was not known to be mineral, at the date of the patent. *Davis v. Wiebbold*, supra. And the regularity of the conveyance from the authorities of the town site to the claimant of a town lot cannot be afterwards questioned collaterally. In the case at bar, lot 50 was not known to contain a valuable mine at the date of the patent; and therefore the respondents obtained no title to any portion of the lot by virtue of the attempted mining location, made nearly nine years afterwards.

This leaves only the question of adverse possession to be disposed of. Most of the

work done by respondents upon their asserted mining claim was done outside of lot 50. A small amount of work was done underground, within the boundaries of said lot 50; and there was an actual occupancy of only a small portion of the surface of said lot 50 by the respondents. They had an arastra there, and a dump pile, although it does not appear how much of the dump pile was made within five years before the commencement of the suit. There may also have been an occupancy of some other small portions of the lot. But respondents contend that having located their mine, covering a large portion of lot 50, and having continued to work on some part of the general location, the work outside of lot 50 gave them constructive possession of all of lot 50, within the lines of their mining location. But we do not think that this contention can be maintained. At the time of the attempted location of the mining claim, lot 50 was no longer public land of the United States, but had passed into private ownership; and the attempted location of a mine upon said lot in the manner prescribed for the location of mines on the public domain was invalid. Moreover, the appellant and her grantors were themselves, during the whole time, in possession of the whole of lot 50, except such parts thereof as were actually occupied by respondents, having it inclosed with a fence, and using it for pasturage. If the findings of the court can be construed as finding that they were not thus in possession, they are not, as to that subject, justified by the evidence. The testimony of James McCormick clearly shows that there was such possession on the part of plaintiff and her grantors, and there is no evidence contradicting it. Moreover, respondents' counsel admits such possession, and in his brief says: "It is true that appellant, during such time, was in the general possession of lot 50." If it be admitted, therefore, that, as claimed by appellants, the notice of location of the mining claim was a written instrument, within the meaning of section 322, Code Civil Proc., and would carry constructive possession to the boundaries designated in it, still that doctrine only applies to unoccupied land, of which there is no possession in the true owner. But, where the owner of the true title is also in possession, the constructive possession follows his title, except as to that part of the land which is in the actual adverse possession of the intruder. *Semple v. Cook*, 50 Cal. 29; *Labory v. Orphan Asylum*, (Cal.) 32 Pac. Rep. 281, and cases there cited. Therefore, in the case at bar, the appellant having the true title, and being in general possession of lot 50, her constructive possession went to the whole lot, except the portions actually occupied by the respondents; and respondents cannot be held to have an adverse possession of any portion of lot 50, except those parts thereof of which they were in the actual possession, and the judgment of the court that they were entitled to the possession of all of lot 50 embraced in their mining location was erroneous.

These views make it unnecessary to no-

tice any other points made in the case. Certain records of judgments which were offered in evidence by respondents, but excluded by the court, are printed in the transcript; but they are so printed improperly, and can have no consideration. Judgment and order reversed, and cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

(37 Cal. 353)

FOX v. HALE & NORCROSS SILVER MIN.
CO. et al. (No. 15,238.)

(Supreme Court of California. Feb. 17, 1893.)

APPEAL BOND—SUFFICIENCY—CORPORATION AS
SURETY—JUSTIFICATION.

Code Civil Proc. § 1056, provides that a corporation with a paid-up capital of \$100,000 or more, for the purpose of becoming surety on undertakings required by law, shall be accepted as sole surety on such undertakings, the insurance commissioner having power to examine into its affairs, and to require it to file statements of its assets and liabilities, and, whenever the latter exceed the former, it shall do no business in the state till the deficiency is paid up. Section 1057 provides that the officer taking an undertaking required by law, except in case of such a corporation, must require the sureties to make affidavit that they, either singly or collectively, are worth the sum specified in the undertaking; but no such corporation shall be accepted as surety whenever its liabilities shall exceed its assets. Section 942 provides that an undertaking in an appeal from a money judgment does not stay the proceeding unless executed by two sureties in double the amount named in the judgment. Section 948 provides that when the sufficiency of the sureties are excepted to they must justify before the lower court or county clerk. *Held* that, where such a corporation becomes sole surety on an appeal from a money judgment, the sufficiency of the surety may be excepted to, as provided by section 948, and it must show surplus assets equal to its undertaking.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against the Hale & Norcross Silver Mining Company and others. Judgment for plaintiff. Defendants appealed, and proceed by a writ of prohibition or supersedeas to stay proceedings on the judgment pending appeal. Proceedings dismissed.

Lloyd & Wood, Mastick & Waters, and Wm. F. Herrin, for appellants. Wm. T. Baggett and Lindley & Eickhoff, for respondent.

BEATTY, C. J. This is an application by some of the defendants in the above-entitled action for a writ of prohibition or supersedeas to restrain the superior court from enforcing its judgment against them pending their appeal to this court. By the judgment appealed from the plaintiff, Fox, recovered of the defendants, who are petitioning here, a little more than a million of dollars, and the amount of the undertaking necessary to stay proceedings pending the appeal is therefore in excess of two millions of dollars. Code Civil Proc. § 942. Such an undertaking in the proper amount—\$2,030,000—was duly filed,

but the only surety by which it was executed was the Western Surety & Guaranty Company, a corporation with a paid-up capital of no more than \$100,000, incorporated under the laws of the state of California for the purpose, among others, of making, guarantying, or becoming surety upon bonds or undertakings required or authorized by law. Within due time the respondent, Fox, in pursuance of section 948, Code Civil Proc., excepted to the sufficiency of said undertaking and surety, and thereafter, upon notice duly given, the officers of said corporation appeared before the county clerk, and proved the fact of incorporation, and full compliance by said company with all conditions necessary to entitle it to do business. They also proved that its entire capital stock of \$100,000 was paid up and intact. Upon this proof the county clerk certified that said corporation had justified to his satisfaction, and accepted its said undertaking as a good and sufficient undertaking to stay proceedings under said judgment pending the appeal. Notwithstanding this action of the clerk, the superior court was entertaining and proceeding to hear and determine a motion by respondent to issue its execution to enforce said judgment, when the appellants sued out the alternative writ or order to show cause, issued herein.

At the hearing the facts above stated were admitted or proved, and, though certain preliminary questions of practice were raised by the demurrer and answers then filed, all such matters were waived in the argument, and the single question submitted for decision was whether this corporation, with a paid-up capital of barely \$100,000, is sufficient as sole surety upon an undertaking to secure more than 20 times that sum. The proposition that it is in fact sufficient is, on its face, a palpable absurdity. A corporation which has only a hundred thousand dollars can no more pay a loss of two millions than a natural person can. It is true that there is a personal liability on the part of the stockholders of a corporation for their proportion of its debts, and it is suggested that it was shown that some of the stockholders of this corporation were men of large means. But that fact does not help us to a construction of the law. Counsel for petitioners could not deny that the solvency and sufficiency of the stockholders of such corporations is a circumstance of which the law takes no account. If, under the statute upon which they rely, this undertaking is sufficient, it would be equally so if its amount, instead of two millions of dollars had been twenty millions, and if the stockholders, instead of being in some instances men of means, were every one of them notoriously insolvent.

The sole question, therefore, to be determined is whether the statute of March 12, 1885, (St. 1885, p. 114,) or sections 1056, 1057, Code Civil Proc., as enacted in 1889, (which are, in effect, a re-enactment of the statute of 1885,) require the construction contended for by the petitioners, viz. that a corporation of the character therein defined must be accepted as sole and sufficient surety upon any undertaking, no matter

what the disparity between its amount and the amount of the corporate assets. To indicate the argument of counsel, we quote sections 1056, 1057, Code Civil Proc., with their italics: "(1056) In all cases where an undertaking or bond with a number of sureties is authorized or required by any provision of this Code or of any law of this state, any corporation with a paid-up capital of not less than one hundred thousand dollars, incorporated under the laws of this state or any other state of the United States for the purpose of making, guarantying, or becoming a surety upon bonds or undertakings required or authorized by law, or which, by the laws of the state where it was originally incorporated, has such power, and which shall have complied with all the requirements of the law of this state regulating the formation or admission of these corporations to transact such business in this state, may become and shall be accepted as surety or as sole and sufficient surety upon such undertaking or bond, and such corporate surety shall be subject to all the liabilities and entitled to all the rights of natural persons' sureties: provided, that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements, and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks in a daily San Francisco paper; and until such deficiency is paid up such company shall not do business in this state. In estimating the condition of any such company, the commissioner shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition of eighty per cent. of capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force. (1057) In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, *except in the case of such a corporation as is mentioned in the next preceding section*, require the sureties to accompany it with an affidavit that they are such residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount be equivalent to that of two sufficient sureties. Any corporation such as is mentioned in the next preceding section may become one of

such sureties. *No such corporation shall be accepted in any case as a surety whenever its liabilities shall exceed its assets as ascertained in the manner provided in section 1056.*"

It cannot be doubted that this corporation meets all the conditions required to bring it within the application of the words, "may become and shall be accepted as," etc., in section 1056, but we do not attribute to those words the sweeping force which petitioners claim for them. No doubt they must be allowed some operation, but if it is possible to find a meaning for them which will justify their insertion in the statute without convicting the legislature of having enacted an absurdity, they must be limited to such meaning; or, in other words, if the apparent object and policy of the law is subserved by taking them in a qualified and restricted sense, while one of its principal objects is utterly defeated by giving them their largest possible significance, the former interpretation must be preferred. Now, the apparent object of this law was not only to enable corporations of the class designated to become cosureties upon undertakings required in legal proceedings, but to make the sole undertaking of such a corporation equivalent to the joint undertaking of two or more natural persons. To accomplish that object, the use of the language quoted, or something equivalent, was necessary, and the words chosen are as apt for the purpose as any that could be suggested, their only fault being that, taken literally, they seem to mean something more, viz. that such a corporation is not only sufficient as a surety,—the same as a natural person,—and sufficient by itself, without a cosurety, but also sufficient as surety for any amount, no matter how much greater such amount may be than the value of its assets. But to allow this clause of the act such unlimited operation would defeat its general policy, which is undoubtedly to provide ample security for money judgments in order to stay proceedings for their enforcement pending appeals. Such a judgment, when docketed, becomes a lien upon all real estate of the judgment debtor in the county. By the levy of execution liens may be established not only upon real, but also upon personal property; but all such liens are removed by the filing of a proper stay bond; and it is not to be supposed that the legislature intended to discharge one security without providing an equivalent where a corporation becomes surety upon the stay bond, any more than in the case where the sureties are natural persons. The force of these considerations is not in the slightest degree impaired by either of the italicised clauses in section 1057. By the first, corporations are merely exempted from annexing to their undertakings the usual affidavit required of natural persons. For this exception a good and sufficient reason is found in the fact that they cannot, in many cases, be residents of the state in any sense, nor in any case in the ordinary sense of the word, and they need never be, if they possibly can be, either householders or freeholders within the state. And as to their ability

to pay, a full equivalent for the affidavit ordinarily required is supplied by the insurance commissioner's certificate. Nevertheless, the last clause of the section seems to imply that the undertaking of such a corporation shall be accompanied by an affidavit showing that its liabilities do not exceed its assets, computed according to the rule of the statute, in which case it is incapable of becoming surety or cosurety for any amount whatever. But this clause does not necessarily imply that, so long as the assets of the corporation are equal to its liabilities, or, in other words, that so long as it has available assets applicable to the payment of losses equal in amount to 80 per centum of its capital stock, it may become surety for any amount in excess of such assets. All that it necessarily implies is that the corporation may go on doing business, i. e. executing bonds in such amount as other provisions of the statute authorize. What, then, is the amount for which such corporations are authorized to become surety? This question is not answered by the act of 1885, or by sections 1056, 1057 of the Code of Civil Procedure. Nor is any express provision as to this matter to be found in any other statute. In the absence of such provision, petitioners claim that the amount is unlimited. We think, on the contrary, that the question may be safely decided upon analogous provisions with respect to natural persons. When a corporation executes an undertaking in pursuance of section 942, Code Civil Proc., exception to the sufficiency of the surety may be taken in pursuance of section 948, with exactly the same effect as if the undertaking had been executed by natural persons. In response to such exception the corporation must justify upon notice, and, in addition to the facts which qualify it to do business, it must, like natural persons, show surplus assets equal to the amount of its undertaking. For these reasons it follows that the undertaking in this case was and is wholly insufficient to stay execution. Proceeding dismissed.

We concur: DE HAVEN, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

97 Cal. 379

CROSSMAN v. KENNISTON. (No. 14,816.) (Supreme Court of California. Feb. 25, 1893.)

MUNICIPAL OFFICERS—REMOVAL—STATUTES—REPEAL BY IMPLICATION.

Act March 30, 1874, (St. 1873-74, p. 911,) provides that any member of any board of city officers who shall be found guilty of any willful violation of official duty shall be deprived of his office. Section 2 provides that any person may file a complaint charging the officer with such violation, and, if the charges are sustained, the officer may be deprived of his office, "and the court may enter a judgment for one hundred dollars in favor of the complainant." Act March 13, 1883, (Municipal Corporation Act; St. 1883, p. 266,) § 811, provides that no officer of a city shall be interested in any contract with or in furnishing supplies for such city or its officers in an official capacity; that any willful violation of such provisions shall be ground for removal from office, "and shall be

deemed a misdemeanor, and punished as such." *Held*, that the act of 1874 is inconsistent with the latter act, and was repealed thereby. *Frazer v. Alexander*, 16 Pac. Rep. 757, 75 Cal. 147, followed.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Crossman against Kenniston for removal of defendant from the office of trustee of the city of San Bernardino on account of willful misconduct in office. From a judgment of removal, defendant appeals. Reversed.

Rolfe & Freeman and Hargrave & Bledsoe, for appellant. E. Crossman and Harris & Gregg, for respondent.

PATERSON, J. The plaintiff filed an accusation against the defendant, who is a member of the board of trustees of the city of San Bernardino, charging him with having willfully violated his official duty as a city trustee, and asking that he be removed from office. It was alleged that while holding the office of trustee he leased a certain building to the city, to be used by the latter as a city hall, and that he received pay for the use of the building; that he also let to divers city officials teams belonging to a firm of livery stable proprietors of which he was a member and collected pay from the city for the use thereof. A demurrer to the accusation, and a motion to dismiss the proceeding, were filed and overruled. Thereupon an answer was filed, the cause was heard on the merits, the allegations of the complaint were found to be true, and judgment was entered as prayed for. From this judgment the defendant has appealed.

The act of March 30, 1874, provides that any member of any board of officers, state, city, or county, who shall be found guilty of a willful violation of any provision of the statute prescribing or defining his duties, or who shall be found guilty of any other willful violation of official duty, shall be deprived of his office. Section 2 of the act provides that any person may file a complaint charging the officer with a willful violation of official duty; that thereupon a citation may be issued, and a summary hearing had, and if, upon such hearing, the charges are sustained, the officer may be deprived of his office, and the court may enter a judgment for \$100 in favor of the complainant, and for his costs of suit. But this act, so far as it provides for the removal and punishment of municipal officers for malfeasance in office, is inconsistent with the provisions of section 811 of the municipal corporation act, passed March 13, 1883, (St. 1883, p. 266,) which reads as follows: "No officer of such city shall be interested, directly or indirectly, in any contract with such city, or with any of the officers thereof in their official capacity, or in doing any work or furnishing any supplies for the use of such city or its officers in their official capacity; and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void, and, if audited and allowed, shall not be paid by the treasurer. Any

willful violation of the provisions of this section shall be a ground for removal from office, and shall be deemed a misdemeanor, and punished as such." The act of March 30, 1874, (St. 1873-74, p. 911,) provides for a judgment of removal from office, and a judgment in favor of the complainant for \$100. The act of March 13, 1883, provides for a judgment of removal, and conviction of a misdemeanor, to be punished as such. Manifestly the remedy and penalty provided in the former act are different from those provided in the latter act. This being the case, the latter act repealed the former, and the proceeding must be dismissed. *Fraser v. Alexander*, 75 Cal. 147, 16 Pac. Rep. 757. It is claimed by respondent that the case just cited was overruled in *Wickersham v. Brittan*, 93 Cal. 34, 28 Pac. Rep. 792, and 29 Pac. Rep. 51. In this he is mistaken. The only matter decided in the *Wickersham* Case germane to the present inquiry was that the decision in *Fraser v. Alexander* was obiter dictum in so far as it held that the act of March 30, 1874, was repealed by the provisions of the constitution of 1879, but nothing was said in that case impairing the decision in *Fraser v. Alexander* as to the effect of section 55 of the county government act upon the act of March 30, 1874. The judgment is reversed, with directions to the court below to dismiss the proceeding.

We concur: GAROUTTE, J.; HARRISON, J.

97 Cal. 382

CROSSMAN v. LESHER. 14,762.)

(Supreme Court of California. Feb. 25, 1893.)

MUNICIPAL OFFICER—REMOVAL—ACCUSSION—BY WHOM PRESENTED.

Pen. Code, § 889, providing that when proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation in writing, as provided in sections 758 and 772, does not authorize a private person to file an accusation in writing for the removal of a city trustee for official misconduct in leasing a building and letting teams to the city, and collecting pay therefor from the latter, since section 772 provides for proceedings on such accusation for "charging and claiming illegal fees for services rendered or to be rendered in his office," or neglect "to perform the official duties pertaining to his office," and for other willful or corrupt misconduct the accusation must be presented by the grand jury, as provided in section 758.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Crossman against Leshner for removal of defendant from the office of trustee of the city of San Bernardino on account of willful misconduct in office. From a judgment for defendant, plaintiff appeals. Affirmed.

E. Crossman and Harris & Gregg, for appellant. Rolfe & Freeman and Hargrave & Belcher, for respondent.

PATERSON, J. The charges of the plaintiff, in his accusation filed herein, are of the same nature as those referred to in *Crossman v. Kenniston*, 32 Pac. Rep. 448, v.32P.no.5—29

(No. 14,816, this day filed.) By the accusation the plaintiff herein sought, as in the *Kenniston* Case, to remove the defendant from his office as city trustee. The matter was heard before another department of the superior court. Judgment was entered in favor of defendant for his costs, and plaintiff has appealed.

Counsel for appellant herein—counsel for respondent in No. 14,816—rely upon a proposition not presented in the other proceeding. They claim that under section 889 of the Penal Code plaintiff is authorized to commence and prosecute this proceeding. That section reads as follows: "When the proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation or information in writing, as provided in sections 758 and 772." We see no merit in this contention. The section referred to simply provides that proceedings for removal of public officers may be commenced by either an accusation or an information, as provided in sections 758 and 772. Section 772 provides for proceedings in the superior court upon an accusation in writing, filed by any person against any officer, for "charging and claiming illegal fees for services rendered or to be rendered in his office," or neglect "to perform the official duties pertaining to his office." It is not claimed in this case that the defendant charged or collected illegal fees, or that he has refused or neglected to perform any official duty. The accusation charges the defendant with an entirely different kind of misconduct in office. When the proceedings are for any willful or corrupt misconduct in office, other than such as are mentioned in section 772, they must be commenced by accusation presented by a grand jury, as provided in section 758. It is only when the misconduct complained of consists in charging and collecting illegal fees, or failure or neglect to perform the official duties imposed upon the officer by law, that the prosecution may be had upon the complaint of an individual.

Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

97 Cal. 411

HAAS v. WHITTIER et al. (No. 19,020.)

(Supreme Court of California. Feb. 25, 1893.)

INSOLVENCY—PREFERENCES—JUDGMENT NON OBSTANTE VERDICTO.

1. Insolvent act of 1880 (section 55) forbids an insolvent to make any preference by transfer, and provides that any transfer of property by such insolvent, not made in the ordinary course of business, shall be prima facie evidence of fraud. *Held*, that the prima facie presumption of fraud and preference may be overcome by the uncontradicted evidence of the insolvent and the agent of the creditor who acted in the matter of the transfer, showing that the transfer was made in good faith, and that there was no intent to make or secure any preference over other creditors; the question of intent in such case being one of fact.

2. In an action by the assignee of an insolvent attacking a transfer by the insolvent to a creditor on the ground that it was a fraudulent preference, the jury returned a general

verdict for plaintiff, and found specially that the transfer was not made in the usual course of business; that it was not made to give the creditor any preference; that such creditor had no reasonable cause to believe that the transfer was made to prevent the insolvent's property from coming into the hands of the assignee, or to prevent it from being distributed ratably among the creditors. *Held*, that judgment should be entered for defendant, notwithstanding the general verdict; Code Civil Proc. § 625, providing that, where special findings are inconsistent with a general verdict, the former control.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Abe Haas, assignee in insolvency of the estate of Edgar Sessions, an insolvent debtor, against W. F. Whittier, W. P. Fuller, Jr., F. N. Woods, Bryant Howard, and I. A. Lothian, surviving partners of the firm of Whittier, Fuller & Co. From an order granting a new trial and refusing defendant's motion for judgment because the general verdict for plaintiff was not supported by the special findings under Code Civil Proc. § 625, providing that, where special findings are inconsistent with a general verdict, the former control, defendants appeal. Reversed.

The following are the instructions referred to in the opinion:

The part of plaintiff's fourth instruction given is as follows: "In determining the question of whether Whittier, Fuller & Co. had reasonable cause to believe that the debtor was insolvent at the time he made the assignment, you will consider all the facts and circumstances by which the parties were surrounded, so far as known to them, or either of them, or to their agent, who was negotiating the assignment. It is not necessary that positive knowledge of the insolvency of the debtor should exist; neither is ignorance of the law any excuse, as all men are presumed to, and must, know the law. If you believe that the debtor was at the time in such a condition financially that he could not pay his debts from his own means as they became due, and the said Whittier, Fuller & Co. knew that fact, or had reasonable cause to believe it, and under such circumstances obtained a transfer of the property mentioned in the complaint in payment of their claim, then you should find for the plaintiff." The court refused to give the remainder of such instruction, which was as follows: "And the fact that either Sessions or said Whittier, Fuller & Co., or its agent, may have supposed at the time that the debtor would be able, in the course of time, to work out of debt, does not make any difference in the case. The solvency or insolvency of the debtor is not a question of the possibility of his paying off his debts in the course of time, but it is a question of his ability to pay as they become due in the ordinary course of business, and the fact that a debtor transferred a large portion of his property to one creditor without making provision for an equal distribution of its proceeds to all of his creditors, and especially when the transfer is made not in the due course of business, and is made under the pressure of the creditor, these are all facts and circum-

stances to be considered by you in determining whether the assignment was made or intended as a preference of said Whittier, Fuller & Co., and also in determining whether they had reasonable cause to believe at the time that he was insolvent."

The following is plaintiff's fifth instruction, which was allowed: "You are further instructed that a transfer of a considerable portion of his property by Sessions to said Whittier, Fuller & Co., the property being of a different character from that which Whittier, Fuller & Co. were accustomed to deal in, and made for the purpose of satisfying a debt, is not a transfer made in the usual and ordinary course of business; and a transfer not in the ordinary course of business is *prima facie* evidence of fraud."

Plaintiff's sixth instruction, as follows, was refused: "It does not alter the case that Whittier, Fuller & Co. acted in this matter through an agent, for, although they were not personally present, yet, having acted through an agent, and especially as they have received the benefit of the assignment, it is in law the same as if they had acted personally in the matter. And, furthermore, as a matter of law, Whittier, Fuller & Co. had knowledge of everything known to their agent, and whatever the agent had cause to believe they had cause to believe; and, therefore, if you find that the agent knew, or had reasonable cause to believe, that Sessions was insolvent at the time said transfer was made to said firm, and that such transfer and payment was made with a view to prevent said property from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of the insolvent act, such transfer is void, and you should find for plaintiff for the amount stipulated, to wit, \$856.99, with interest thereon at the rate of 7 per cent. per annum from the 26th day of November, 1887."

Defendants' first, third, fourth, and fifth instructions were as follows: (1) "The question of fraudulent intent is one of fact, and not of law. The jury are exclusive judges of all questions of fact." (3) "You are further instructed, in this case, no actual fraud is charged against these defendants, but the complaint simply charges that the assignment in question was made to defendants by Sessions, and was accepted by these defendants with a view to give a preference to defendants, with a view to prevent the property so transferred from coming to the assignee of said Sessions in insolvency, and to prevent the same from being distributed ratably among his creditors, and to defeat the objects of the insolvent act of 1880; and that the defendants had reasonable cause to believe, and knew, that said Sessions was insolvent, and that the transfer was made for the purpose mentioned. Now, if you believe from the evidence that defendant [had not reasonable cause to believe as charged and] had no other intent than to collect an honest debt due them by Sessions, and had no intent of defeating the insolvent law, then you must find for

the defendants." Said instruction being modified by the court by inserting in said instruction the words inclosed in brackets. (4) "Even if you believe from the evidence that Sessions was insolvent at the time of the transfer, and even if he did make the transfer with intent to prefer the defendants to other creditors, if you believe from the evidence that the transfer was made for a valid debt to defendants, and that there was no intent on the part of the defendants to defeat the operation of the insolvent law, [and no reasonable cause on their part to believe as charged,] you must find for the defendants." Said instruction being modified by the court by inserting in said instruction the words inclosed in brackets. (5) "If you believe from the evidence that Sessions did not transfer the property with the view or intention to give preference to defendants, it makes no difference what were the views or motives of the defendants in receiving the property, or what they suspected or believed about the solvency of Sessions; and you should find for the defendants."

H. A. Barclay, for appellants. Graves, O'Melveny & Shankland, and Chapman & Hendrick, for respondent.

PER CURIAM. This is an action brought to recover a sum of money, which the plaintiff, as assignee of an insolvent debtor, Edgar Sessions, claims should be paid him in his representative capacity by the defendants, W. F. Whittier et al., by reason of their having received from the insolvent, and converted to their own use, certain goods delivered to them in satisfaction of a debt due the defendants by the insolvent. The proposition upon which the plaintiff based his claim for a recovery is that the defendants had received the property by a transfer made by the insolvent with the intention of giving them a preference over his other creditors. The cause was tried before a jury, and they gave a general verdict for the plaintiff, but found "No" upon the special issues submitted to them. The special issues were: (1) At the time that Edgar Sessions transferred to Whittier, Fuller & Co. the goods described in the complaint, was he able to pay his debts from his own means as they became due? (2) Was the transfer of said goods by Sessions to Whittier, Fuller & Co. made in the usual and ordinary course of business of said Sessions? (3) Did Sessions make said transfer with a view to give a preference to said Whittier, Fuller & Co.? (4) Did Whittier, Fuller & Co., at the time they received said transfer, have reasonable cause to believe that it was made with a view to prevent Sessions' property from coming to his assignee in insolvency? (5) Did Whittier, Fuller & Co., at the time of said transfer, have reasonable cause to believe that the transfer was made to prevent said property from being distributed ratably among his creditors? The defendants moved the court for a judgment in their favor, because the general verdict was not supported by the special findings, under section 625, Code Civil Proc. The plaintiff made a motion for a new trial.

and the court below considered the two motions together, refused that of the defendants, and granted that of the plaintiff, from which rulings this appeal is taken.

The real questions involved in the case are whether the trial court was justified in believing, upon the evidence, and contrary to the view of the jury, that the preference denounced by section 55¹ of the insolvent act had been given, and whether such errors of law had been committed on the trial as warranted a new trial. It would have been useless to have entered judgment for the defendants on the special issues found by the jury if the trial court had not considered the evidence sufficient to support the special findings of the jury, or had believed itself to have committed errors of law on the trial; for, immediately following the order for judgment for defendants, the court would, by granting a new trial, have rendered the judgment inoperative. The jury found, as it was proper they should, under the evidence, that the transfer was not made in the usual and ordinary course of business. This, of course, made the transaction *prima facie* a preference not allowed by section 55 of the insolvent act. But they also found, as we think justifiably from the evidence, that neither of the parties had in fact any intention to violate the law denouncing a preference in favor of one creditor over others. If the court was not right in coming to a different conclusion from the evidence, then it could not, in the exercise of its discretion, grant a new trial on that ground. As we look at the evidence, it is all one way,—that both parties were desirous that all creditors should share alike. This is shown in part by the fact that both of them were willing and desired that a general assignment should be made for all creditors, and were prevented from taking this course by the advice of an attorney, who thought

¹Insolvent Act of 1880. (section 55:) "If any person, being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment or seizure, having reasonable cause to believe that such person is insolvent, and that such attachment, seizure, payment, pledge, conveyance, transfer, or assignment is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of, this act, such transfer, payment, conveyance, pledge, or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor; and if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of fraud."

it could not be done. The creditor's agent wished to secure his debt; the debtor wished to settle it in some way, and preferred to make a general assignment; and for this, also, the creditors were willing, if they were advised it could be done; but they did not proceed in that way, as they were advised to the contrary by an attorney at law. It is clear that there was no intent to make or to secure a preference over other creditors. The main idea of the insolvent was to secure all his creditors alike. He had his choice to make an assignment, which, under the advice he had, he was justified in not doing, to be attached, which would render his chance to pay all his creditors worse, or to pay his creditor in goods, as he had not the money. This shows the contrary of any intention on his part to make a preference of one creditor over another. The truth is, he seems to have been very anxious to do the best he could for all his creditors. The creditor had no ground to believe that the debtor intended to make any preference such as the law denounced.

The declarations of the insolvent and the agent of Whittier, Fuller & Co. are directly to the point that they did not have the least intention of preferring any creditor. The insolvent was a witness for the plaintiff in this action. He is contradicted in his material statements by no witness. And the evidence of both these witnesses was not on this trial given orally in the presence of the court, but was, by agreement, read from the transcript of the case made up when it was in this court on a former appeal. 25 Pac. Rep. 917. There was nothing, then, in their manner or appearance (as the court did not have them before it) which could have influenced that tribunal to disbelieve their positive statements, and we perceive nothing in the circumstances to raise any such disbelief. The presumption, *prima facie*, which the law makes from the unusual nature of the transfer is entirely done away with by the testimony of these two uncontradicted witnesses, and the jury was right in its special findings. The court below had, therefore, no legal ground to doubt the correctness of their conclusion, and should not have done so.

The question then recurs, what, if any, were the errors in law committed by the trial court? That tribunal should not have directed a verdict for the plaintiff, as the respondent contends it should, for the question of intent to make a fraudulent preference, denounced by the statute, was one of fact. *Bull v. Bray*, 89 Cal. 298, 26 Pac. Rep. 873. And, as we have seen, there was no evidence except the *prima facie* presumption, which was entirely done away with, to support any such theory of the case as the plaintiff contends for.

The next contention of respondent in support of the court's action is that the court erred in striking out a portion of the fourth instruction. The matter which it was proper should be contained therein as an instruction in the part stricken out was fully covered by the fifth instruction for the plaintiff and the part of the fourth given. The matter concerning the responsibility of Whittier, Fuller

& Co. for the acts of their agent in the plaintiff's sixth instruction was sufficiently explained in the plaintiff's fourth instruction granted, and the balance of what was refused was given by the court in the first instruction for plaintiff. We perceive no objection to the first instruction given for defendants. It is sustained by *Bull v. Bray*, 89 Cal. 298, 26 Pac. Rep. 873. Neither do we perceive any valid objection to the third and fourth instructions asked and given for defendants. The fifth instruction is in accordance with the law of this case, as settled by the appellate court in 87 Cal. 613, 25 Pac. Rep. 917.

It is further claimed that the jury found contrary to the fourth instruction given by the court for the plaintiff, and therefore the new trial should have been granted. Taking all the instructions together, such was not the effect of the findings by the jury. They were not told by the instruction last mentioned to find for the plaintiff at all events, but that, if they believed certain facts existed, or things had been done by defendants, they would find for plaintiff; and the basis on which this instruction is placed as one element necessary to show a wrongful intent is, did defendants know, or have reasonable cause to believe, the debtor was insolvent when they took the transfer? But the insolvency of the debtor, known to the creditor when he took the transfer, was not the only condition on which the jury were told that they could find for plaintiff. Taking all the instructions together, and interpreting them fairly, the jury had the right, if the evidence warranted, to find that the defendants and the debtor had no intent to make a preference in violation of section 55 of the insolvent act. This they did find in effect, and in so doing they did not violate the instructions of the court. We think that the court below should not have granted a new trial, but should have rendered judgment for the defendants on the special findings, and therefore the order granting a new trial is reversed, and the court below directed to enter judgment for defendants as herein indicated.

97 Cal. 388

NORTON v. ATCHISON, T. & S. F. R. CO.
(No. 14,614.)

(Supreme Court of California. Feb. 25, 1893.)

JUDGMENT BY DEFAULT—FAILURE TO SERVE SUMMONS—SETTING ASIDE ON MOTION—OFFER TO PLEAD—AFFIDAVIT OF MERITS—EVIDENCE.

1. Code Civil Proc. § 473, providing that a court may relieve a party from a judgment taken against him "through his mistake, inadvertence, surprise, or excusable neglect," has no application to a motion to set aside a judgment by default for want of service of summons, and hence such motion need not be accompanied by any affidavit of merits, nor need defendant offer to appear, and plead to the merits.

2. Where a judgment is entered by default against a nonresident defendant, who has not been personally served with summons within this state, the court has power to set it aside on a motion in the same action, if such motion is made within a reasonable time, and an independent action need not be brought.

3. Ten days after the rendition of such judgment is a reasonable time within which to file such motion.

4. Where, on the hearing of such motion, the evidence is conflicting as to whether or not defendant was served within the state, a finding that such service was not made will not be disturbed.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by C. V. Norton against the Atchison, Topeka & Santa Fe Railroad Company. After judgment for plaintiff by default, defendant appeared, and moved to set aside the judgment on the ground that there was no legal service of summons. An order granting said motion was affirmed in department. Affirmed.

William Fuller, for appellant. A. Brunson and Hunsaker, Britt & Goodrich, for respondent.

McFARLAND, J. This is an appeal by plaintiff from an order of the superior court granting a motion of defendant to quash the service of summons, to set aside and vacate the default of defendant, and to set aside and vacate the judgment which had been entered in the case in favor of plaintiff. The appeal was heard in department 2, and the order of the court below was there, upon an opinion prepared by Belcher, C., affirmed. 30 Pac. Rep. 585. Upon a petition by appellant, urging strongly that there was no authority in the court to grant said motion, a hearing was ordered in bank. After a further and full consideration of the point made, we are satisfied that a correct conclusion was reached in department. The respondent is a corporation formed under the laws of Kansas, and having its principal place of business in, and being a resident of, that state. The action, which is in personam, was commenced in San Diego county, and the sheriff of that county returned that he had personally served the summons on the 19th of November, 1890, on K. H. Wade, general manager of defendant, "by delivering to said defendant personally, in the county of San Diego, a copy of said summons," etc. No appearance having been made by respondent within 10 days, its default was entered by the clerk on the 1st day of December, 1890. On the 3d day of December, 1890, judgment was entered by the court against defendant, the judgment reciting that defendant had been regularly served with summons. Within 10 days thereafter, to wit, on December 12, 1890, respondent, by its attorneys, served and filed a notice that "the defendant in the above-entitled action will appear for the purpose of this motion only, and for no other purpose, and will move the court to set aside and recall the execution heretofore issued in this case, and to set aside the judgment and default heretofore entered on the 1st day of December, 1890, and to quash service of summons herein, upon the ground that said service is not such as is authorized by law, and that said court has no jurisdiction of defendant to enter said default or judgment, and that the same is void." Affidavits were filed

by both parties on the hearing of this motion, but appellant objected to the entertainment of any such affidavits on the part of respondent. On the 23d of January, 1891, the court granted a motion quashing the service of the summons, vacating the judgment, etc. From that order plaintiff appeals.

It is contended strenuously by appellant that such a motion can be maintained only when based upon section 473 of the Code of Civil Procedure; that this motion is not based upon that section, and is not accompanied by any affidavit of merits, which affidavit has been held to be necessary when proceeding under the section; and that under that section a party can be relieved only upon an offer to appear and plead to the merits. Appellant relies on this point upon *People v. Harrison*, 84 Cal. 608, 24 Pac. Rep. 311; *People v. Greene*, 74 Cal. 400, 16 Pac. Rep. 197; *People v. Goodhue*, 80 Cal. 200, 22 Pac. Rep. 66, and some other cases cited. But the cases cited go no further than to hold that a motion to vacate a judgment cannot be made after the expiration of six months, or, with respect to one ground for setting aside the default, after one year, unless it be void on its face. The recent case of *Jacks v. Baldez*, (Cal.; filed December 28, 1892,) 31 Pac. Rep. 899, might also be cited in support of what appellant deems to be the correct position. But those authorities relate to cases which come clearly within, or should have been brought under, the provisions of said section 473. The main provision of that section is that a court may relieve a party from a judgment taken against him "through his mistake, inadvertence, surprise, or excusable neglect;" and it is quite clear that the provision just quoted has no application to the ground upon which respondent moved in the case at bar. Defendant here is not asking relief from its neglect, or mistake, or default of any character. Its contention is that the court has no jurisdiction over it, and no power to compel it to answer to the action. It does not ask to be allowed to come in and answer, but contends that in its situation it cannot be called upon to answer; therefore there can be demanded of it no affidavit of merits. In the cases cited the parties making application to set aside the judgment confessed some neglect or misconduct from which they sought to be relieved, and thus come clearly within the provisions of said section, and, of course, were compelled to comply with the provisions of the section under the construction which the court had given them. Moreover, they were residents of the state, and within the territorial jurisdiction of her courts; while in the case at bar respondent is a non-resident, and beyond such jurisdiction, except so far as the statute of this state can provide, and has provided, for jurisdiction under special circumstances. It was clearly, then, the duty of the court to quash the service of the summons, when it appeared to it that the return of such service was false; and the vacating of the judgment was an incident which necessarily followed, provided that the proceeding by motion by which this result was sought to be accomplished was a proper one. In

Freeman on Judgments (commencing at paragraph 105) there is a chapter on "Vacating judgments under statutes," and various statutes of different states, similar to section 473 of our Code, are reviewed, and the distinction between proceedings under those statutes and proceedings independent of them is stated; and in paragraph 108 the author says: "In all cases an affidavit of merits must be made and filed, except where it appears that the court had never acquired jurisdiction of the moving party, and that its judgment against him is void; but in this class of cases he is entitled to relief independently of those statutes." In *Bell v. Thompson*, 19 Cal. 707, the court makes this same distinction,—section 68 of the practice act being at the time of that decision the same substantially as the present section 473 of the Code; and also in *People v. Greene*, supra, in *Society v. Thorne*, 67 Cal. 53, 7 Pac. Rep. 36, and other cases. See, also, *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. Rep. 842, and *Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. Rep. 887. In *Cowles v. Hayes*, 69 N. C. 410, the court, in discussing a motion similar to that in the case at bar, say: "The motion is not made under section 133, Code Civil Proc. The plaintiff does not ground his claim to relief on his own mistake, inadvertence, surprise, etc., but he puts it on the ground that the judgment of which he complains was irregular, and against the course and practice of the court."

Appellant contends that there should have been an independent action brought to set aside the judgment, but we do not think so. The general common-law rule is that courts have power over their judgments during the entire term at which they are rendered, and may vacate them on motion. *Freem. Judgm.* § 90 et seq. Many of the courts have vacated judgments after the expiration of the term, but it was established in California that such jurisdiction was exhausted at the close of the term, unless kept alive by some motion or appropriate proceeding during the term. *Bell v. Thompson*, 19 Cal. 706; *Shaw v. McGregor*, 8 Cal. 521; *Robb v. Robb*, 6 Cal. 21; *Baldwin v. Kramer*, 2 Cal. 582. Under our present system terms of court are abolished, and a motion to set aside a judgment would have to be made within a reasonable time, (*People v. Greene*, supra,) and perhaps, following the analogy of section 473, six months might be considered the extent of a reasonable time for any motion; but, however that may be, there is no question in the case at bar as to reasonable time, because the motion was made within 10 days after the judgment. It is admitted that a motion to vacate a judgment is a direct, and not a collateral, attack; and if, as we hold, a motion was the proper proceeding in this case, of course any fact going to show the invalidity of the judgment could be presented at the hearing of such motion. Where a return shows that a nonresident was personally served with summons within the state, and it is made to appear to the court that such return was false, it would be strange if, within a reasonable time, the court could not,

upon application, set aside the service, or the false return of service, and vacate the judgment. There is no reason why, in such a case, the nonresident should be put to the necessity of an independent action. We hold, therefore, that, where a nonresident has not been personally served within the state, the court has power, within a reasonable time, when it finds that it has been deceived by a false return of such service within the state, to quash the service of summons, and vacate the judgment. This is as broad a statement of the rule as the facts of this case require; and, so holding, we think that the order of the court below should be affirmed.

With respect to the question of fact whether or not the respondent in the case at bar was served within the state, the evidence before the lower court was conflicting, and we would not be warranted in disturbing the finding of the court as to that fact. Upon this point we are satisfied with the said opinion prepared by Commissioner Belcher in department. The order appealed from is affirmed.

We concur: PATERSON, J.; DE HAVEN, J.; HARRISON, J.

BEATTY, C. J., (concurring.) Before terms of court were abolished it is clear that a default judgment entered upon a false return of personal service of summons could have been set aside upon motion made within the term. The abolition of terms cannot be held to have abolished the remedy by motion, but only the limitation of time within which the motion must be made; and if, under section 473, Code Civil Proc., a defendant may be relieved on motion from a default judgment taken against him through his mistake or excusable neglect, provided his motion is made within a reasonable time, not exceeding six months, a fortiori he should be relieved on motion made within the same time, when he has been guilty of no neglect. None of the decisions cited are in conflict with this view. They merely hold that judgment will not be vacated upon motion made after the lapse of the prescribed period unless it is void upon its face, which is quite consistent with the proposition that a motion made within the statutory period may be granted as well when the defendant is wholly without fault as when he has been guilty of neglect, mistake, etc. As to the conditions upon which the order should be made, the statute only requires the imposition of such terms as may be just; and when, as in this case, the court finds that the defendant has never been brought within its jurisdiction, it would not be just to require it to answer to the merits, or to make an affidavit of merits. Upon these grounds I concur in the judgment.

97 Cal. 384

DARBY v. ARROWHEAD HOT SPRINGS HOTEL CO. (No. 19,101.)

(Supreme Court of California. Feb. 25, 1893.)

PAROL EVIDENCE.

In an action against a corporation to recover money it appeared that plaintiff had

been a stockholder in the corporation, and had made advances to it to the amount sued for; that he had transferred his stock and interest in defendant corporation to other stockholders therein by a written instrument which recited that he sold "all right, title, and interest of whatsoever nature in and to all property * * * hitherto and now belonging to" defendant, including all "claims and advances." *Held*, that parol evidence was admissible to show to whom the claim for "advances" mentioned in the instrument belonged, and that they were those which formed the basis of the action.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by R. R. Darby against the Arrowhead Hot Springs Hotel Company for money loaned. From a judgment for defendant, plaintiff appeals. Affirmed.

Holloway & Kendrick and Ray Billingsley, for appellant. Chapman & Hendrick and H. C. Rolfe, for respondent.

PER CURIAM. The plaintiff, R. R. Darby, brought this action to recover a certain sum of money from the defendant, an hotel corporation, claimed by him to have been loaned to the corporation. The defendant denied all the allegations of the complaint, except that the defendant was a corporation; and for a further and separate defense alleged that before the commencement of this action the plaintiff had sold and transferred to other parties, every indebtedness due by the defendant to the plaintiff, which included the present demand; and that at the time the action was brought the plaintiff was not the owner or holder of any demand against the defendant. The court below found all the allegations of the answer to be true, and rendered judgment in favor of defendant for costs, etc. From that judgment, and from an order refusing a new trial, this appeal is taken.

The main ground assumed by the plaintiff and appellant for a reversal of the judgment and order is that the court erred in the admission in evidence of a certain deed from the plaintiff to three other persons, who were stockholders in the hotel corporation. The objection made was that the evidence proffered was irrelevant and immaterial, and not responsive to any of the pleadings in the case. If it is sufficiently appears from the recitals of this instrument that the plaintiff's claim against the hotel corporation for loaned money was transferred and assigned to the three persons named in that instrument as transferees, then, of course, the deed was relevant and material to the issues raised in the pleading. To our minds the recitals above adverted to, taken in connection with the circumstances of the transfer proved by the plaintiff himself, make it clear that it was intended by that instrument to sell and transfer to the three parties above named the demand against the hotel corporation, which is the basis of plaintiff's action. The language describing a part of the property, and which affects the matter in hand, runs thus: "And also all right, title, and interest of whatsoever nature in and to all property, real, personal, and mixed, in San

Bernardino county, hitherto and now belonging to the Arrowhead Hot Springs Hotel Company, a corporation, including all furniture and fixtures, insurance, papers, stock, books of account, bills receivable, accounts, claims, and advances, business and good will." The plaintiff had shown by evidence that he was a stockholder in the corporation; and that he had made to it loans and advances to the amount he sued for; that the other stockholders, four in number, had also made such loans, and that he had sold his stock and interest in the hotel company property by instrument of writing to the three grantees in the deed. The instrument in question was certainly not one by the terms of which the transferees and purchasers were selling any stock or claims for the money they had loaned or advanced. The hotel corporation did not have and could not have belonging to it any shares of stock which it could sell or transfer; neither could such a corporation have any claims for money advanced or loaned. Therefore it is very clear that the only other person or party to this instrument who had any stock or claim for advances, which he transferred or could transfer, was the plaintiff. It does not appear from the language of the instrument, therefore, with absolute certainty, to whom the "advances" mentioned in the deed belonged; but, taking the evidence of the plaintiff that he had made advances of money as a stockholder, and that of the transferees of the plaintiff's interest in the hotel company, it is plain that the advances intended to be transferred were those which formed the basis of this action. The argument suggested by the appellant against this view of the matter is that the language of the deed as affecting these "advances" is too plain to admit of any explanation whatever; that it is there distinctly asserted that these advances belonged to the hotel company, and therefore no explanation by parol could be admitted which could vary the meaning of that language. But, as we have seen, such an hotel corporation could not, according to the rules of law, advance money to any one, as a bank or commission merchant could; therefore it appears on the face of the instrument itself that such advances made to some one could not belong to the corporation. "Courts cannot adopt a construction of any legal instrument which shall do violence to the use of language or the rules of law." 2 Pars. Cont. (7th Ed.) p. 495. This being so, it seems pertinent to show in this matter what advances were transferred by the deed, and, as it were, identify to whom they belonged when the instrument was executed, and thus to explain this language of the contract by reference to the circumstances under which it was made. Code Civil Proc. §§ 1647, 1856-1860; Brewster v. Lathrop, 15 Cal. 21; 2 Pars. Cont. (7th Ed.) p. 550. It will be observed here, also, that the corporation against which this suit is brought is not a party to the instrument offered in evidence. The three stockholders to whom the transfer was made, and the fourth, who made it, are the sole parties. The fifth stock-

holder is not a party in privity with them in the matter. It would seem, therefore, that the strictness of the rule against the admission of parol evidence to explain this contract should be relaxed in a case like this. "In such cases much of the reason which prohibits the introduction of extrinsic evidence fails, and with it the prohibition fails." 2 Pars. Cont. (7th Ed.) p. 687. We therefore think that the deed and the evidence explanatory of it were admissible. There being no prejudicial error shown by the record, the judgment and order are affirmed.

97 Cal. 468

BENICIA AGRICULTURAL WORKS v. GERMANIA INS. CO. (No. 18,076.)

(Supreme Court of California. March 7, 1893.)

INSURANCE—CONSTRUCTION OF POLICY.

Where a fire insurance policy on a harvesting machine, though running in terms for a year, contains a clause stating that it only insures the machine while operating in the grain fields, and in transit from place to place in connection with harvesting, the insurance company is not liable for a loss of the machine by fire within the year if at the time of such loss it was not actually in operation or in transit, as provided by such clause.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the Benicia Agricultural Works against the Germania Insurance Company. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Edward Lynch and Geo. B. Graham, for appellant. T. C. Van Ness, for respondent.

McFARLAND, J. This is an action to recover for the loss of a certain harvesting machine and outfit insured by defendant against loss from fire. The court below granted a nonsuit, and rendered judgment for defendant. From the judgment, and from an order denying a new trial, the plaintiff appealed.

The policy ran, in terms, for a period of one year from June 12, 1890, to June 12, 1891; but, after reciting the character of the property, it contained the following clause: "All while owned by assured, and known as the 'Harvest King harvesting machine and outfit,' and operating in the grain fields, and in transit from place to place in connection with harvesting in Fresno county, of California." It appeared that the harvesting season in Fresno county usually ends about the 1st of September; that in 1890 it was somewhat longer than usual; that the insured, appellant's assignor, finished harvesting that year in September, or about the 1st of October; that he then took the machine home to his ranch, having entirely finished using it in the business of harvesting for that year; that he separated the header from the balance of the machine, so that the whole machinery could be more readily placed in his shed; that he was prevented by other work from putting it in his shed; and that it remained near the shed until the 18th of the following November, at which time it was

destroyed by fire. It is clear, therefore, that it was not burned while "operating in the grain fields, or in transit from place to place in connection with harvesting in Fresno county." But appellant now contends—and, indeed, that is nearly its whole contention—that because the policy runs, in terms, for a year, respondent is responsible for the loss, whether the fire occurred during the harvesting season, or at any other time during the year. But to maintain that contention would be to hold that the most prominent part of the policy could be ignored entirely. The plain, clear meaning of the language used is that the respondent would be responsible if the property, at any time between June, 1890, and June, 1891, should be destroyed by fire, while operating in the grain fields, or in transit from place to place in connection with harvesting. This provision is in the body of the policy, and not in the long memoranda printed on the back of it, and made a part thereof, and must be considered as a leading clause in the contract, to which the attention of the parties was clearly called; and it is clear that respondent was not to be liable for any loss by fire unless it occurred while the said machine was operating, or in transit in connection with harvesting, as before stated. Indeed, this contention which appellant now makes is barely consistent with the complaint, which alleges that the loss occurred while the machine was operating in the grain fields or in transit, or with the specifications of error, which include the proposition that it was so operating, or so in transit.

The appellant took exceptions to the rulings of the court excluding certain offered evidence, by which appellant sought to show that the risk or hazard was not increased by the fact that the machine was not employed in the fields, or in transit, at the time of the fire; but those objections and that testimony were immaterial, under the view which we have taken of the contract itself. Judgment and order affirmed.

We concur: **DE HAVEN, J.**; **GAROUTTE, J.**; **HARRISON, J.**; **PATERSON, J.**

97 Cal. 472

DE BAKER v. BATCHELLER et al. (No. 10,962.)

(Supreme Court of California. March 7, 1893.)

LEEVE DISTRICTS—PETITION FOR ORGANIZATION—PUBLICATION.

1. Act March 10, 1891, (St. p. 30, § 1), provides for the organization of levee districts for the protection of lands, when desired by "a majority of freeholders owning land injuriously affected, or liable to be injuriously affected, by overflow from any innavigable running stream." For such organization, section 2 provides that a petition shall be presented to the board of supervisors, "signed by the required number of freeholders of such proposed district." Held, that such petition need not be signed by a majority of the landowners liable to be affected by the overflow of the stream, but only those within a proposed levee district.

2. Under Act March 10, 1891, (St. p. 30, § 2), which provides for the publication of the petition for the organization of a levee dis-

trict to protect lands from the overflow of a stream, where the petition described the land within the proposed district, and referred to a plat of such district, the publication is not void because such plat, submitted with the petition, was not also published.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Arcadia B. De Baker against J. W. Batcheller and others to restrain the issuance and sale of certain bonds. Judgment for defendants, and plaintiff appeals. Affirmed.

Wells, Monroe & Lee, for appellant. Wilson & Lamme and Chas. L. Batcheller, for respondents.

McFARLAND, J. April 6, 1891, certain persons presented to the board of supervisors of Los Angeles county a petition for the formation of a levee district under the act of March 10, 1891, entitled "An act to provide for the organization and government of levee districts created for the protection of lands from overflow of innavigable running streams of water," etc., (St. 1891, p. 30,) to be called the "Fruitland Levee District." Such proceedings were afterwards had that the board of supervisors declared such district organized; and, after other steps provided for by the act had been taken, the defendants were elected as the board of directors of said district; and they were about to issue and sell certain bonds of said district when the plaintiff commenced this action to restrain them from so doing. A portion of plaintiff's complaint was stricken out, against her objection, and, the defendants having answered, the case was heard by the trial court, and judgment rendered for defendants. From the judgment, and from an order denying a new trial, plaintiff appeals.

1. The lands included in the district lie along the Los Angeles river, and the main contention of appellant is that the petition failed to give the supervisors jurisdiction because it was signed only by a majority of freeholders owning lands within the proposed district, whereas it is contended by appellant that it should have been signed by a majority of freeholders owning land injuriously affected by overflow from said Los Angeles river, throughout its entire course. If the contention of appellant be true, then no levee district under the act could be legally created along any of the rivers of the state,—not even along the San Joaquin or Sacramento,—except upon a petition signed by a majority of all the freeholders of lands liable to be injuriously affected by overflow, from the foothills to the bay. We do not think that appellant's position is tenable. The whole contention rests upon the language of the first few lines of the bill, to wit, "a majority of freeholders owning land injuriously affected, or liable to be injuriously affected, by overflow from any innavigable running stream," etc.; and it is contended that this language necessarily means a majority of all the freeholders who own land at any point on the stream which might be injuriously affected by overflow. But, when the entire act

is looked at, it clearly means a majority of such freeholders within the proposed district. The second section expressly provides that the petition shall be "signed by the required number of freeholders of such proposed district." It also provides that the board of supervisors "may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries;" also "that no lands already embraced in * * * levee * * * district shall be included in such boundaries;" and that the board of supervisors shall not "allow another district to be formed, including any of the lands in such district, without the consent of the board of directors thereof." From these and other provisions of the act, it is apparent that the legislature contemplated the possible creation of several districts along the same stream, and that, when the act speaks of a "majority of freeholders," it means a majority of the freeholders of the proposed district. Appellant admits that there may be a district created which does not include all the lands subject to overflow along the river,—indeed, she says that it may be as small as "two acres;" but she contends that in order to organize a district, however small, there must be a petition signed by a majority of all the freeholders owning lands subject to overflow along the entire course of the stream, and that such a petition, so signed, is requisite to establish the first district, or any subsequent district. Such a construction is unreasonable, and destructive of the respective rights of districts and freeholders along the stream. We think, therefore, that the court below was right in holding that the petition in the case at bar was sufficient, independent of the question whether or not the action of the board of supervisors in determining the boundaries of a district is final, and beyond review.

2. The act provides that "said petition shall be published" in a certain prescribed way, and appellant contends that the board of supervisors did not acquire jurisdiction because in this case the petition was not so published. It is admitted that the body of the petition itself was published as required by the act, but it contains this provision: "The said proposed boundaries of said district are shown, approximately, by the plat thereof heretofore annexed." And, as no plat was published with the petition, it is claimed that the publication was defective. But we do not think so. In the body of the petition the boundaries of the proposed district are fully stated, with minute detail. The plat referred to is not expressly made a part of the petition, purports to show the boundaries only approximately, and is not at all a necessary part of the petition. If the petitioners had been unusually wise or cautious, they would have avoided the possibility of the point now under review being made, by either leaving out any reference to the plat, or by publishing it after having made such reference; but we think that the publication of the body of the petition in this instance was a sub-

stantial compliance with the provision of the act on the subject.

Judgment and order affirmed.

We concur: DE HAVEN, J.; GAROUTTE, J.; PATERSON, J.; HARRISON, J.

3 Cal. Unrep. 811

HOOPER v. PATTERSON et al. (No. 14,394.)

(Supreme Court of California. Feb. 25, 1893.)

ACTION ON INJUNCTION BOND—MEASURE OF DAMAGES—ATTORNEYS' FEES PAID—RECOVERY BY ADMINISTRATOR.

1. An appeal from a judgment should be dismissed, where it is not taken until more than two years after the entry thereof.

2. In an action by an administrator on an injunction bond, the amount of attorneys' fees paid by the intestate in procuring a dissolution of the injunction cannot be recovered, when such fees have not been paid, and no claim for them had been filed against the estate, at the time of filing the complaint.

3. In such action, it is error to allow interest on the damages from the date of filing the complaint, as such damages are unliquidated and uncertain until settled by process of law, or by the parties.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

(Not to be published in California Reports.)

Action by W. N. Hooper, as administrator of Terence Burke, deceased, against James Patterson and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Appeal from the judgment dismissed. Order denying a new trial reversed.

Wm. H. H. Hart, for appellants. T. V. O'Brien, O'Brien & Morrison, and O'Brien & Dangerfield, for respondent.

VANCLIEF, C. Action upon two injunction bonds to recover \$5,000 damages alleged to have been sustained by plaintiff's intestate, by reason of the injunctions. The plaintiff had judgment for \$500, with interest thereon from February 29, 1884, (the date of filing original complaint,) until the date of judgment, May 4, 1889, and costs, taxed at \$188.20. The defendants appeal from the judgment, and from an order denying their motion for a new trial. The appeal from the judgment should be dismissed, as it was not taken until September 23, 1891,—more than two years after the entry of the judgment.

The two injunction bonds were given in the same action. The first injunction having been dissolved on demurrer to the complaint, the second, to the same effect, was granted upon an amended complaint and a second bond. A demurrer to the amended complaint, upon which the second injunction was issued, was also sustained, and thereupon final judgment, dismissing the complaint and dissolving the injunction, was rendered. From this judgment an appeal was taken, whereupon the judgment and order dissolving the injunction were affirmed. See 61 Cal. 525, 527. The injunction restrained plaintiff's

intestate and the sheriff of El Dorado county, pendente lite, from selling, on execution in favor of the former, certain mining claims, and improvements thereon. The findings of the court negative all alleged damages by reason of the injunction, except as follows: (1) "That said Burke (plaintiff's intestate) was necessarily put to costs and expenses, in the amount of \$500, for attorneys' fees in procuring the dissolution of said injunctions, and expended said sum." (2) "That said Burke was necessarily put to cost and expense, in the amount of \$200, for attorneys' fees in the supreme court of the state of California, in procuring an affirmation of said judgment dissolving said injunctions."

1. It is contended for appellant that neither of these findings is justified by the evidence. I think this point should be sustained. The evidence not only fails to show that Burke or his administrator ever paid any attorneys' fees for services in procuring a dissolution of either injunction, but positively shows that no such fees were ever paid, and, furthermore, shows that the estate of Burke was not liable for any such fees at the time the amended complaint, on which the case was tried, was filed, for the reason that no claim for any such fees was ever presented for allowance to the administrator of Burke, or to the probate judge. The plaintiff was appointed and qualified as administrator of Burke more than four months prior to the filing of the original complaint herein, and nearly two years before the filing of the last amended complaint; and it appears that notice to the creditors had been duly published by the administrator. Substantially all this appears from the testimony of Thomas V. O'Brien, a witness for plaintiff, who appears to have been the leading attorney for Burke in the action in which the injunctions were issued, and also in this action; and there was no other evidence on the trial, touching attorneys' fees for services in procuring a dissolution of the injunctions, than this testimony. In the late case of Mitchell v. Hawley, 79 Cal. 301, 21 Pac. Rep. 833, this court said: "The allowance of counsel fees in suits on injunction bonds, and in one or two other actions of a kindred character, is exceptional; and it should not be carried beyond the point to which former decisions have taken it." By former decisions in this state, it seems to have been well settled that in cases of this kind attorneys' fees cannot be recovered as damages sustained by reason of the injunction, unless they have been paid. The principal former decisions to this effect are to be found in the following cases: Wilson v. McEvoy, 25 Cal. 170; Prader v. Grimm, 28 Cal. 11; Roussin v. Stewart, 33 Cal. 208; Bustamente v. Stewart, 55 Cal. 115.

2. Appellant also makes the point that the court erred in allowing interest on the damages, and I think this point is well taken. The liability of the defendants, if any, arose from a contract; but the amount of the damages could not have been estimated or ascertained by means of the contract; nor does the contract furnish any data useful as a factor in es-

timating the damages. Therefore, the damages were unliquidated and uncertain, and could only be made certain by proof and adjudication on the trial, or by a settlement between the parties. *Coburn v. Goodall*, 72 Cal. 509, 14 Pac. Rep. 190; *Heald v. Hendy*, 89 Cal. 632, 27 Pac. Rep. 67.

I think the appeal from the judgment should be dismissed; but that the order denying a new trial should be reversed, and a new trial granted. But inasmuch as it appears that the attorneys for defendants refused to accept an offer of plaintiff's attorneys to consent to an order granting a new trial, made at the time notice of defendants' motion for a new trial was served, I think the appellant should pay the costs of the appeal.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the order denying a new trial is reversed, and a new trial granted. Costs of appeal to be paid by appellant.

97 Cal. 422

MARSHALL v. TAYLOR. (No. 19,073.)

(Supreme Court of California. Feb. 27, 1893.)

ENTRY OF JUDGMENT—FAILURE OF CLERK TO MAKE—EFFECT—MOTION TO DISMISS.

1. Where judgment was rendered for plaintiff, and on the same day she gave to the clerk a form thereof, and paid costs of the action, and he neglected to enter the judgment, a motion by defendant to dismiss the action because the judgment was not entered within six months after rendition, as provided by Code Civil Proc. § 581, providing that an action may be dismissed where, after verdict, the successful party neglects to demand entry of judgment thereon for more than six months, was properly denied, the provisions of such section not being mandatory. *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. Rep. 121.

2. Even if such statute were mandatory, such motion could not be sustained, since there was no "neglect" on the part of plaintiff, she having a right to assume that the clerk would perform his duty as required by Code Civil Proc. § 664, providing that judgment must be entered by the clerk in conformity with the verdict within 24 hours thereafter, unless the court order the case reserved for argument or further consideration, or grant a stay of proceedings.

3. A certificate by the clerk that no judgment had ever been entered, attached to the transcript on appeal served on plaintiff, did not affect her with notice that such judgment had not been entered.

4. If such certificate were evidence of notice, under any circumstance, defendant could not use it for such purpose when he stated in his bill of exceptions that, immediately after the rendition of the verdict, "judgment was rendered and entered in said case in accordance with said verdict," and he also stated in his notice of appeal that the appeal was from the judgment entered in favor of plaintiff.

5. Where the court has actually rendered a judgment, but it has not been entered on the record, through neglect of the clerk, an order may be made that it be entered nunc pro tunc, though the six months allowed for entering judgment have elapsed.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Jessie N. Marshall against Jacob S. Taylor. There was judgment for plaintiff, and from an order overruling a motion by defendant to dismiss the action because the judgment was not entered within six months after rendition thereof, and from an order directing the clerk to enter the judgment nunc pro tunc, defendant appeals. Affirmed.

C. C. Stephens, for appellant. W. W. Holcomb, W. T. Williams, and J. W. Cochran, for respondent.

PATERSON, J. Plaintiff recovered a judgment against the defendant in the court below, for the sum of \$25,000 damages, on December 18, 1890. On that day her counsel gave to the clerk the form of judgment, and paid him the costs of the action. The verdict was duly recorded, and the judgment was filed, but was not entered. In due time the defendant moved for a new trial. The motion was denied, and the defendant appealed on June 26, 1891. The notice of appeal served upon the plaintiff states that the defendant appeals to the supreme court from the final judgment given, made, rendered, and entered in the cause on December 18, 1890, and also from the order of June 12, 1891, denying defendant's motion for a new trial therein. The transcript on appeal was served upon respondent on August 25, 1891, and contains a certificate of the clerk which states that no judgment has ever been rendered or entered in the action. On December 9, 1891, the appellant served upon respondent a notice of motion to dismiss the action upon the ground that the plaintiff had neglected for more than six months after the rendition of the verdict to demand, or have entered, a judgment thereon. About the same time, plaintiff served the defendant with notice of motion to have judgment entered "as of the date, the 18th day of January, 1890." The motions were heard together. The motion of the defendant, for a dismissal of the action, was denied; and the motion of plaintiff, "for an order directing the clerk to enter judgment nunc pro tunc as of January 18, 1890, was granted. From these orders the defendant has appealed.

We think the court properly denied the motion to dismiss the action. The application was based upon section 581, Code Civil Proc., which provides that "an action may be dismissed * * * in the following cases: * * * (6) By the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months." This section is not mandatory. (*Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. Rep. 121,) and, if it were, would not authorize a dismissal of the action, under the circumstances shown in this case, because there was no "neglect" on the part of the plaintiff. When plaintiff paid to the clerk the costs of the action after verdict, and presented him with a form of the judgment which she desired to have entered, she had a right to rely upon the assumption that the clerk would perform the duty required of him by the statute. Section 664, Code Civil Proc., provides that

"When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."

It is claimed that the clerk's certificate to the transcript was notice to the respondent that no judgment had ever been entered, and she having neglected thereafter, until the notice of motion to dismiss as served, to take any steps to have the judgment entered, it was an abuse of discretion in the court below to refuse to dismiss the action. But the certificate of the clerk cannot be used, and never was intended to be used, for any such purpose. If it were evidence of notice, under any circumstance, the appellant ought not be allowed to use it for such a purpose after having incorporated into his bill of exceptions a statement that immediately after the rendition of the verdict, "on the 18th day of December, 1890, judgment was rendered and entered in said case in accordance with said verdict," and also a certificate of the judge to the effect that on the hearing of the motion for a new trial, among other documents introduced in evidence, was the judgment, and having also stated in his notice of appeal served upon respondent that the appeal was from the judgment entered on the 18th day of December, 1890, in favor of plaintiff, and against the defendant.

It is contended that a judgment *nunc pro tunc* can be entered only when the delay has arisen from the act of the court, and that there is nothing in the record upon which to base an order of entry *nunc pro tunc*. Neither of these contentions is sound. The pleadings, the minutes of the court, and the verdict were sufficient record evidence to sustain the action of the court. The verdict is equivalent to findings of fact and conclusions of law; and section 664, *supra*, is equivalent to an express direction by the court to the clerk to enter judgment in accordance with the verdict. The rights of the parties were fully determined, there was no question as to the form or substance of the judgment, and nothing remained to be done but the mere ministerial duty, to be performed by the clerk, of entering the judgment as required by the statute. *Casement v. Ringgold*, 28 Cal. 339; *Gray v. Palmer*, Id. 416. The rule is that where the court has actually rendered a judgment, but the same has not been entered on the record, whether in consequence of the neglect of the court, or neglect or misprision of the clerk, an order may be made that the judgment rendered be entered *nunc pro tunc*, and this may be done after the expiration of the term—in this state, after the expiration of six months. Such an order was made in a case, although nearly eight years had elapsed, it appearing that third persons would not be injured thereby. In such a case the effect of the order is simply to supply matters of evidence. The record is merely amended by inserting in the memorial of the proceedings that which has been improperly omitted therefrom. 1 Black, Judgm. §§ 128-133. The

appellant's rights on appeal will not be effected by the action of the court below, because the order relates back to the time the proceedings of the court actually took place, and the *nunc pro tunc* entry of the judgment becomes a part of the entry of that date, the same as if it had actually been entered then. "There can be no doubt that such an entry may operate so as to save proceedings which have been had before it is made." 1 Black, Judgm. § 136.

To protect the rights of the parties, however, it is necessary that the order of the court granting the plaintiff's motion should be corrected in one respect. It directs the clerk "to enter a judgment *nunc pro tunc* as of January 18, 1890." The word "January" is a palpable mistake as to the month. The action was not commenced until March 22, 1890, and the record shows beyond question that the judgment ought to have been entered December 18, 1890. The order denying the defendant's motion to dismiss the action is affirmed, and the court below is directed to amend the order granting the plaintiff's motion by striking out the word "January," and inserting in lieu thereof the word "December." As so modified, the last-named order will stand affirmed; and, there being no merit in the appeal, the appellant will not recover the costs thereof.

We concur: HARRISON, J.; GAROUTTE, J.

(97 Cal. 428)

In re WOODS' ESTATE. (No. 18,051.)

(Supreme Court of California. Feb. 27, 1893.)

LETTERS OF ADMINISTRATION—TO WHOM GRANTED—MINOR CHILDREN OF DECEASED—GUARDIAN'S RIGHT TO NAME ADMINISTRATOR.

Code Civil Proc. § 1365, names the persons to whom letters of administration shall be granted, but does not name the guardian of a minor. Section 1369 declares that a minor is not competent to serve as administrator. Section 1379 provides that administration may be granted to one or more competent persons, though not otherwise entitled to the same, at the written request of the person entitled. Section 1368 provides that, if any person entitled to administer is a minor, letters must be granted to his or her guardian, or to any other person entitled to letters of administration, in the discretion of the court. *Held*, that a written request by a guardian of the minor children of deceased that letters be granted to appellant did not confer on the latter the right to administer.

Department 2. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge.

C. M. West and George F. Bronner, public administrator, were contestants for letters of administration on the estate of James A. Woods, deceased. From an order denying the application of West, and granting letters to Bronner, the former appeals. Affirmed.

Hall & Dunn, for appellant. Johnson, Johnson & Johnson, for respondent.

PER CURIAM. C. M. West and George F. Bronner, public administrator, were contestants for letters of administration of the estate of James A. Woods, deceased.

The court made an order denying the application of West, and granting letters to Bronner, and West appeals from the order. The only heirs of said Woods, deceased, were three minor children, and appellant offered to prove that Susan Sherwood was their only appointed guardian, and that said guardian had made a written request for the appointment of said West as administrator. An objection to this evidence was sustained by the court, and appellant excepted. West founded his claim to be appointed administrator solely upon said request of said guardian. We think that the court was right in its ruling. Section 1365, Code Civil Proc., declares that administration upon estates shall be granted to some person belonging to one of ten specified classes, who shall be entitled in the order named, and the guardian of a minor is not one of the persons therein named. Section 1369 declares that a minor is not competent, or entitled, to serve as administrator. Section 1379 provides that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled." Section 1368 provides: "If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." No doubt these sections are somewhat confusing as to the point whether a minor is a "person entitled," and therefore as to whether the guardian of a minor may be granted letters. But assuming, for the purposes of this case, that the guardian herself had some right to letters, still she had such right merely as representative, or in place, of the minor. She does not come within any one of the classes of persons enumerated in section 1365 as persons to whom administration must be granted, and therefore her written request could not confer upon appellant the right to administer. The order appealed from is affirmed.

(97 Cal. 433)

SAN DIEGO SCHOOL DIST. OF SAN DIEGO COUNTY v. BOARD OF SUP'RS OF SAN DIEGO COUNTY. (No. 19,173.)

(Supreme Court of California. March 2, 1893.)

APPEAL—WHEN LIES—SATISFACTION OF JUDGMENT.

Where, in a proceeding by a school district against county supervisors to compel defendants to levy a tax for the use of plaintiff, the court gave judgment for plaintiff, and ordered defendants to levy the tax, and they thereupon complied and made the levy, defendants cannot thereafter appeal from such judgment, as it was satisfied, and its force exhausted, by defendants' compliance, and a reversal could not set aside the levy; Code Civil Proc. § 957, providing that in case of reversal the appellate court may make restitution of all rights and property lost by the erroneous judgment, so far as consistent with certain rights acquired thereunder.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the San Diego school district

of San Diego county against the board of supervisors of San Diego county. Judgment for plaintiff. Defendant appeals. Appeal dismissed.

Wm. F. Herrin, Johnson & Jones, J. E. Deakin, and Mr. Kelly, for appellant. Parrish, Mossholder & Lewis, A. G. Watson, and J. O. W. Paine, for respondent.

HARRISON, J. Motion to dismiss the appeal. The board of education of the city of San Diego presented an estimate to the board of supervisors of the county of San Diego of the amount of money needed to be raised by taxation for school purposes of the school district of the city of San Diego, and requested said board of supervisors to levy a tax upon all the taxable property in the city sufficient to raise the amount of said estimate. Whereafter the board of supervisors notified the board of education in writing that it would not levy such tax, whereupon the plaintiff herein brought this action to compel its levy. Upon the hearing the court rendered its judgment, September 26, 1892, directing the supervisors that at the time of levying the county tax of the county they levy a tax upon all the taxable property in said San Diego school district, sufficient to raise the amount required by said school district for school purposes during the year next ensuing after the first Monday in January, 1893. Upon the service of this judgment upon the board of supervisors they on the same day complied therewith, and levied the tax, as directed by the mandate of the court. On the 6th of October, 1892, the board of supervisors took an appeal to this court from the judgment that had been entered against them, and the respondent now moves to dismiss the appeal upon the ground that the judgment was satisfied before the appeal was taken, by a compliance therewith, and a levy of the tax directed by the judgment.

We are of the opinion that the motion must be granted. The defendant voluntarily complied with the mandate of the court, and the judgment was thereupon satisfied, and its force exhausted. After it had thus been satisfied, there was nothing in the judgment which the court had rendered of which the defendant could complain, or about which it could say that it was aggrieved. A reversal of the judgment would not of itself set aside the levy of the tax which had been made, nor did the appellant by its compliance with the judgment lose any property or rights of which restitution could be made in case of a reversal. Code Civil Proc. § 957.¹ The proceeding was for the purpose of compelling the defendant to perform an official duty, and not one in which it had any personal rights to be affected. By reason of

¹Code Civil Proc. § 957: "When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed."

its levy of the tax in obedience to the judgment, rights and interests of other parties have supervened, and it would be unjust to those who have acquired or lost such rights by reason of its compliance with the judgment if the appellant should now be permitted to seek a reversal of the judgment under which, by reason of its own acts, those rights and interests have been acquired. The appeal is dismissed.

We concur: PATERSON, J.; GAROUTTE, J.

97 Cal. 440

CITY OF CORONADO et al. v. CITY OF SAN DIEGO et al. (No. 19,115.)

(Supreme Court of California. March 2, 1893.)

TAXATION—LEVY—WRIT OF PROHIBITION.

A writ of prohibition will not lie, on the petition of one city, to restrain the levy of taxes for the municipal purposes of another city, from which the former has been severed, since the levy of a tax is not a judicial act.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Petition by the city of Coronado and others against the city of San Diego and others for a writ of prohibition to prevent the levy by the latter city, within the limits of the former city, of certain taxes. From an order sustaining a demurrer to the petition, petitioners appeal. Affirmed.

O. A. McConoughey and A. M. McConoughey, for appellants. William H. Fuller, for respondents.

GAROUTTE, J. This is an application for a writ of prohibition to prevent respondents from levying a tax for municipal purposes upon property situated within the corporate limits of petitioner. A general demurrer to the petition was sustained by the trial court, and the legal sufficiency of the petition is the only matter before us. After alleging the corporate existence of the city of San Diego; that the territory forming the city of Coronado was originally a portion of the city of San Diego, but had been set off, and the city of Coronado created therefrom in accordance with the requirements of the law,—the petitioner further alleged “that the city of San Diego, ever since said exclusion of said territory from its corporate limits, has without warrant of law, charter, or grant exercised the franchise of assessing, levying, and collecting taxes on and from all the territory within said city of Coronado, so excluded, for the municipal uses of the city of San Diego, and has finished the assessment for the year 1892 on the property in the said city of Coronado, and is threatening and has expressed its intention to levy taxes thereon for the municipal uses of said city of San Diego, which franchise is not conferred upon it by statute, charter, or grant; and there is no plain, speedy, or adequate remedy in the ordinary course of law,” etc. The foregoing facts form no basis for the issuance of a writ of prohibition. Prohibition is essentially jurisdictional, and therefore judicial; mandamus is pure-

ly ministerial; and when the Code of Civil Procedure declares that the writ of prohibition is the counterpart of the writ of mandate, the declaration cannot be true in its broadest sense, and to that extent it is misleading. These two writs are the counterpart of each other to the extent that one is prohibitory and the other mandatory; one acts upon the person, the other acts upon the tribunal; but beyond that they have nothing in common. *Maurer v. Mitchell*, 53 Cal. 289. It is recognized as a universal rule that the writ of mandate will issue to compel the levy of a tax, and it will issue for the reason that the act of making the levy is purely ministerial. If mandamus will issue to compel a levy because the act is ministerial, it must be conceded that prohibition will not run to restrain the levy, for it can only be invoked to restrain threatened acts which are judicial in their character. It was held in *Maurer v. Mitchell*, supra, that the writ of prohibition to which reference is made in the constitution and the statute is the common-law writ, and that it would not run to prohibit the tax collector from selling property under an alleged void assessment. In *Le Conte v. Town of Berkeley*, 57 Cal. 269, a writ was refused to restrain the collection of a street assessment upon the ground that it was not the proper remedy. In *People v. Election Commissioners*, 54 Cal. 404, it was declared that the writ would not lie to restrain a board of election commissioners from calling an election, their action not being judicial in its nature, the court further saying that whether it was legislative or ministerial was not necessary to determine. There are numerous other authorities in this state to the same effect. The levy of the tax is not a judicial act, and for the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; PATERSON, J.

97 Cal. 445

HAAREN v. HIGH. (No. 19,041.)

(Supreme Court of California. March 2, 1893.)

TAX SALE—VALIDITY—TIME FOR REDEMPTION—NOTICE OF EXPIRATION—DEED—EFFECT AS EVIDENCE—REGULARITY OF PROCEEDINGS.

1. In an action for land, the court found that plaintiff's land was sold for delinquent taxes for 1883, but the proceedings did not show that defendant, the purchaser, 30 days before the year for redemption expired, served on plaintiff a notice that the land had been sold for taxes, the amount due, and the time when the right of redemption would expire, as required by Pol. Code, § 3785, as amended by Act March 12, 1885. *Held*, that the findings showed that the right of redemption expired before the amendment requiring the notice took effect, 60 days after its passage, since the taxes referred to must be taxes payable in 1883, and since, under Pol. Code, §§ 3763-3765, 3772, requiring the first publication of the delinquent tax list to be made on or before the first Monday of February, and the sale to be completed within three weeks from the beginning of the sale, and within 28 days of the first publication, the land could not have been sold later than March, 1884.

2. In such case it was not necessary for

defendant to give the notice required by the law as amended.

3. Where, in such case, the tax collector filed with the county recorder and county clerk the affidavit of the publication of the tax list as required by Pol. Code, § 3769, it is immaterial whether the affidavit was signed by the tax collector, or by the printer of the newspaper, as required by Code Civil Proc. § 2010, since, under Pol. Code, § 3787, the deed of the tax collector is conclusive evidence of the regularity of all proceedings from the assessment to the execution of the deed.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Claus Haaren against J. E. High. Judgment for plaintiff, and defendant appeals. Reversed.

Works, Gibson & Titus, for appellant. Sylvester Kipp, for respondent.

TEMPLE, C. Defendant appeals upon the judgment roll. The action was brought to recover possession of land. Defendant denies plaintiff's title, claims title and right of possession in himself, and pleads the statute of limitations. The case was tried without a jury, and the court found, as facts, that plaintiff acquired title to the demanded premises in June, 1882; that on the 7th day of July, 1885, the tax collector of San Diego county, where said property is situated, executed to defendant four tax deeds, being one for each lot described in the complaint. The deeds were executed in the proceedings for the collection of delinquent state and county taxes for the year 1883, under the provisions of the Political Code, but did not show that any notice of redemption was given, as required by section 3785 of the Political Code,¹ as amended in 1885. The deeds were recorded by defendant on the day of their execution, and defendant has ever since claimed to be the owner of the lots, has paid all taxes levied upon them, and in 1886 inclosed the entire property by a fence.

It is contended by plaintiff and respondent that the deeds are void because no notice was given as required by the section above cited. To this it is replied that the time for redemption had expired before section 3785 was amended so as to require notice. Therefore, no such notice was required in this case. *Rollins v. Wright*, 93 Cal. 395, 29 Pac. Rep. 58.

But it is again contended that it does not appear that the full year allowed for redemption had expired, for the reason that the finding does not state when the sale was made for taxes. Admitting that in such case the burden would be on defendant to show that such notice was not required, I think the fact is made to appear by unavoidable inference from the

facts which are stated. The amendment was made to the Political Code, so as to require that such notice be given, March 12, 1885. The property was sold by the tax collector in the proceedings for the collection of the taxes for 1883. There is no such fiscal year, but the finding must be understood as referring to the taxes levied, for which assessment is made and which are payable in that year, and which became a lien upon property on the first Monday of March, 1883. The tax collector was required to publish the delinquent tax list on or before the first Monday in February. Sections 3764, 3765, Pol. Code. The sale of property delinquent for taxes must commence not later than 28 days after the first publication, (section 3768, Pol. Code,) and be completed within three weeks after the day first named for the commencement of the sale, (section 3772, Pol. Code.) The sale, therefore, as is shown by the facts found, could not have been later than March, 1884. Section 3785 was amended so as to require the notice March 12, 1885, and took effect 60 days thereafter, to wit, April 15th. The time of redemption, therefore, had fully expired before the law took effect as amended.

It is claimed that the deed is void because the tax collector did not file with the clerk and recorder of the county the affidavit required by section 3769 of the Political Code. The findings show that an affidavit in full accord with the provisions of that section was filed, but it was the affidavit of the tax collector. This is objected to because section 2010, Code Civil Proc., provides that evidence of the publication of a notice required by law to be published in a newspaper may be furnished by the affidavit of the publisher, or his principal clerk. It is not necessary to determine which is the proper mode of proving the publication, for the reason that the deed is conclusive that the proper proof was made. Section 3787, Pol. Code; *Rollins v. Wright*, supra. I think the judgment should be reversed, and the lower court directed to set aside the judgment entered, and to enter judgment for the defendant on the findings.

We concur: BELCHER, C.; VANCILIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to set aside the judgment entered, and to enter judgment for the defendant on the findings.

97 Cal. 454

OWENS et al. v. COLGAN, Comptroller, et al. (No. 18,055.)

(Supreme Court of California. March 6, 1893.)
ISSUANCE OF MANDAMUS — SUBSEQUENT APPLICATION FOR LEAVE TO INTERVENE.

Where, on petition, a writ of mandate has issued compelling the state comptroller to draw a warrant on the state treasurer in favor of petitioners for a sum of money, which has been done, and the amount paid, a motion subsequently made by a third person to set aside the judgment and allow a complaint of intervention to be filed will be denied, because as

¹This section provides that the purchaser of a tax title shall, 30 days previous to the expiration of the time for redemption, or 30 days before he applies for a deed, serve on the owner or occupant of the land a written notice that the land has been sold for taxes, the amount due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and providing, further, that till such notice is given the owner shall have the right of redemption, indefinitely.

rule interventions cannot be allowed after final judgment, and also because, after the money has been paid, an intervention could not benefit the intervener.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin Judge.

Petition by one Owens and others against one Colgan, comptroller, for a writ of mandate. The writ was issued and the money paid, and afterwards J. M. Wood moved to set aside the judgment, and for leave to file a complaint of intervention. From an order denying his motion, said Wood appeals. Affirmed.

Clinton L. White, for appellant. Johnson, Johnson & Johnson, for petitioners. W. H. H. Hart, Atty. Gen., for respondent.

PER CURIAM. Owens Bros. filed a petition in the superior court for a writ of mandate to compel Colgan, as state comptroller, to draw a warrant in their favor upon the state treasurer for a certain sum of money. An alternative writ was issued, and on the return day, July 31, 1891, Colgan filed a demurrer to the petition, which having been overruled, the court made its findings, and ordered judgment for petitioners as prayed for. On the next day, August 1, 1891, judgment was entered, and a peremptory writ was issued, and on that day the amount of the warrant was paid to petitioners by the state treasurer. Afterwards, on August 29, 1891, Wood served on petitioners and respondent a notice of motion to set aside the judgment, and for leave to file a complaint of intervention. The motion was afterwards heard, and the court made an order denying it, and from that order Wood appeals.

Appellant complains that he was seduced into delaying his application to intervene in the mandamus proceeding by the representation of Hart, attorney for respondent, that it would not be heard as soon as it was; and it is difficult to see how the petitioners for the writ of mandate could be bound in any way by the representations of the attorney of respondent. But, however that may be, the order must be affirmed. In the first place, the general rule is that an intervention cannot be allowed after final judgment. Section 887, Code Civil Proc.; *Carey v. Brown*, 58 Cal. 180; *Laugenour v. Shanklin*, 57 Cal. 70. In the second place, since the comptroller has obeyed the writ, and the warrant issued by him has been paid, it would be a vain thing to vacate the judgment, or allow appellant now to intervene; and such a proceeding would not benefit him in the least. The order appealed from is affirmed.

97 Cal. 448

PEOPLE v. SAMONSET. (No. 20,932.)

(Supreme Court of California. March 6, 1893.)

SEDUCTION—CRIMINAL PROSECUTION—CHARACTER OF PROSECUTRIX—EVIDENCE—PROMISE OF MARRIAGE—INSTRUCTIONS.

1. In a prosecution for seduction, testimony of a witness that the prosecutrix had lived with her for two years, and during that time was a woman of good character and good repute,

was admissible as tending to establish the previous chaste character of the prosecutrix.

2. In a prosecution under Pen. Code, § 268, providing for the punishment of "every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character," defendant's good faith in making the promise of marriage at the time of committing the offense is immaterial.

3. On the cross-examination of defendant it was proper to read in evidence an affidavit made by him in support of a motion for a new trial in a civil action formerly brought against him by prosecutrix, when such affidavit tends to contradict his testimony on his examination in chief.

4. Defendant asked the court to instruct the jury that, if they found that prior to the alleged seduction the prosecutrix committed lewd and immodest acts, and did not deport herself as a virtuous woman should, she was not at the time of the alleged seduction a female of previous chaste character, even though it should appear that she did not actually have illicit intercourse. *Held*, that this was properly refused, as being a charge on matters of fact, which the judges are forbidden to give by Const. art. 6, § 19.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Miguel Samonset was convicted of seduction, and appeals. Affirmed.

Stephen M. White and F. H. Howard, for appellant. W. H. H. Hart, Atty. Gen., for the People.

BELCHER, C. The defendant was charged with the crime of seducing an unmarried female of previous chaste character under promise of marriage. He was tried and convicted, and the judgment was that he pay a fine of \$1,000, and, if not paid, that he be imprisoned in the county jail one day for every \$2 thereof until it is satisfied. The appeal is from this judgment and an order denying defendant's motion for a new trial. It is argued for appellant that the court below committed several prejudicial errors in its rulings upon the admission of evidence, and also in its refusal to give to the jury certain instructions asked, and hence that the judgment should be reversed.

The prosecutrix testified, in substance, that she first became acquainted with defendant in March, 1890, and that on the 16th of October following he promised to marry her, and to have the marriage ceremony performed on the 5th of November; that immediately after the engagement he went to the church, and spoke to the priest about it, and had the bans published three times, the first publication being on the 19th of October; that, on the 22d of October, defendant called to see her, and then told her that he was like her husband and she was like his wife, and that he loved her and no one else, and was certainly going to marry her on the 5th of November, and had a right to do everything he wanted with her; that she loved him, and believed everything he said, and then allowed him to have sexual intercourse with her, and that but for his promises and persuasions she would not have done so; that on the 5th of November he postponed the marriage until the 15th of the same month, and then failed to appear, and

went off to France, and was gone till August of the next year. She also testified that she had never been married, and had never had sexual intercourse with any other man, and never with the defendant except upon the one occasion above mentioned. One Slatrì was next called as a witness by the prosecution, and testified that he had known the prosecutrix for one or two years, and had roomed in the house where she was employed, and had never known of any improper conduct on her part. This evidence was objected to by the defendant as immaterial and irrelevant, and it is urged that it did not appear that the witness had had opportunities for observation sufficient to qualify him to testify. The objection was overruled, and, we think, properly. The prosecution next offered to prove by a Mrs. Maxwell that the prosecutrix had lived with her for two years, and during all that time was a woman of good character and good repute. This evidence was objected to by the defendant, so far as it related to the prosecutrix's good reputation, upon the ground that it did not tend to establish her "previous chaste character." The objection was overruled, and in this ruling we see no prejudicial error. It was incumbent upon the prosecution to prove that the prosecutrix was a woman of previous chaste character, and the offered evidence, in connection with her own testimony, seems clearly to tend in that direction.

In making his defense, the defendant claimed and offered to prove that at the time of his engagement to marry the prosecutrix he was sick and suffering from chronic liver complaint, and in such a condition as to inhibit him from marrying with safety; that he was advised by his physicians to take a sea voyage, and in pursuance of their advice he left and went to France, his native country; that the prosecutrix knew of his condition, and that all his actions with her were in good faith; and hence his failure to carry out his engagement was excusable. And in support of this theory he asked the court to instruct the jury as follows: "If you find from the evidence that the defendant had sexual intercourse with the prosecutrix, as testified by her, and that at the time he had such intercourse he intended to marry her, and stated to her in good faith what he believed to be true, and made no representations of any kind, directly or indirectly, to her which he did not then and there in good faith believe to be true, and did not in any way deceive her, and intended at such time to fully carry out all his promises, then the court charges you that no offense was committed." The court refused to admit most of the offered evidence, and refused to give the instruction asked, and these rulings are assigned as error. The promise to marry, and the intercourse, at the time and under the circumstances stated by the prosecutrix, were practically admitted by the defendant, and he simply sought to escape the consequences by proving that when he made the promise he intended in good faith to carry it out. The offense charged is defined in section 268 of the

Penal Code as follows: "Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable," etc. And the next section provides: "The intermarriage of the parties subsequent to the commission of the offense is a bar to a prosecution for a violation of the last section; provided, such marriage take place prior to the finding of an indictment or the filing of an information charging such offense." Under these sections we do not think that defendant's good faith was a matter of any consequence in determining as to his guilt or innocence. If under and by means of his promise of marriage he induced the prosecutrix to surrender her chastity to him, and then refused to fulfill his promise, the offense was committed, whatever his intentions may have been when such promise was made; and a subsequent marriage would not have prevented a conviction, unless it took place before the information was filed. There was no error, therefore, in the rulings complained of under this head.

In connection with the cross-examination of defendant, the prosecution read in evidence an affidavit made and used by him upon a motion for new trial in a civil action instituted against him by the prosecutrix. This affidavit referred to accompanying affidavits made by Patrick O'Neal and Web Smith. The defendant objected to his affidavit being read, and the objection was overruled. He then offered to read the affidavits of O'Neal and Smith, but, on objection by the prosecution, they were excluded. It is argued that both of these rulings were erroneous, but we think them proper. The affidavit of defendant tended to contradict in some respects his statements on his examination in chief, and the affidavits of O'Neal and Smith were clearly inadmissible for any purpose. But, if otherwise, the makers of them were both in court, and were called and examined by defendant as witnesses.

To prove that the prosecutrix was not a woman of previous chaste character, the defendant testified that he had sexual intercourse with her several times prior to his engagement to marry her, and he also called other witnesses to testify that in the summer and fall of 1890 she lived in a house of bad repute, and to which prostitutes resorted at night, and that she had on several occasions committed immodest acts, and deported herself as a lewd woman. This testimony was all objected to by the prosecution, so far as it related to acts subsequent to the alleged seduction, and excluded; and in rebuttal the prosecutrix positively denied that she ever had sexual intercourse with the defendant prior to October 22d, and also denied most of the statements of the other witnesses as to her immodest acts. In support of his theory upon this point the defendant asked the court to instruct the jury as follows: "If you find from the evidence that immediately before and up to the time of the alleged seduction the prosecutrix resided in a house of bad character, and which was then habitually resorted to by lewd and lascivious people, you

have a right to take such facts into consideration, as tending in some degree to show that the prosecutrix was not at such time a person of chaste character." "If you find from the evidence that prior to the alleged seduction the prosecutrix committed lewd and immodest acts, and did not deport herself as a virtuous woman should, then the court instructs you that, in that event, she was not at the time of the alleged seduction a female of previous chaste character, even though it should appear that she did not actually have illicit sexual intercourse; and if you so find, the defendant must be acquitted." The first of these instructions was given, and the last refused, and this refusal is assigned as error. The constitution declares that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Article 6, § 19. The instruction refused was clearly upon matters of fact, and, if given, it would have been in contravention of this provision of the constitution. Courts have no right to instruct juries on controverted facts, nor on the weight of evidence. The refusal was, therefore, not error.

The defendant also asked the court to give this instruction: "You should remember that all presumptions in this case are in favor of the innocence of the defendant, and that there are no presumptions in favor of the innocence of the prosecutrix." The instruction was refused, but the court had already in another instruction, asked by defendant, stated to the jury very clearly and fully the law upon this subject. There was no error, therefore, in refusing to state it a second time.

Some other minor points are made, but they do not, in our opinion, require special notice. After carefully going over the record, we find no prejudicial error calling for a reversal, and therefore advise that the judgment and order be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 814)

WILEY v. CALIFORNIA HOSIERY CO.
(No. 14,386.)

(Supreme Court of California. March 6, 1893.)

CONTRACT OF EMPLOYMENT—EVIDENCE—TRAVELING SALESMAN—DISCHARGE—MEASURE OF DAMAGES—JUSTIFICATION—CUTTING PRICES—USAGE.

1. A written proposition by defendant to plaintiff recited that "we will pay you a commission of 7½ per cent. on all orders taken by you and shipped by us between this date and October 31, 1887. You are not to pay out any money or contract any obligation of whatever nature for us, nor represent us in any legal proceeding of any kind or in any place, unless specially authorized in writing so to do. Your duty to us is to take orders for our goods. We reserve the right to decline such orders as we may not want to fill;" and the same was orally accepted by plaintiff. *Held*, in an action by plaintiff for a wrongful discharge, that oral evidence was inadmissible to change or enlarge the terms of the contract thus made, except as to matters necessarily implied in it or necessary to its performance.

2. In such action plaintiff is not entitled to recover the specified commission on the amount of goods sold by other salesmen for defendant in territory in which plaintiff claimed the exclusive right to sell for it, since he had not such privilege under the contract.

3. The fact that plaintiff, for three years preceding such contract, had solicited orders for defendant in such territory, would not entitle him to such privilege, and evidence of such fact is inadmissible.

4. In such action plaintiff admitted that he took orders at prices below those given to him by defendant, and without its express permission, and that, when he told defendant's secretary that he could not get such prices of certain persons, he said, "You have got to get these prices for the goods, or else not sell them, and the goods have to bring that price this year." The evidence showed that defendant wrote plaintiff several times protesting against his taking orders at cut prices, and finally wrote him that "we will have no man working for us in any manner who will not take our instructions. Because you have been with us a long time, we again give you your choice of doing as we want you to do, or return our samples and reference book;" and that plaintiff replied that "you have been the only violators of the contract, and I defy you to show a point wherein I have not fulfilled it to the letter. In your letter of July 7th, you state I may consider myself no longer in the employ of your company. I consider a full discharge." *Held*, that plaintiff voluntarily quit defendant's employ, rather than comply with reasonable instructions, and the evidence did not support a verdict for plaintiff.

5. An instruction in such case that, if the jury found for plaintiff, they should find the amount of defendant's goods plaintiff would have sold during the remainder of his term of employment, and allow 7½ per cent. thereon, is erroneous, since it fails to take into account plaintiff's expenses, which should be deducted therefrom.

6. In such action plaintiff testified that he told defendant's secretary that he could not sell their goods alone for less than 10 per cent., and the former promised him a side line of flannels; that "I said that is just what I wanted, and on the strength of that we entered into this contract. I told him I was to have a line of gloves in connection with defendant's goods." *Held*, that plaintiff was not entitled to recover for commissions that he would have made on the sale of gloves during the remainder of his term of employment, in the absence of any other evidence of a contract with defendant in relation thereto.

7. In such action evidence of a usage by which plaintiff was allowed, in his discretion, to make reductions within certain limits from the list price, in so far as the same was inconsistent with the written agreement and positive instructions of defendant, was inadmissible.

8. In such case the rule for estimating the amount of sales plaintiff would have made during the remainder of his term of employment should be based on the sales made during the part of the term which had expired at the time of the discharge, modified by the facts as to whether the sales would be greater or less during the early or later period.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene Garber, Judge.

(Not to be published in California Reports.)

Action by Thomas Wiley against the California Hosiery Company to recover damages for a wrongful discharge of plaintiff as defendant's traveling salesman.

From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

P. Reddy and W. H. Metson, for appellant. S. H. Regensburger and P. F. Dunne, for respondent.

HAYNES, C. Action to recover damages for an alleged breach of contract. A jury trial was had, and the plaintiff obtained a verdict and judgment for \$1,000 damages. The appeal is from this judgment and an order denying defendant's motion for a new trial. The complaint alleged that on February 10, 1887, plaintiff and the defendant (a corporation) mutually agreed that plaintiff should serve the defendant from that date until October 31, 1887, as a traveling salesman to sell and take orders for defendant's goods, for which plaintiff was to receive a commission of $7\frac{1}{2}$ per centum, and pay his own expenses; that, as a further inducement, defendant was to give plaintiff the exclusive right to sell its goods in Utah, Colorado, Nebraska, Wyoming, New Mexico, and Kansas; and, as breaches of this agreement, plaintiff alleged that in May, 1887, defendant, while plaintiff was faithfully discharging his duties, sent another salesman to Salt Lake City and Ogden, in Utah, who made sales in those places amounting to \$2,500, and that on July 1, 1887, the defendant wrongfully discharged plaintiff; that thereby he was prevented from selling at least \$20,000 of defendant's goods; and, as another element of damage, plaintiff alleged that, as part of his said agreement and of the consideration thereof, defendant agreed that plaintiff should have the privilege of carrying for sale a line of gloves manufactured by another house, upon which he was to receive 10 per centum commission, he paying his own expenses, but that he could not carry the gloves alone to make a profit or cover expenses; and that by his discharge he was prevented from selling gloves to the amount of \$3,000, and demanded judgment for his commission on the \$2,500 sold by another in Utah, and upon the \$20,000 of defendant's goods he could have sold during the remainder of his term of service, at $7\frac{1}{2}$ per centum, and upon the prospective sale of gloves, at 10 per centum,—in all \$1,987.50. The answer of defendant specifically denied each material averment of the complaint, and for a further answer set out the written proposal of defendant to plaintiff for his employment, and under which he entered defendant's service, and which is as follows: "Oakland, California, Feb. 10, 1887. Thomas Wiley: We will pay you a commission of $7\frac{1}{2}$ per cent. on all orders taken by you and shipped by us between this date and October 31, 1887. You are not to pay out any money or contract any obligations of whatever nature for us, nor represent us in any legal proceeding of any kind or in any place, unless specially authorized in writing so to do. Your duty to us is to take orders for our goods. We reserve the right to decline such orders as we may not want to fill. California Hosiery Co. John Williams, Secretary."

The answer further alleged that plaintiff accepted the proposal and entered upon said employment the same day, and was furnished by defendant with samples and a list of the prices at which he should sell defendant's goods; that in May and June, 1887, plaintiff took orders at reduced prices, whereupon defendant notified him that, unless he would promise in writing to be governed by the price lists, he should quit defendant's service; that he did not inform defendant that he would be governed by such price lists, but, on the contrary, notified defendant that he would quit its service; and that the contract between them was ended July 17, 1887. A great many exceptions were taken by defendant to adverse rulings upon the admission of testimony, and to instructions to the jury given and refused; and it is also specified that the verdict is not justified by the evidence in several particulars. It is not necessary to notice these specifications in detail. The discussion of some of the controlling questions must suffice.

The verdict in favor of plaintiff must have been based on a finding that plaintiff was wrongfully discharged. It is true that it is alleged in the complaint that defendant violated the agreement by sending another man into his territory, and taking orders to the amount of \$2,500. This occurred in May, and plaintiff's letter to defendant dated May 21st showed that he then had knowledge of the sales made by Deane in Utah, but plaintiff continued in the service of defendant after the knowledge of this alleged violation of the agreement until July. Besides, this violation of the agreement, if it were such, was capable of exact compensation; and, as it was not alleged or claimed that such violation was continued or threatened to be continued, it could form no just excuse for the abandonment of the contract by plaintiff. But we do not find in the record any evidence which would justify a finding that plaintiff was to have the exclusive right to sell in the states and territories named. It is conceded by plaintiff that nothing was said upon that subject at the time the agreement was made, but it is said that, for three years preceding, plaintiff had solicited orders in those states and territories for defendant, and it seems to have been assumed by plaintiff that he was to have the exclusive right in those states and territories in 1887. The evidence, however, in relation to this matter could only be material as tending to support the charge that defendant had violated its agreement. As this agreement was in writing, we think no oral testimony could be received to change or enlarge its terms, at least in matters not necessarily implied in it, or necessary to its performance by either party. The verdict of the jury must therefore be sustained, if at all, upon the assumption that plaintiff was wrongfully discharged by defendant; and upon this point it is clear the verdict of the jury cannot be sustained. It is admitted by plaintiff that he took orders at prices below those given to him, and without express permission from the defendant. He claims, however, that the reductions made upon certain orders were

made under and in accordance with a usage of defendant by which he was allowed to use his discretion, within certain limits, to make reductions from the list prices upon certain orders for more than a specified quantity of particular kinds of goods. He testified that he knew, as matter of fact, in 1887, when A 1, six of the same kind in a box, were sold, the course of business was to give the buyer 50 cents reduction; but he testified that at the time of the agreement of February 10th he said to Williams, "I won't be able to sell these goods in Wyoming to B. Hellman & Co. at the advanced figures." Mr. Williams said: "You have got to get these prices for the goods, or else not sell them, and the goods have to bring that price this year." He further testified "that it meant the price of every article to be sold by him,—for which he should sell it only as modified in writing or some way in a proper communication." The witness further testified that all he had stated concerning usage was based upon a memorandum in writing, written by Mr. Williams in a little book which he received in 1885. Shortly after plaintiff entered upon defendant's employment he was expressly authorized, in writing, to cut prices within certain specified limits on two classes of goods; but plaintiff conceded that he had no instructions to cut on other goods. The instruction was: "When strictly necessary, you may cut A 1 and 1,995 to \$18.00; but the twenty gauge must be held where they are, at \$16.50." He admitted that he cut A 1 to \$18, 2-12 in a box, and to \$17.50, 6-12 in a box, (six of one size in a box;) that the writing was in English, and that he understood it to cut to \$18, and regarded it as the positive instruction of his employer to cut to \$18, and no more; that he had no instructions to cut on 1,995, but that he cut that number from \$16.50 to \$16, 6-12 in a box, but admitted he did not know of 1,995 ever being out in 6-12 boxes. We can see from the testimony of plaintiff no evidence of usage justifying a departure from the list prices given him by defendant. Indeed, his own testimony showed that he was never at any time authorized to make changes in prices because of any usage. The very fact upon which he relies to establish a usage was based upon a written instruction in 1885. This instruction was not renewed in 1887, but, on the contrary, he admits that he was informed at the time of his employment that the goods that year must bring the prices marked, and these instructions he admits were positive and clearly understood. We therefore conclude that there was no evidence of usage or otherwise which justified the defendant in cutting prices upon any of these goods, except as to the two classes named in defendant's letter of March 24th, which specified distinctly the extent to which, as well as the circumstances under which, such reductions might be made.

On June 11th defendant wrote plaintiff, among other things saying: "Where is your authority for cutting prices? We have written to B. Hellman that we will not fill his order except at regular prices. You are the only salesman who finds it

necessary to cut. If you cannot get an order without cutting, do not hurt yourself and us by cutting the price, and then having us to reject the orders for that reason. * * * You must get full prices, or else you must give up. We will not send you any more samples until you notify us that you will not cut prices without authority. If you do not do that, please send us our samples by freight at once." In another letter, written the same day by defendant to plaintiff, it was said: "You cut prices again to J. E. Miller and to Myers & Nessly, of Lincoln, Nebraska. We will not fill the orders except at the regular prices given you. We must reiterate, prices must not be cut. Our goods can be sold in your territory without cutting. If you do not sell them we will do it ourselves, but we will do nothing until you have had an opportunity to decide whether you will return the samples or not. July 1st will be the end of our limit." On July 7th defendant wrote plaintiff acknowledging receipt of five orders, and calling plaintiff's attention to the fact that he had not answered defendant's letters of June 11th, and added: "We wrote you then that you would have until July 1st to decide whether you would return our samples, or promise to stop cutting prices. You have neither returned the samples nor written a line in answer to the letters. We do not, therefore, consider that you are now in any manner in our service." Following these letters we find in the record a letter from plaintiff to defendant, bearing date Salt Lake City, July 11, 1887, but evidently written at a much later date, saying: "Your letters of June 11th and also letters of July 7th were received, and contents noted. To answer them fully and satisfactorily to you and myself, it would, according to my judgment, require a personal interview, which I trust will take place on early date. * * * I shall not, in opposition to your wishes, take any orders here until I fully hear from you." On July 15th defendant wrote plaintiff, in reply to plaintiff's letter above mentioned, advising him that it was not necessary to have a personal interview, and again saying that he had been cutting prices without authority, and that, when written to about it, had not said a word one way or the other, and added: "For such an offense as this, we would discharge any man working on a salary. It is something that we cannot permit, and we know that it is not necessary. * * * We do not like this uncertainty, and it puts us to a great deal of trouble to make new arrangements. We will have no man working for us in any manner who will not take our instructions. Because you have been with us a long time, we again give you your choice of either doing as we want you to do, or return our samples and reference book." To this letter plaintiff replied under date of August 2nd, and, after discussing the matter of cutting prices, and the sales made by Deane at Salt Lake City and Ogden, said: "You have been the only violators of the contract, and I defy you to show a point wherein I have not fulfilled it to the letter. In your letter of July 7th

you state I may consider myself no longer in the employ of your company. I consider a full discharge." It is perhaps immaterial, so far as the merits of the case are concerned, whether plaintiff was discharged by defendant, or he preferred to quit defendant's employment, rather than to give any assurance that he would not disobey their positive instructions. We think it is clear, however, that the circumstances fully justified the defendant in discharging plaintiff; but that, notwithstanding the defendant's language in its letter of July 7th, that "defendant did not consider himself longer in their employ," the subsequent letter again renewed the offer to continue in their service upon his complying with their request. That request being reasonable, under the circumstances, we are led to conclude that the plaintiff voluntarily, and without sufficient reason, quit the defendant's employment. We conclude that the evidence is not sufficient to justify the verdict, and that the motion for a new trial should have been granted. We also think the verdict was against the instructions of the court, as given in the 3d, 4th, 6th, 8th, and 9th instructions given at defendant's request.

As we cannot assume that upon a new trial the evidence will be the same upon the question of defendant's liability, it is necessary to notice briefly the question of damages. The court instructed the jury as to the measure of damages substantially that, if they found for the plaintiff, they should find the amount of the defendant's goods plaintiff would have sold during the remainder of his term of employment, and also the amount of gloves he would have sold during the same time, and allow $7\frac{1}{2}$ per centum on the former and 10 per centum on the latter. These instructions, as given, were clearly erroneous. Under the terms of his employment, plaintiff was to pay his own expenses. What he would have earned, therefore, would have been the amount of his commission upon the sale of defendant's goods effected by him, so far as the same were accepted and shipped by defendant, less the amount of his expenses incurred in securing orders. No reference is made anywhere in the charge of the court to these expenses. If the plaintiff voluntarily quit the defendant's employ, under circumstances justifying such course, or was wrongfully discharged, he would have been entitled to the same compensation for the remainder of his term of employment that he would have realized if he had continued in their employment, and no more. We cannot assume that he continued to incur expenses, and charge the defendant therewith, after he had quit soliciting orders. To do so would virtually change the terms of the employment to a commission of $7\frac{1}{2}$ per centum and all expenses paid by the defendant.

In relation to the commission charged upon the prospective sale of gloves during the remainder of his term of employment, we do not think defendant can be charged therewith. Plaintiff agreed to sell defendant's goods for the commission named in the memorandum of agree-

ment. There is no stipulation that he should represent others, nor that plaintiff made that a condition of entering the service of defendant. Plaintiff testified: "I told him [Williams] that I could not sell his goods for less than ten per centum,—not his goods alone; but, if he would give me a side line of flannels, I could perhaps do it for seven and one half per centum. He would not give me ten per centum, and he promised me a side line of flannels, besides their knit goods, for that territory, which I carried the year previous. Mr. Williams replied, 'We are going to sell California flannels in Colorado this year.' I said that is just what I wanted, and on the strength of that we entered into this contract. I told him I was to have a line of gloves in connection with defendant's goods." This last remark is all that appears to have been said by either party in relation to gloves, and it clearly appears that, as defendant agreed to furnish him with a side line of flannels, which they had not theretofore sold, he was satisfied with the amount of commission to be paid to plaintiff. That it was to plaintiff's advantage to carry this additional line of gloves there is no question; but, clearly, the defendant is not liable to the plaintiff for profits the plaintiff might have realized in serving others, when such extra service did not enter into the contract between the parties. We think the testimony in relation to the gloves, as well as that in relation to the amount of sales made in former years, and as to usage, so far as such usage was inconsistent with the written agreement and positive instructions given plaintiff by defendant, was improperly received. We further think that the true rule for estimating the amount of sales which would have been made of defendant's goods during the remainder of the term of employment should be based upon the sales made during that portion of the period of employment prior to the termination of it, modified, if the facts justified it, by evidence as to whether ordinarily the sales would be greater or less during the early or later period of employment. We think the judgment and order appealed from should be reversed, and a new trial granted.

We concur: BELCHER, C.; VAN-CLIEF, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

DE HAVEN, J. I concur in the judgment.

(3 Cal. Unrep. 824)

WEYERS v. ESPITTALIER et al. (No. 19,010.)

(Supreme Court of California. March 6, 1893.)

APPEAL—WEIGHT OF EVIDENCE.

A verdict will not be disturbed on appeal where the evidence is conflicting.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

(Not to be published in California Reports.)

Action by Wilhelmine Weyers against Joseph Espittaller and Martin G. Aguirre to enjoin a sale under execution. From a judgment for plaintiff, and from an order refusing a new trial, defendants appeal. Affirmed.

W. T. Williams, for appellants. Guthrie & Guthrie, for respondent.

TEMPLE, C. Appeal from the judgment, and an order refusing a new trial. This action was brought to enjoin a sale under an execution against one Elise Deste, the daughter and grantor of the plaintiff. Espittaller, the judgment creditor, is made defendant with the sheriff. The answer justifies the attempted sale on the ground that the deed to plaintiff was without consideration, and was made to hinder, delay, and defraud the creditors of Elise Deste, and particularly the defendant Espittaller. The case was tried with a jury, which rendered a verdict in favor of the plaintiff. The question raised on the motion for a new trial is as to the sufficiency of the evidence to sustain the verdict. There was evidence which plainly tended to sustain it in every respect. Appellants contend that the evidence shows a state of things which would either make the plaintiff, her son-in-law, and her daughter partners in the transactions in which the indebtedness of Elise Deste was incurred, or that Elise Deste transacted the business for and as the general agent of plaintiff, and therefore plaintiff is herself directly responsible for the indebtedness. Conceding that such an issue is tendered in the answer, and that such facts would constitute a defense to this action, the most that can be claimed for it is that there is much evidence which tends to support such defense. But there is also much which tends to support the other theory, that a large portion of the money invested by Elise Deste was received from her mother as a loan, and that the investments were made by the daughter in her own name and on her own account. The jury found in favor of the latter hypothesis, and we cannot disturb the verdict. A careful examination of the alleged errors occurring at the trial discloses none injurious to appellant. The judgment and order should be affirmed.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 825)

PEOPLE v. HAMILTON. (No. 14,636.)

(Supreme Court of California. March 6, 1893.)

PUBLIC OFFICER—REFUSAL TO PAY OVER MONEY TO SUCCESSOR—INDICTMENT—SUFFICIENCY.

1. Pen. Code, § 950, provides that an information must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." *Held*, that an information, which alleged that defendant, "having theretofore" been a county clerk, and "charged with the receipt, safe-keeping, transfer, and disbursement of public moneys, in his

official capacity as such clerk and officer, and his official term * * * having expired, * * * and there then and there remaining in his hands certain public moneys theretofore received by him in his official capacity as such clerk," he willfully omitted to pay them over to his successor, the demand therefor "having then and there been made of" defendant by his successor, sufficiently charged that defendant, as county clerk, received money as such officer, and failed to pay it over to his successor; and the use of the participle instead of the past tense of the verb did not make the allegations mere recitals.

2. Pen. Code, § 426, declares that the phrase "public moneys" includes all money received or held by county officers in their official capacity. *Held*, that an allegation that moneys were received by defendant "in his official capacity" was the allegation of a fact which fixed their character as "public moneys."

3. The allegation that defendant received the money in his official capacity was sufficient, without referring to the statute under which the information was drawn, or to any statute which created a duty, the antecedent existence of which constituted a factor connected with the offense; the general conclusion of the information, "contra formam statuti," being sufficient.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

(Not to be published in California Reports.)

M. D. Hamilton was convicted of omitting and refusing to pay over to his successor in office moneys received by him as county clerk. From an order arresting the judgment, the people appeal. Reversed.

Wm. H. H. Hart, Atty. Gen., for the People. Johnstone Jones, Dist. Atty., E. W. Hendricks, and Copeland & Daney, for respondent.

HAYNES, C. The respondent was tried and found guilty of omitting and refusing to pay over to his successor in office moneys received by him as county clerk. On the day fixed for passing sentence, the defendant moved for a new trial, and also in arrest of judgment. The motion for a new trial was heard, but not disposed of, and the court granted an order arresting the judgment; and from this order the people appeal.

The information was drawn under subdivision 10 of section 424 of the Penal Code, which provides: "Each officer of this state, or of any county, * * * and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who willfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law to pay over the same, is punishable," etc. The information, omitting the title and conclusion, is as follows: "M. D. Hamilton is accused by the district attorney of the said county, by this information, of the crime of omitting and refusing to pay over money received by him under duty imposed by law to pay over the same. Committed as follows: The said M. D. Hamilton, on the 5th day of January, A. D. 1891, at the said county of San Diego, and before the filing of this information, having theretofore, for the two years immediately preceding, been an offi-

cer of said county, to wit, the clerk of the county of San Diego, and an officer charged with the receipt, safe-keeping, transfer, and disbursement of public moneys in his official capacity as such clerk and officer, and his official term as such clerk and officer having expired by limitation of law, and there then and there remaining in his hands certain public moneys theretofore received by him in his official capacity, as such clerk, during the said official term as aforesaid, the sum of four thousand four hundred and twenty-two and thirty-six one hundredths dollars, money of the United States of America, and it being his duty imposed by law to transfer and pay over to his successor in office in the office of county clerk of said county, one W. M. Gassaway, he, the said M. D. Hamilton, did willfully, unlawfully, fraudulently, and feloniously omit and refuse, neglect, and fail to pay over the said sum of money to the said W. M. Gassaway, he, the said Gassaway, being then and there the clerk of said county as aforesaid, and being the officer and person authorized by law to demand and receive the same as the successor in the office of said county clerk to said M. D. Hamilton; the demand for the transfer and payment of the said sum of money having then and there been made of the said M. D. Hamilton by the said W. M. Gassaway, clerk of said county and successor in the said office as aforesaid; the said omitting and refusing, neglecting, and failing to transfer and pay over the said money and moneys being contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California." The ground relied upon by the defendant, and upon which the court arrested the judgment, is that the information does not substantially conform to the requirements of sections 950-952 of the Penal Code. It is contended that the information is not "direct and certain, as it regards the party charged, the offense charged, and the particular circumstances of the offense charged;" this being, it is argued, one of the cases where the particular circumstances of the offense must be set forth by allegations that are direct and certain. The points urged are that there is no definite or certain allegation that the defendant was county clerk during the time named, nor that moneys remained in his hands, nor that the moneys were public moneys; that these matters are not allegations of fact, but mere recitals.

It may be conceded that the mode adopted by the pleader in stating these facts is not the best that could have been devised, but that is not required by the Code, nor is there any standard by which the degree of certainty in criminal pleading is to be measured, save that provided by the Code. Section 950 of the Penal Code provides that the information must contain: "(2) A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." We think that no one of common understanding

could fail to know what was intended by the language used, and, besides, it would seem to be the natural and ordinary mode of expressing the fact intended. No better illustration of this can be given than that furnished by the learned counsel for respondent in the opening sentence of their brief, in giving a statement of the case for the information of this court. It is as follows: "The respondent having been the county clerk of the county of San Diego, and his term of office having expired, and he having failed to turn over certain moneys," etc. Besides, the fact that he was clerk of the county, and had received money which it was his duty to turn over to his successor, was not an offense, nor any part of the offense. The offense consisted of the omission or refusal to turn it over to his successor; and though without the pre-existence of the fact that he was such clerk, and had received such money, he could not commit the offense, such pre-existing facts are matters of inducement, which, though required to be distinctly stated, need not be charged with the directness of the specific act which converts the innocent person into a criminal one.

The objections to the information upon which the learned judge sustained the motion in arrest of judgment were that the facts that the defendant was an officer, and had received and had in his hands the moneys mentioned, were not positively alleged, but were merely recitals, and that the statement that the money so in his hands were "public moneys," was a conclusion of law. The first of these objections seems to have been based upon the use of the past participle instead of the past tense of the verb. Bishop, on Criminal Procedure, (volume 1, § 556,) says: "Where the direct averment is required, as in laying the main charge, it is usually made with the verb. But any other part of speech which reasonably conveys the idea is adequate, as the participle, and even the adverb." An illustration given by the same author is, in substance, as follows: Lawley, being found guilty of attempting to persuade one not to appear as a witness against Crooke, moved in arrest of judgment because it was not positively averred that Crooke was indicted. It was only said that "she, knowing that Crooke had been indicted, and was to be tried," did so and so; but the court held that it was sufficient. So, in an indictment, under an English statute which made punishable any one "above the age of fourteen" who should steal an heiress, charging that the defendant, "being above the age of fourteen years," did the act, was held to contain a sufficient averment of his age. Id. § 557. The Code requirement clearly permits, if it does not enjoin, the use of "ordinary" language in charging offenses; and the test of the sufficiency is that a person of common understanding shall be enabled to know what is intended. If, therefore, criminal pleading must be framed in the technical language which formerly prevailed, these Code provisions are vain and useless; for it would require us to resort to the same technical system of pleading abolished or rendered

unnecessary by the Code in order to determine whether a fact is so alleged as to enable "a person of common understanding to know what is intended." We think it is sufficiently charged that the defendant was county clerk during the time named; that he received the money specified as such officer, and failed to pay it over to his successor.

It was further held by the learned judge that the allegation that there was remaining in his hands certain public moneys theretofore received by him in his official capacity is a conclusion of law; that the facts should have been stated which would show that they were in fact public moneys.

The fact is clearly alleged that these moneys were received by the defendant "in his official capacity." Section 426 of the Penal Code is as follows: "The phrase 'public moneys,' as used in the two preceding sections, includes all bonds and evidences of indebtedness, and all moneys, belonging to the state, or any city, county, or town, or district therein, and all moneys, bonds, and evidences of indebtedness, received or held by state, county, district, city, or town officers, in their official capacity." The allegation that these moneys were received by the defendant "in his official capacity" is the allegation of a fact which conclusively fixes their character as "public moneys." It is the official character in which the moneys are received, and not the ultimate ownership of the money, which, under the last clause of the section, makes them public moneys. The words "public moneys" might have been omitted without affecting the sufficiency of the information; but there is no inconsistency in the averment, since the kind or character of the public moneys charged to have been withheld is defined by the accompanying statement. At the most, it was surplusage, which does not vitiate. Nor could there be any difficulty in pleading an acquittal or conviction under this information in bar of a subsequent prosecution. The defendant is charged with all moneys remaining in his hands, which were received by him as clerk during his incumbency of that office. The offense is single, whether the amount be great or small; and a conviction or acquittal of that single offense must, of necessity, bar a second prosecution, even though it be afterwards ascertained that the amount in his hands was larger than that alleged in the first information.

Respondent further contends that, if the facts hereinbefore referred to were sufficiently pleaded, still the information does not state sufficient facts, because there was no law authorizing the clerk to receive deposits from litigants, and that, therefore, deposits received by him were illegally collected, and belonged to the depositors. But this question is not before us. This appeal involves only the sufficiency of the information, and the jurisdiction of the court, while this contention assumes facts which may have been given in evidence, but which could not properly be considered upon this appeal, if they were. The allegation that defendant received these moneys in his official capacity was sufficient, without referring, by title

or otherwise, either to the statute under which the information was drawn, or to any statute which created a right, duty, or obligation, the antecedent existence of which may constitute a factor more or less intimately connected with the offense. As to all these, the general conclusion of the information, "contra formam statuti," is sufficient. We therefore conclude that the information is sufficient, and that the court below erred in arresting the judgment, and advise that the order arresting the judgment in said cause be reversed, and the court be directed to vacate its order directing the district attorney to prepare and file a new information in said cause, and to take such further proceedings therein as the law requires.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order arresting the judgment is reversed, and the court below is directed to vacate its order directing the district attorney to prepare and file a new information in said cause, and to take such further proceedings therein as the law requires.

97 Cal. 464

HEALY v. WOODRUFF et al. (No. 18,042.)
(Supreme Court of California. March 7, 1893.)

IRRIGATION—APPROPRIATION OF WATER—RIPARIAN OWNERS.

The fact that one who has appropriated, for irrigation purposes, a certain quantity of water, is a riparian owner on the stream from which the water is taken, cannot be urged against his right afterwards to take a greater quantity, where no other rights were in existence at the time, or for years afterwards.

Department 2. Appeal from superior court, Lassen county; G. G. Clough, Judge.

Action by Mathew Healy against B. C. Woodruff and others to quiet title to certain water. From a judgment quieting title to a less amount than claimed, plaintiff appeals. Reversed.

Spencer & Raker, for appellant. A. L. Shinn and R. L. Shinn, for respondents.

McFARLAND, J. This is an action to quiet plaintiff's title to certain waters of a stream called "Cedar Creek," and to a ditch leading therefrom, and for an injunction, etc. The court rendered judgment for plaintiff against the defendants Harrison Smith and Edward Bonyman as prayed for in the complaint; but, as against the defendants James and John A. Smith and B. C. Woodruff, the judgment quieted plaintiff's title to only 180 inches of water, measured under a 4-inch pressure. Plaintiff appealed from the judgment, and contends that the court's conclusions of law were erroneous, and that, upon the findings of fact, his title should have been quieted to 360 inches.

The court finds, in brief, these facts: In April, 1873, plaintiff's grantor, Frank Thomas, entered upon said Cedar creek, and constructed the ditch described in the complaint. He completed it before the 4th of November, 1873, and diverted 180

inches of water, and used it for irrigating certain lands described in the findings, for watering stock, and for domestic purposes to the amount of 180 inches; that being then the capacity of the ditch. In the winter of 1873-74, the ditch became so enlarged "through the action of water running to the head thereof, and into the same," that it was afterwards capable of carrying 360 inches. "Ever since said ditch was so enlarged, and up to the time of the commencement of this action, plaintiff and his grantors did divert and use from said Cedar creek the waters of said creek to the full capacity of said ditch, as so enlarged, whenever sufficient water came down to the same, and that said waters have been used during all said time for irrigating the lands described in finding 5, as well as other lands of plaintiff described in the complaint herein, and for watering stock, and for general household purposes." Plaintiff's lands require for irrigating at least 360 inches of water. Plaintiff acquired from said Thomas the said ditch and water rights and certain lands in September, 1874, and has ever since been the owner of the same. Many years afterwards the various defendants began to assert rights to the waters of said creek as riparian owners, or as appropriators, and to divert the same from plaintiff's ditch; but none of such rights had any origin within five years after the said enlargement of the said ditch. Most of them originated 10 or 15 years afterwards. Between the time when the ditch was first constructed, with the capacity of 180 inches, and the winter of 1873-74, when it was enlarged to 360 inches, the said Frank Thomas, plaintiff's grantor, acquired title from the United States to a piece of land, through a small portion of which the said Cedar creek runs. Before that the entire stream ran through public lands, and it continued afterwards to run through public lands for many years, throughout its course, except where it ran through said land acquired by said Thomas in 1873, as aforesaid.

Upon these findings of fact the court below made the conclusion of law that plaintiff should have his title quieted to only 180 inches. The record does not show upon its face upon what theory this conclusion was reached, but we discover the theory from the brief of respondents. It appeared that the court held that because the plaintiff's grantor acquired the title to some land on the stream, and thus became a riparian owner, he could not afterwards acquire any more water by appropriation, and that, therefore, his enlargement of the ditch in the winter of 1873-74 did not give him any right to an increased flow of water in his ditch as against any one who years afterwards might assert riparian rights on the stream above the ditch. But this position is clearly untenable. The fact that plaintiff or his grantor was a riparian owner does not warrant the conclusion that he could not be an appropriator. There is, as is said in a play, "no consonancy in the sequel." The notion seems to be that becoming a riparian owner estops one, in some sort of a way, from being an appropriator of

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water, although there be no one in existence in whose favor the estoppel can be invoked. When the ditch was enlarged, there was no person having any rights on the stream, except plaintiff's grantor himself, and therefore the enlargement of the ditch encroached upon nobody's vested or prior rights. Respondents argue that if appellant's position be correct the first riparian owner could monopolize all the waters of the stream. But they admit that an appropriator who is not a riparian owner can take all the water of a stream on the public lands, if he be the prior or first appropriator; and it would certainly be strange if the first comer to a stream, who acquired title to some land upon it, has less rights in the water of the stream than one who owns no land there at all. At the time of the enlargement of the ditch, there was no riparian owner on the stream, except plaintiff's grantor. If some other person had been the riparian owner instead of plaintiff's grantor, the latter, with the consent of such riparian owner, or by adverse user, could have diverted the waters of the stream, and held them against all subsequent comers; and certainly his own consent to the appropriation was equal, at least, to the consent of another person, who might have occupied his position. Counsel for respondents seem to think that because plaintiff's grantor, as a riparian owner, could have prevented subsequent appropriators from diverting the water above his land, and away from it, therefore he could not divert the water himself; but that is a confusion of the distinction between *meum* and *tuum*. Counsel complain that this view gives great advantage to the first possessor and appropriator of the water of a stream. This is no doubt true; but it is the advantage which the law gives, and which necessarily follows prior occupancy and appropriation. We think, therefore, that the third and fourth conclusions of law made by the court below, to the effect that plaintiff has the first right, by prior appropriation, to 180 inches of the waters of said Cedar creek, are erroneous, and that the court should have found, as a conclusion of law, that plaintiff has such right to 360 inches of said water; and, as the facts found show what the judgment should have been, there is no necessity for another trial.

The judgment, as to respondents and defendants B. C. Woodruff, John A. Smith, and James M. Smith is reversed, with directions to the superior court to amend its conclusions of law as indicated in this opinion, and to enter judgment in due form quieting plaintiff's title as against said respondents to said ditch, and to said waters of Cedar creek, to the extent and in the amount of 360 inches of water, measured under a 4-inch pressure, and enjoining said respondents from diverting water from said ditch or interfering therewith, while there are not more than such 360 inches running in said ditch, with costs, etc., as in the former judgment.

We concur: DE HAVEN, J.; FITZGERALD, J.

97 Cal. 461

NYE v. MARYSVILLE & Y. C. ST. R. CO.
(No. 18,000.)

(Supreme Court of California. March 7, 1893.)

NEW TRIAL — SUFFICIENCY OF APPLICATION —
STREET-CAR COMPANIES — EJECTMENT OF PAS-
SENGER — REFUSAL TO PAY FARE.

1. Where the notice of intention to move for a new trial "on a statement of the case," in which the errors were specified, was not incorporated into the statement, the motion was properly denied, as Code Civil Proc. § 659, provides that, "if no such specifications be made, the statement shall be disregarded on the hearing of the motion."

2. In an action against a street-car company for ejecting a passenger it appeared that defendant's rules required passengers to pay their fare on entering the car; that, after plaintiff had ridden about one and one half blocks without paying fare, his attention was called to the rule, and he was requested by the driver to pay; that plaintiff answered that the driver "was in too much of a hurry," and that he (plaintiff) "would take a little time on that;" that plaintiff was then ordered to get off of the car; that the driver undertook to eject plaintiff, but was himself put out by plaintiff; that the driver then seized an iron bar, and again ordered plaintiff to leave the car, which he did, without being struck or injured in any way. *Held*, that plaintiff could not recover, as his conduct amounted to a refusal to comply with a reasonable rule of defendant, and justified his removal.

3. Under Civil Code, § 2187, providing that a "common carrier may demand the fare of passengers either at starting or at any subsequent time," a rule of a street-car company, requiring passengers to deposit their fare on entering the car, is reasonable.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; John C. Gray, Judge.

Action by George Nye against the Marysville & Yuba City Street-Railroad Company. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

M. C. Barney and Mr. Donohoe, for appellant. M. E. Sanborn, for respondent.

HAYNES, C. This action was brought to recover damages for an alleged wrongful eviction from one of defendant's street cars. At the conclusion of the evidence offered by plaintiff defendant moved for a nonsuit, which was granted, and judgment was entered against the plaintiff, who thereafter gave notice of his intention to move for a new trial upon a statement of the case. The statement was thereafter prepared and settled, and upon the hearing the motion for a new trial was denied. This appeal is from the judgment and the order denying said motion.

Respondent makes the point that the judgment and order must be affirmed; the first, because no error appears upon the judgment roll; and the second, because there are no specifications of error of any kind, either of law or fact, in the statement on motion for a new trial. Appellant's notice of intention to move for a new trial forms no part of the judgment roll, nor is it incorporated in the statement. It is inserted in the record after the statement, but, as its insertion was improper, it is no part of the record.

Pico v. Cohn, 78 Cal. 384, 20 Pac. Rep. 706; Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. Rep. 102; Bohnert v. Bohnert, 95 Cal. 445, 30 Pac. Rep. 590, and cases there cited. The statement contains no specifications of error whatever. Section 659, Code Civil Proc., provides: "If no such specifications be made, the statement shall be disregarded on the hearing of the motion." It was therefore impossible for the court below to grant the motion without violating the above provision, and, that being true, it follows that the court did not err in denying appellant's motion for a new trial. Dawson v. Schloss, 93 Cal. 194, 29 Pac. Rep. 31. Waiving the question whether a statement which cannot be used on motion for a new trial, because it does not comply with the requirements of the Code, may nevertheless be used upon an appeal from the judgment, an examination of the record makes it clear that the court did not err in granting the nonsuit.

Among the rules of the respondent posted in the car was one requiring passengers to deposit their fare upon entering the car. This rule was reasonable, and necessary to prevent fraud upon the company. Plaintiff was not ignorant of the rule, as shown by his testimony; and after he had seated himself in the car, and had ample time to comply with this rule, his attention was called to it, and he was requested to pay his fare. Instead of complying, plaintiff said that he was going to Yuba City, and had plenty of time to pay. The driver insisted that he must pay then, to which plaintiff retorted that he, the driver, "was in too much of a hurry," and that he, the plaintiff, "would take a little time on that." He was then told to get off the car or he would be put off. Not complying with this request, the driver attempted to remove him from the car, but was unsuccessful; and a second attempt resulted in the driver being put out on the front platform, plaintiff remarking, "If you have any business out there on the platform, you had better attend to it." The driver then removed an iron used to open and shut the door, and went into the car, and again ordered plaintiff to leave the car, which he then did. Appellant was not struck or injured in any way. He had ridden about a block and a half before his attention was called to the payment of his fare. He had ample time and opportunity to pay, and, while not expressly refusing to pay his fare, his language and conduct amounted to a refusal to comply with a reasonable rule and proper request made by respondent, and justified respondent in removing him from the car. Civil Code, § 2188. Nor was any more force, or appearance of force, resorted to than was necessary to secure his removal. That the regulation of respondent, and the demand of payment of the fare at the time it was demanded, were reasonable and proper, see Civil Code, §§ 2186, 2187.¹ The judgment and order appealed from should be affirmed.

¹Section 2187 provides that a common carrier may demand the fare of passengers either at starting or at any subsequent time.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

DE HAVEN, J. I concur in the judgment.

VON SCHMIDT v. WIDBER, Treasurer.
(No. 15,160.)

(Supreme Court of California. March 8, 1893.)

PRACTICE ON APPEAL—BOND.

An appeal from an order denying a new trial will be dismissed, where no undertaking is filed.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by A. W. Von Schmidt against James H. Widber, treasurer of the city and county of San Francisco. Judgment for plaintiff. Defendant appeals. Dismissed.

John H. Durst, for appellant. Tilden & Tilden, for respondent.

PER CURIAM. Upon motion of respondent, the appeal from the order denying a motion for a new trial in the above-entitled action is dismissed, upon the ground that no undertaking upon appeal has been filed.

(3 Cal. Unrep. 836.)

GREGORY et al. v. GREGORY et al. (No. 18,080.)

(Supreme Court of California. March 9, 1893.)

APPEALABLE ORDERS.

Where a judgment is itself appealable, and no motion is made for a new trial, an appeal from a subsequent order refusing to set the judgment aside will not lie. *Goyhinech v. Goyhinech*, 22 Pac. Rep. 175, 80 Cal. 400, followed.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

(Not to be published in California Reports.)

Action by James W. Gregory and others against John H. Gregory and others. Judgment for defendants. Plaintiffs appeal from an order refusing to set the judgment aside. Dismissed.

James Gartlan, for appellants. E. P. Tuttle and C. Tuttle, for respondents.

BELCHER, C. This case was submitted to the court below for decision upon an agreed statement of the facts, signed by the attorneys of the parties thereto, and on February 25, 1892, judgment was given and entered by the court in favor of the defendants. Thereafter, on April 6th, the plaintiffs served notice on the defendants that on the 20th of that month they would move the court to vacate the judgment, and restore the cause to the calendar for trial, upon the ground that there were no findings to support the judgment. In due time the motion was heard, and submitted upon the papers and record in the case, and upon an affidavit made by

plaintiffs' attorney, in which, among other things, he stated: "No stipulation was made that said statement should constitute a part of the judgment roll in the action. Findings were not waived. No findings of fact have been signed or filed." On April 29th the court denied the motion, "for the reason that all the facts in the case had been agreed upon, and submitted to the court, and consequently that there was no issue of fact before the court to be determined, and nothing requiring, or upon which to base, separate findings of fact; the court being of the opinion that the findings of fact were, in effect, thereby waived, and no other or further findings of fact were necessary or permissible, beyond the said agreed statement." From this order denying their motion the plaintiffs appealed, and have brought the case here on a bill of exceptions.

The defendants move to dismiss the appeal, and in support of their motion cite, among other cases, *Goyhinech v. Goyhinech*, 80 Cal. 400, 22 Pac. Rep. 175. In that case the appeal was from an order like that involved here, and on motion the appeal was dismissed. The court said: "The motion was not for a new trial, and the judgment was itself appealable. It is settled that, when a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside. [Citing cases.] The plaintiff should have appealed from the judgment, with a bill of exceptions upon that appeal." Upon the authority of that case, we advise that the appeal in this case be dismissed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal herein is dismissed.

(97 Cal. 459)

PEOPLE v. FICE. (No. 20,970.)

(Supreme Court of California. March 7, 1893.)

CRIMINAL LAW — REQUEST FOR INSTRUCTIONS — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE — ADDITIONAL AFFIDAVITS.

1. Failure to instruct on any proposition deemed essential by defendant in a criminal case is not error, unless such an instruction was requested.

2. Where defendant's affidavits in support of a motion for a new trial for newly-discovered evidence are fully contradicted by affidavits of the prosecution, a new trial is properly denied.

3. A motion to be allowed to file additional affidavits is also properly denied when made after the new trial has been denied, and without production of the affidavits.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Conviction of one Fice for robbery, from which, and the denial of a motion for a new trial, he appeals. Affirmed.

D. A. O'Connell, for appellant. Atty. Gen. Hart, for the People.

HARRISON, J. The defendant was convicted in the superior court of robbery,

and sentenced to the state prison for the term of 10 years. Thereafter he moved for a new trial upon the grounds that the court had erred in its instructions to the jury; that the verdict was contrary to the evidence; and upon newly discovered evidence. The motion was denied, and he has appealed to this court.

In support of the first ground it is urged that the defendant was not sufficiently identified as the person who committed the robbery, and that the evidence showed that at the time of the robbery he was confined to his residence by sickness. There was, however, positive evidence before the jury on the part of several witnesses that the defendant was the individual who committed the offense, and their verdict must be deemed to have determined any conflict of evidence concerning the alibi or as to his identity.

The instructions of the court are not in the record, and we cannot determine whether it committed any error. The failure of the court to instruct upon any proposition deemed essential by the defendant is not to be regarded as error unless he made a request for such instruction.

Upon the ground of newly-discovered evidence it is sufficient to say that the affidavits offered in support thereof were fully contradicted by counter affidavits on the part of the prosecution, and for that reason the court below exercised a proper discretion in refusing to grant the motion. The motion to be allowed to file an additional affidavit in support of this ground after the motion for a new trial had been denied was properly refused by the court, both for the reason that it had already denied the new trial, and also for the reason that an affidavit of the witness by whom the facts could be shown was not itself produced. The judgment and order are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

VON SCHMIDT v. WIDBER, Treasurer.
(No. 14,935.)

(Supreme Court of California. March 8, 1893.)

APPEAL—BOND—WHEN REQUIRED.

A county officer, against whom suit has been brought, is not exempted from filing an undertaking on appeal by Code Civil Proc. § 1058, declaring that in any civil action wherein the state is plaintiff, or any state officer in his official capacity or on behalf of the state, or any county, city, or town, is plaintiff or defendant, no undertaking shall, as to such parties, be required.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by A. W. Von Schmidt against James H. Widber, treasurer of the city and county of San Francisco. Judgment for plaintiff. Defendant appeals. Dismissed.

John H. Durst, for appellant. Tilden & Tilden, for respondent.

PER CURIAM. This is a motion to dismiss an appeal from the judgment ren-

dered in favor of respondent in the above-entitled action upon the ground that no undertaking upon appeal has ever been filed. Upon an examination of the record we find no bond upon appeal was ever filed. A county officer is not exempted from filing an undertaking on appeal by virtue of the provisions of section 1058, Code Civil Proc.¹ Let the appeal from the judgment be dismissed.

97 Cal. 476

POSACHANE WATER CO. v. STANDART
et al. (No. 18,030.)

(Supreme Court of California. March 8, 1893.)

WATER RIGHTS—CONFLICT—LEGAL TITLES—OPINION EVIDENCE—GRADE OF DITCH—REVERSAL OF JUDGMENT ON APPEAL.

1. Where acts done in diverting water from a ditch are justified by a prior right, it is immaterial, so far as the owner of the ditch is concerned, whether the strict legal title to the right is in the person claiming such right, or has been conveyed by him to a corporation.

2. The fact that there is no finding as to certain rights set up in defendants' answer will not cause the reversal of a judgment in their favor where the judgment was not based on such rights, and was sustained by other findings.

3. Opinion evidence is admissible as to the grade per mile of a ditch used in conveying water for beneficial purposes, although it may be overcome if more accurate information is obtained by the other side.

Department 2. Appeal from superior court, Fresno county; William O. Minor, Judge.

Action by the Posachane Water Company against T. W. Standart and others. Judgment for defendants. Plaintiff appeals. Reversed.

W. D. Tupper, for appellant. Sayle & Caldwell and J. B. Campbell, for respondents.

McFARLAND, J. This case involves the conflicting claims of the parties to the waters of Posachane creek. It is averred in the complaint that since 1886 plaintiff and its grantors have been the owners of a certain ditch through which they have diverted and carried the waters of said creek, and used the same for beneficial purposes; and that in December, 1890, the defendants wrongfully constructed a dam near the head of said ditch, by which they completely prevented the flow of any water into the same from said creek, etc. The defendants are T. W. Standart and several other natural persons, and they aver, substantially, that said Standart constructed a ditch, and acquired the right to divert the waters of said creek through said

¹This section provides that in any civil action or proceeding wherein the state or the people of the state are parties plaintiff, or any state officer in his official capacity or on behalf of the state, or any county, city and county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state, or the people thereof, or any officer thereof, or of any county, city and county, city, or town.

ditch, in 1885; that said ditch and water right of said Standart were prior and superior to any right of plaintiff or its predecessors to any of the waters of said creek; and that defendants rightfully did the acts complained of in the complaint under and by virtue of said prior right of said Standart. The court found in favor of the priority of said right under which the defendants claim, and found that the ditch constructed by Standart in 1885 "was twenty-seven feet in width at the top, twenty feet in width at the bottom, and thirty inches in depth, and that by means of said ditch and canal, so constructed as aforesaid, the said T. W. Standart did, on or about the 1st day of March, 1885, appropriate and divert four hundred and twenty-seven cubic feet of water per second, flowing and to flow on a grade of seven feet to the mile." The court also found that plaintiff and its grantors had acquired and appropriated of the waters of said creek 1,000 cubic feet of water per second, but that "their said appropriation of water, and the right to the use thereof, was and is subsequent and inferior to the appropriation of the defendant T. W. Standart of four hundred and twenty-seven cubic feet of said water." Judgment was entered accordingly, and plaintiff appeals from the judgment, except that part thereof which awards plaintiff its costs of suit, and also from an order denying plaintiff's motion for a new trial.

We see no errors committed by the court in arriving at the conclusion that the said T. W. Standart had a prior right to some of the waters of said creek. Appellant contends, among other things, that the court erred in holding that said Standart was the owner of said prior right, because it appeared that he had conveyed whatever right thereto which he may have had to a corporation called the Standart Ditch Company. In their original answer the defendants averred that said defendant Standart had conveyed his ditch and water right to said corporation, and that they did the acts complained of by plaintiff as officers, agents, employees, etc., of said Standart Ditch Company; but during the progress of the trial the defendants amended their answer by striking out the averment of conveyance to said corporation, thus leaving the title to the ditch and water right in said T. W. Standart. This amendment was made (and allowed by the court) upon an affidavit of said Standart that he had made a conveyance by which he intended to convey said ditch and water right to said corporation, but that he had been informed by his attorneys that said conveyance was only of the ditch, and did not carry the water right. The conveyance in question granted to the said corporation the ditch of said Standart, particularly describing it, and immediately after the description contained these words: "Together with all and singular hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof." And appellant contends

that by this conveyance the water right was conveyed to the corporation as an appurtenant to the ditch. Respondents contend that such was not the effect of the deed; and the question thus presented is argued at length by counsel. Such a question might possibly be embarrassing if raised between grantor and grantee in such a conveyance, but we do not see how in the case at bar the plaintiff is at all affected by the question. The defendants defended their acts under said ditch and prior water right acquired by said T. W. Standart; and their acts were justified, whether the strict legal title to the ditch or the water right or both was in the said Standart individually or in the said corporation. With respect to this matter, therefore, we see no error committed by the court.

The defendants set up in their answer certain rights as owners or occupants of lands situated within what is called the "Posachane Sinks," and appellant contends that the judgment should be reversed because there is no finding as to that matter. But as the court does not base any of the rights of respondents upon their alleged ownership in said Posachane sinks, and entirely ignores such rights, appellant is not injured by the failure of the court to find anything upon that subject if the other facts found sustain the judgment of the court as to the priority of the water rights under which respondents claim.

Respondents asked the witness, Standart, if he knew what the grade of the ditch was at a certain point, and he answered that he thought it was about six feet to the mile, and that the usual grade of the country at that place was from six to eight feet to the mile. Appellant moved to strike out this testimony, and contends that the court erred in overruling its motion. Appellant's point as to this matter seems to be that, as the grade of the ditch may be ascertained with absolute certainty, therefore the judgment of a witness as to such grade is not admissible. This position is not tenable. The judgment of a witness as to such a matter is always admissible, subject, of course, to be overcome by the other side by more accurate information, if such can be produced.

But the finding of the court as to the amount of water diverted by the Standart ditch prior to the vesting of appellant's water rights in the creek is not sustained by the evidence. The finding that the Standart ditch, in 1885, diverted "427 cubic feet of water per second, flowing and to flow on a grade of seven feet to the mile," is rather confusing, for, if it actually diverted 427 feet, it matters not what its grade was. We suppose that the whole finding (finding 3) means that the ditch was 27 feet wide on top, 20 feet on the bottom, and 30 inches deep, and had a grade of 7 feet to the mile; and that, being of that size and grade, it carried 427 cubic feet of water per second. In the first place, there is no evidence that the ditch along its entire course was of the dimensions found by the court. The strongest evidence for respondents on the point was the testimony of T. W. Stand-

art himself, and he only testified that "for a distance of a quarter to one third of a mile" the ditch was 27 feet wide "from the top of one embankment to the top of the other," that for the next half mile it was only 16 feet wide, and beyond that still smaller. Now, the general rule is that (making due allowance for evaporation, seepage, etc.) the capacity of a ditch is measured by the amount of water which it will carry from the point of diversion to the point of use, and the point of least carrying capacity fixes the general capacity of the ditch. It is true, if a ditch is intended to supply, and does supply, water for use at various points along its course, the latter part of the ditch need not be so large as the first part; but in the case at bar it does not appear that the water was intended to be used before it reached the point at which the size of the ditch was decreased, the intention apparently being to supply first the land of the homestead of Standart, which was beyond the point of contraction. We think, therefore, that Standart, under the evidence, did not acquire a prior right to the amount of water which a ditch of the dimensions described in the findings would carry. But if we assume that he did construct a ditch in 1885, which along its entire course was of the size and grade found by the court, still, under the evidence, it could not possibly have carried 427 cubic feet per second. The only definite evidence as to what amount of water a ditch of a given size and grade will carry is found in the testimony of respondent's witness Hughey, who is a civil engineer and surveyor. He testified upon the subject as follows: "Taking the width at 30 feet, the bottom at 20 feet, the depth at 3 feet, and the grade at $10\frac{1}{2}$ feet to the mile, the discharge would be in cubic feet flowing per second 426.75." A ditch with a width of 27 feet across the top, 20 feet on the bottom, with a depth of 3 feet, and a grade of $10\frac{1}{2}$ feet to the mile, the discharge of cubic feet flowing per second would be 400.44. From this testimony it is clear that such a ditch as that found by the court, to wit, 27 feet at the top, 20 feet on the bottom, 30 inches in depth, and with a grade of only 7 feet to the mile, could not possibly carry as much as 427 cubic feet of water per second. The finding of the court, therefore, as to the amount of water to which respondents had a right prior and superior to that of appellant is clearly erroneous, and for this reason the judgment must be reversed.

Counsel for respondents suggest that if the amount of water found by the court to be embraced by the prior right of respondents be too large, this court might modify the judgment by reducing that amount. But by that course this court would be making a finding for the court below, which it cannot do. And the different rights and contentions of the parties are so mixed and interlaced in the findings and judgment that we do not see how there could be a partial approval of the findings or affirmance of the judgment. The entire rights of the parties can be better readjusted and established by a retrial of the whole case. The judgment

and order appealed from are reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

97 Cal. 496

GRANT v. BERONIO. (No. 19,078.)

(Supreme Court of California. March 9, 1893.)

SPECIFIC PERFORMANCE—DECREE—CONSTRUCTION
OF CONTRACT.

1. Where defendant agrees to convey to plaintiff certain land, free of incumbrances, upon payment of the price, and, upon tender of such price, refuses to execute a conveyance, the court, in an action for specific performance, upon ascertaining the amount of such incumbrances, and that they can be discharged by mere payment thereof, may order defendant to execute a conveyance to plaintiff, may cause the purchase money to be brought into court, and may direct its payment to the holders of the incumbrances, instead of to defendant, even though such holders are not before the court; it appearing that the incumbrances cover the whole amount of the purchase money.

2. Where defendant agreed to convey to plaintiff certain land upon the payment of the balance of the purchase price, a provision in the agreement that, in case of failure to make the conveyance, the money paid at the making of the agreement was to be returned to plaintiff, does not give defendant the option of conveying or not.

3. Where defendant agrees to convey to plaintiff certain land, which agreement recites the receipt of \$1,000, the acceptance by defendant of \$750 in lieu of the \$1,000 is not inconsistent with or contradictory to the acknowledgment of the receipt of the \$1,000, it appearing that the difference between the sum for commissions for the sale of the premises

agreed upon between defendant and the broker who effected the sale.

4. Where defendant agrees to convey to plaintiff certain lands free of incumbrances, and plaintiff, in part payment, gives defendant an order payable at the delivery of the deed, the court, in an action for specific performance, may direct the payment of this order to the discharge of the incumbrances upon the land.

Department 1. Appeal from superior court, Ventura county; W. B. Cope, Judge.

Action by one Grant against one Beronio for the specific performance of an agreement to convey land. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Wilde, for appellant. E. S. Hall and J. Hamer, for respondent.

HARRISON, J. Action for specific performance. The plaintiff had judgment in the court below, and the defendant has appealed upon the judgment roll alone, without any bill of exceptions. The court finds that the defendant made an agreement with the plaintiff for the sale and conveyance to him of a parcel of land, of which he was the owner, in the town of San Buenaventura, for the sum of \$5,500, of which he acknowledged in the agreement that he had received \$1,000, and the remaining \$4,500 was to be paid on delivery of a deed free of incumbrances within 60 days thereafter; and the defendant agreed that, upon receiving such payment, he would execute to the plaintiff a good and sufficient deed conveying the title to said premises. The agreement contained the clause: "In case failure to make deed, money paid to be returned." On the same day with the execution of the agreement, the plaintiff gave to the defendant an order upon certain bankers in San Buenaventura for the sum of \$725, to be paid when he should deliver the deed for said premises, which the court finds was accepted by him in lieu of the cash payment of \$1,000 provided by the agreement, the difference between the two sums being for certain commissions for the sale of the premises agreed upon between the defendant and the broker who had effected the sale. At the date of the execution of the agreement there were two mortgages upon the property that had been executed by the defendant, but the debts secured thereby were mature and payable. The court finds that the provision in the agreement giving 60 days to complete the transaction was to enable the defendant to procure a release of the premises from the mortgage liens, and that although those liens exceeded in amount the purchase price of the property, yet there was more than enough to satisfy the first mortgage, and that the holder of the second mortgage was willing to accept the sum that would remain out of the purchase money after deducting certain items therefrom to which the plaintiff is entitled, and to release the property therefrom; and that prior to the expiration of the 60 days, and ever since, the defendant had been able out of said purchase money to procure said releases, and convey the premises in accordance with the terms of the sale. On the day before the expiration of the 60

days the plaintiff tendered to the defendant the said sum of \$4,500, together with a deed for the premises prepared for execution, and demanded of him that he accept the money and execute the deed, and, upon the defendant's refusing to comply with said demand, this action was brought. The court rendered judgment that plaintiff should pay the \$4,500 to a commissioner appointed by it for that purpose; and that the defendant should deliver to the said commissioner his deed to the plaintiff conveying the premises; and that the said commissioner, out of the moneys received by him, should pay off the first mortgage lien thereon, and certain other charges in favor of the plaintiff, and pay the remaining moneys to the holder of the second mortgage, and cause the said mortgage to be discharged of record.

In an action for the specific performance of an agreement to convey land, a court of equity has power by its decree, as against the parties who are before it, to enforce all the terms of the agreement. If the vendor's agreement is that his conveyance shall transfer the title free of incumbrances, the court can direct the application of the purchase money to the satisfaction of those incumbrances, and for that purpose can cause the money to be brought into court and disbursed under its direction. If the holders of those incumbrances are before the court, they will be bound by the direction of the court, and their claims would be satisfied by a satisfaction of the judgment. If the amount of the incumbrances is ascertained, and the court finds that the liens therefor can be discharged by mere payment thereof, it can direct that the payment be made directly to the holders of the incumbrances, even though they be not before the court, instead of to the vendor. So long as the vendor incurs no liability, and is freed from any personal claim for the amount of the incumbrances, he will not be heard to object to the application of the purchase money for the purpose of making good his agreement with the vendee. The agreement between the parties hereto was an unconditional contract on the part of the defendant to convey the land to the plaintiff upon his complying with its terms. The provision therein that, in case of failure to make the deed, the money was to be returned, was for the benefit of the purchaser alone, and did not give to the vendor the option of conveying the lot or not, as he might choose. He could not refuse to make the deed, and thus, by his own act, against the will of the purchaser, relieve himself of his obligation to convey. *Newton v. Hull*, 90 Cal. 487, 27 Pac. Rep. 429. Nor was the right to receive the money that he had paid the only right which the purchaser acquired by the contract. He had also the right to an enforcement of the vendor's agreement to make him a conveyance of the land, and, if he was willing to accept a conveyance in satisfaction of that obligation, it was not for the vendor to object that there were incumbrances upon the land or defects in the title.

The acceptance by the defendant of the order for \$725, in lieu of the cash payment of \$1,000, may be regarded as a contemporaneous agreement between the parties in modification of the price to be received for the conveyance, and it is not inconsistent with or contradictory to the acknowledgment in the agreement that \$1,000 of the purchase price had been received by the defendant. See *McCroskey v. Ladd*, 96 Cal. 458, 31 Pac. Rep. 558. The defendant cannot object to the application of the money to be obtained upon this order in satisfaction of the liens upon the land which he had created. He accepted the order in lieu of the cash payment of \$1,000, and is bound by its terms. As the order is in terms made payable when he should deliver a deed which should convey the land free of all incumbrances, he cannot now object to the direction of the court that it be so applied that the deed which he makes shall be in compliance with his agreement. The judgment is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

97 Cal. 429

KENNEDY, City Treasurer, v. MILLER,
County Treasurer, et al. (No. 19,032.)

(Supreme Court of California. March 2, 1893.)

SCHOOL FUND—CUSTODY—CITY DISTRICTS.

Const. art. 9, directs the establishment by the legislature of a common-school system, and a fund to be inviolably appropriated to its support. Pol. Code, § 1576, declares that every city forms a school district, unless subdivided, etc. Section 1616 declares that boards of education shall be elected in cities under the provisions of the laws governing such cities, and that their powers and duties shall be as prescribed in such laws, except as otherwise provided. Section 1617 confers substantially the same powers and duties on boards of education as on the trustees of districts, among which is the duty to pay all moneys collected for school purposes into the county treasury, to be placed to the credit of the special fund of their district. Section 1532 requires the state superintendent to apportion the school money to the several counties, and to draw his order on the comptroller, in favor of each county treasurer, for the moneys appropriated to the county. Section 1543 requires the county superintendent to apportion the school moneys of the county to each district, and, on the order of the board of trustees or board of education, to draw his requisition on the county auditor for all necessary expenses against the school fund of any city or district, and on the receipt of such requisition the auditor shall draw his warrant on the county treasurer. Sections 1817-1820, for the purpose of raising money additional to that provided by the state fund, directs the county superintendent to furnish the supervisors, each year, an estimate of the amount needed, which is to be levied uniformly on all property in the county, and paid out of the county treasury. *Held*, that all moneys apportioned from the school fund, as well as those raised by a levy on the taxable property of a city, are to remain in the county treasury until withdrawn under requisition of the county superintendent, and are not subject to call by the city for deposit in the city treasury.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Kennedy, city treasurer of the city of San Diego, against Miller and another, as county treasurer and auditor, to obtain custody of funds apportioned for school purposes. Judgment for defendants. Plaintiff appeals. Affirmed.

William H. Fuller, for appellant. Johnston & Jones and Parrish, Mossholder & Lewis, (J. E. Deakin, of counsel,) for respondents.

HARRISON, J. The charter of the city of San Diego was framed by a board of freeholders chosen therefor, and having been adopted by the electors of the city, and approved by both houses of the legislature, (St. 1889, p. 643,) went into effect on the first Monday of May, 1889. Article 7 of the charter is entitled "Educational Department," and provides for a board of education, with certain designated powers and duties. Section 6 of this article provides for a public school fund of the city, to consist of "all moneys received from the city, county, and state school funds, of all moneys arising from taxes which shall be levied by the common council for school purposes," and certain other moneys; and further provides that "all moneys of this fund shall be deposited with the city treasurer, and the same shall be drawn only by a warrant signed by the president and clerk of the board, and duly audited by the auditor." Section 16 requires that the board of education "shall report to the common council, before the annual tax levy be made, the amount necessary to carry on the public schools for the next school year, and thereupon the common council shall levy a rate of tax for school purposes, * * * and such tax shall be in addition to all other amounts levied for city purposes." The plaintiff herein is the city treasurer of the city of San Diego, and alleges that certain moneys in the custody of the county treasurer have been apportioned by the county superintendent of schools to the school district of the city of San Diego, a portion of which were derived from the public school fund, and a portion from a tax upon the taxable property of the city of San Diego levied by the board of supervisors, in pursuance of an estimate made by the city board of education; and he seeks by this proceeding to compel the defendants, as auditor and treasurer of the county of San Diego, to deposit these moneys with him, as the treasurer of the city of San Diego.

Article 9 of the constitution makes education, and the management and control of the public schools, a matter of state care and supervision. The election of a state superintendent of public instruction, and of a county superintendent of schools for each county, is therein authorized; and a public fund for the support of schools is provided, which, it is declared in section 4, "shall be inviolably appropriated to the support of common schools throughout the state," and, in section 6, that the revenue from this fund, as well as from the state school tax, "shall be applied exclusively to the support of primary and grammar schools;" and in section 8 it is further declared that no public money

"shall ever be appropriated for the support of any school not under the exclusive control of the officers of the public schools." The legislature is directed, in section 5, to provide for "a system of common schools;" and section 6 declares that "the public school system shall include primary and grammar schools, and such other [of certain designated] schools as may be established by the legislature, or by municipal or district authority." The term "system," itself, imports a unity of purpose, as well as an entirety of operation; and the direction to the legislature to provide "a" system of common schools means one system, which shall be applicable to all the common schools within the state. In pursuance of this direction the legislature has enacted chapter 3, tit. 3, pt. 3, of the Political Code, wherein the system outlined in the constitution is amplified, and provision made for the organization of school districts, and the election of the officers thereof, as well as of the officers authorized by the constitution, and defining their powers and duties, and also providing for the proper application of the revenue from the state school fund, and for the raising of additional money, by taxation, for the support of the common schools.

Section 1576 of the Political Code declares that "every county, city, or incorporated town, unless subdivided by the legislative authority thereof, forms a school district." By virtue of this legislative authority, each school district becomes a public corporation. (*Estate of Bulmer*, 59 Cal. 131; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. Rep. 1067;) and its functions and powers as such corporation are those which are given to it by the act under which it is created. The legislative declaration that every incorporated city is a school district does not import into the organization of the school district any of the provisions of the city charter, or limit the powers and functions which, as a school district, it has, by virtue of the Political Code. The city is a corporation distinct from that of the school district, even though both are designated by the same name, and embrace the same territory. The one derives its authority directly from the legislature, through the general law providing for the establishment of schools throughout the state, while the authority of the other is found in the charter under which it is organized; and, even though the charter may purport to define the powers and duties of its municipal officers in reference to the public schools in the same language as has the legislature in the Political Code, yet these powers and duties are referable to the legislative authority, and not to the charter. The constitution and laws of this state recognize three classes of cities: Those which are organized under the provisions of the general law authorizing municipal incorporations; those whose charters have been framed by a board of freeholders chosen for that purpose by the city itself; and those which were organized prior to the adoption of the constitution, but have not chosen to change their form of organization. The legislature is, by the constitution, not only prohibited

from creating a municipal corporation by special law, but it has also been prohibited from passing any local or special laws with reference to the powers or duties of municipal officers, or of any matter relating to municipal government. In all matters, however, which may affect the state at large, or whenever any legislation is, in its judgment, appropriate for all parts of the state, it possesses all the legislative power of the state that has not been specifically denied to it; and, upon whatever subjects its power to pass a general law exists, such general law must be the controlling rule of action in all parts of the state, and over all its citizens. The constitution does not purport, of itself, to affect the organization of any city which had been previously incorporated, or to give to the legislature any power to affect its organization, except with its consent; but it gives to the legislature the right to pass general laws which shall be applicable to all cities within the state, by declaring (article 11, § 6) that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to, and controlled by, general laws."

Section 1616 of the Political Code declares that "boards of education are elected in cities under the provisions of the laws governing such cities, and their powers and duties are as prescribed in such laws, except as otherwise in this chapter provided;" and, in the municipal government act, provision has been made for boards of education in cities that may be organized under that act. By the expression, "the laws governing such cities," is meant the charter of the city, or the power under which the city acts and exercises its authority, whether such power be such as was originally conferred by special charter prior to the adoption of the present constitution, or such as has been conferred by the general law providing for the organization of cities, and accepted by the city, or such as is embraced in a charter framed by freeholders of its own selection, and ratified by the legislature. The "boards of education" thus provided for in cities is but another term for the "boards of trustees," to which the control of school districts has been given; and by section 1617 the same powers are conferred upon each, except in certain enumerated instances. It is unnecessary to determine whether it is competent for the legislature to delegate to these boards of education any of the powers which the constitution has authorized it to exercise in providing for a system of common schools, as the rights of neither party herein depend upon the exercise of such power; but conceding that, by virtue of this section of the Political Code, the charter under which a city is organized may prescribe the powers and duties of a board of education, yet the "powers and duties" authorized by section 1616 are powers and duties of the same general character as those which are enumerated in section 1617, and which, except in certain enumerated particular, are conferred alike upon boards of education and boards of trustees. The powers

and duties of the board of education in a city cannot trench upon the system that the legislature has provided for the entire state, since the charter is limited in its operation by any general law that may be passed by the legislature, and in addition thereto such powers and duties are, by the terms of the section in which they are authorized to be given, limited by the provisions of the Political Code. One of these is found in the second subdivision of section 1617, by which it is made the duty, not only of the trustees of school districts, but also of boards of education in cities, "to pay all moneys collected by them, from any source whatever, for school purposes, into the county treasury, to be placed to the credit of the special fund of their district." These powers and duties relate to the management and control of the schools, for the purposes of education, and do not pertain to the custody or disbursement of the school moneys. Section 1532 of the Political Code requires the state superintendent of public instruction to apportion the school money to the several counties, and, when he has so apportioned it, to draw his order on the comptroller, "in favor of each county treasurer," for the moneys appropriated to that county; and section 1543 requires the county superintendent of schools to apportion the school moneys of the county to each school district within the county, and, on the order of the board of trustees or board of education, "to draw his requisition upon the county auditor for all necessary expenses against the school fund of any city, town, or district," and "upon the receipt of such requisition the auditor shall draw his warrant upon the county treasurer, in favor of the parties, for the amount stated in such requisition." The money is to remain with the county treasurer until it is paid out by him upon the receipt of such requisition. The school moneys never lose their character of public moneys belonging to the state, and are to remain under the control of its officers for the purposes for which they have been appropriated. The fact that they have been apportioned to the several school districts does not give to those districts any proprietary right therein, or any right to their custody; but the districts, through their authorized agents, have the right merely to contract for their proper disbursement within the purposes authorized by law. If any portion of the moneys thus apportioned is not used during the school year, it is made, by section 1621, the duty of the county superintendent to reapportion the balance as other moneys are apportioned.

Section 1617 makes it the duty of the boards of education in cities to pay all moneys collected by them, from any source whatever, for school purposes, into the county treasury. As these boards do not collect the money which the superintendent apportions to the district, this provision must have reference to other moneys; but, as it requires them to pay all moneys collected from any source into the county treasury, it is corroborative of the proposition that, as a school district, the city is not an independent organization, but

is correlated to the other school districts in the county, as a part of the system of public schools provided for by the legislature. For the purpose of raising money additional to that provided for from the state school fund, section 1817 directs the county superintendent to furnish to the supervisors, each year, an estimate of the amount needed for the ensuing year; and section 1818 requires the supervisors of each county having less than 100,000 inhabitants to levy a tax known as the "County School Tax," which, as all other county school taxes, must, by section 3714, be at a uniform rate, upon all taxable property within the county, and, by section 1820, must be paid into the county treasury. For certain special purposes, the supervisors are authorized to levy an additional tax within a school district, if the district has voted therefor; but, with this exception, the school tax must be uniform throughout the county. A board of education within a city has only the same right to make a requisition upon the board of supervisors to levy a tax for school purposes upon the taxable property within the city that has the board of trustees within any other school district in the county; and with the exception of a tax authorized by a vote of the district under the provisions of sections 1830-1837 of the Political Code, for the expenditure of certain moneys within that district, the supervisors are not authorized to levy any tax for school purposes that shall not be uniform upon all the taxable property within the county. Section 1837 requires that this money, when collected, shall be paid into the county treasury for the use of the district in which the tax was voted, and there is no provision of law authorizing the county treasurer to pay out any of the moneys held by him for the account or to the credit of a school district, except in the manner provided by section 1543.

The provision in the charter of the city of San Diego that all moneys belonging to the school fund of the city shall be deposited with the city treasurer cannot, as we have seen, supersede the requirements of the Political Code, that all moneys pertaining to the public school system shall be paid into the county treasury. Aside from the fact that this provision in the charter purports, in terms, to apply only to those taxes levied by the common council, and not to those levied by the board of supervisors, a consideration of the functions of the city government relative to the county government will show that the provisions of the charter cannot have the effect contended for by the appellant. The constitution has authorized the city to frame this charter "for its own government," and this limitation implies that its authority is restricted to its own officers, and the inhabitants within its territory, and that it cannot extend the authority of its officers to matters outside of its territory, or to subjects that have been placed by the constitution exclusively within the control of the legislature, or that have been confided by the legislature to the management of other officials. The county treasurer and the

county auditor are elected by the county at large, and constitute a portion of the political government of the state, with duties and powers prescribed by the legislature, and, in their official positions, act for the welfare of the state; but if it should be held that the inhabitants of a city can, by means of a charter framed by themselves, prescribe the powers and duties of these officers, the charter of that city would cease to be a charter "for its own government," and we might have the spectacle of different cities within the same county prescribing different, and perhaps contradictory, duties for officers who had not been chosen by them, but had been elected by different constituencies under the general law of the state, and who were accountable for their acts to the citizens by whom they had been elected. We hold, therefore, that the appellant is not entitled to the custody of the moneys referred to in his petition, and the judgment of the superior court is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(97 Cal. 442)

CITY OF SAN DIEGO v. DAUER et al.
(No. 19,063.)

(Supreme Court of California. March 2, 1893.)

SCHOOLS—AUTHORITY OF CITY BOARD—SALARY OF SUPERINTENDENT.

A city cannot enjoin the payment of a warrant drawn on account of the city school district against the county treasurer for an amount fixed by the board of education as salary of the city superintendent, since the city and city school district are distinct corporations, and since, under Pol. Code, § 1793, as amended, (St. 1891, p. 164,) authorizing the board of education to elect a superintendent, and to fix the salary of its employees, the matter of the superintendent's salary is under the control of the board.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action for injunction by the city of San Diego against C. R. Dauer and others. Order dissolving a preliminary injunction. Plaintiff appeals. Affirmed.

William H. Fuller, for appellant. Parrish, Mossholder & Lewis and Johnstone Jones, (J. E. Deakin, of counsel,) for respondents.

HARRISON, J. The appellant sought by this action to enjoin the respondent Dauer, as treasurer of the county of San Diego, from paying a warrant drawn upon him in favor of the respondent De Burn for his salary as superintendent of public schools of the city of San Diego. By the charter of the city of San Diego, the salary of the superintendent of schools was originally fixed at \$1,500 a year; and chapter 9 of the charter directs the common council to readjust and fix anew, in the month of January, 1891, and every four years thereafter, the amount of all official salaries provided for in the chapter. In pursuance of this direction, the common council, on the 31st day of January, 1891,

passed an ordinance fixing the salary of the superintendent of schools at \$900 a year. The respondent De Burn was elected superintendent of the public schools of the city of San Diego on the 4th day of May, 1891, and on December 17, 1891, the board of education of that city passed a resolution fixing his salary at \$125 per month, to take effect January 1, 1892. Thereafter the president and clerk of the board of education gave an order on the county superintendent of schools, directing him to draw a requisition on the county auditor, against the county school fund, in favor of De Burn, for \$125, as his salary for the month of January, 1892; and, upon the presentation thereof to the county superintendent, he gave to De Burn his requisition upon the county auditor, and upon its receipt the county auditor drew his warrant upon the county treasurer, in favor of De Burn, for its payment. This action was brought by the plaintiff to restrain the county treasurer from paying the warrant, and also to restrain the president and clerk of the board of education from thereafter drawing any similar orders. A preliminary injunction, that had been granted by the judge upon the complaint of the plaintiff, was dissolved, upon the motion of the defendants, and the plaintiff has appealed from the order dissolving that injunction.

In *Kennedy v. Miller*, (Cal., No. 19,032,) 32 Pac. Rep. 558, we have held that the city of San Diego is a corporation distinct from the corporation known as the "School District of the City of San Diego," and that the rights and obligations of the school-district corporation are to be determined by the provisions of the Political Code, and not by those of the charter of the city of San Diego, and also that the powers and duties of boards of education in cities are the same as those of boards of trustees in other school districts. We also held in that case that all the moneys which are apportioned from the school fund, as well as those which are raised by means of a tax for school purposes, levied by the board of supervisors, are to be paid into the county treasury, and to remain there until they are paid out upon a warrant drawn by the county auditor under a requisition from the county superintendent of schools. Section 1793 of the Political Code, as amended in 1891, (St. 1891, p. 164,) authorizes the board of education of a city to elect a city superintendent of schools, and also to fix the salary of its employees. Assuming, therefore, that the superintendent of schools of the city of San Diego is an employee of the board of education of that city, whose functions pertain to the management of the public schools organized within the school district of the city of San Diego under the system established by the legislature, the fixing of his salary would pertain to the board of education, and not to the common council, and such salary would be payable out of the moneys held in the county treasury for the account of the school district of the city of San Diego. These moneys are in the treasury to the credit of the school district, and the city of San Diego, as a municipal corporation,

has no interest therein. It therefore appeared upon the face of the complaint that the plaintiff was not entitled to the injunction sought for, and the order dissolving the same is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

97 Cal. 456

THOMAS v. PARKER et al. (No. 14,890.)

(Supreme Court of California. March 6, 1893.)

MORTGAGE BY ADMINISTRATOR—RECITALS—ORDER TO SHOW CAUSE—GUARDIAN FOR MINORS.

1. Where a mortgage by an administrator of his intestate's land, after referring to the order of the court authorizing its execution, recited that "now, therefore, the said mortgagor, pursuant to the order last aforesaid, * * * mortgages to the mortgagee, * * *" such recital, with other similar recitals, sufficiently showed that the mortgage was executed by the mortgagor as administrator in pursuance of law and the court's order, and not in a personal capacity; Code Civil Proc. §§ 1577, 1578, authorizing the execution of mortgages by administrators under proper order of court.

2. Code Civil Proc. § 1578, subd. 3, provides that the order to show cause required to be issued before an administrator can mortgage his decedent's real estate must be served on all parties interested either in person or by publication. *Held*, where the order was properly served by publication, that it was sufficient even though it appeared from the order that there were certain infant defendants under the age of 14 years.

3. Code Civil Proc. §§ 1577, 1578, under which administrators are authorized to mortgage an intestate's real estate, does not require the appointment of a guardian ad litem for infants, and provides that no irregularity in the proceedings shall invalidate the mortgage given in pursuance thereof. *Held*, where the court had jurisdiction to make the order for the execution of a mortgage by an administrator, that the nonappointment of a guardian for minors was an "irregularity," and did not invalidate the mortgage.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Henry Thomas against J. L. Parker, administrator, and others, to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Affirmed.

R. W. Ready and A. W. Blair, for appellants. James A. Thomas and D. P. Hatch, for respondent.

PERCURIAM. This action was brought to foreclose a mortgage executed in favor of the plaintiff by the administrator of Mary E. Parker, deceased. The purpose for which the mortgage was given seems to have been to borrow money with which to pay certain debts of the decedent contracted in her lifetime, and to pay expenses of administration, family allowance, etc. The defendants are the husband, who is also the administrator of Mrs. Parker's estate, and her minor children. Demurrers were filed to the complaint, and overruled. The defendants then answered the complaint, and upon evidence given in the premises, findings being waived, the trial court entered a decree of foreclosure in accordance with the

prayer of the complaint. From the judgment thus made, this appeal is taken on the judgment roll and bill of exceptions.

One of the grounds upon which a reversal of the judgment is demanded is that the petition which was filed by the administrator when seeking to obtain the order of the probate court to mortgage the real estate of his decedent was insufficient, and did not therefore give that court jurisdiction to make the order. The law under which this proceeding can be had is to be found in the Code of Civil Procedure, §§ 1577, 1578. A critical examination of the petition and of the language of the statute makes it clear that the petition is sufficient.

The further contention of appellants that the mortgage sought to be foreclosed was not executed by J. L. Parker in his character as administrator of the estate of Mary E. Parker, and is therefore only a personal mortgage of said Parker, is clearly without merit. The mortgage, after referring to the order of the superior court authorizing its execution, proceeds to recite: "Now, therefore, the said mortgagor, pursuant to the order last aforesaid, * * * mortgages to the mortgagee," etc. This, with the other recitals, is sufficient to show that the mortgage was intended as a mortgage of property belonging to the estate of which the mortgagor was administrator, and was executed by him in his character as administrator, in pursuance of law and the order of the superior court directing its execution.

It is further argued that the order to show cause required by the second subdivision of section 1578 of the Code of Civil Procedure is insufficient, because it does not comply with the provisions of that subdivision, and for the further reason "that the same does not direct or require the personal services thereof to be made upon the infant defendants herein and minor heirs in said proceedings, it appearing therein that each and all of them were under the age of fourteen years." The court refused, on the objection of the defendants, to rule out the order above adverted to and offered in evidence. The objection as made is general, with the exception of the matter last specified, with reference to the want of personal service on the minors, and therefore the trial court had only that matter called to its attention in a proper way. In relation to this objection it is sufficient to say that subdivision 3 of section 1578 of the Code of Civil Procedure, under which the order to show cause was made, provides that service of such order may be made personally, "or it may be published for five successive weeks in a newspaper of general circulation published in the county;" and the order was so published, and in accordance with the directions contained in such order. There is therefore nothing in the exception taken. The appellant further claims that, in order to validate the proceedings, it was necessary for a guardian ad litem to be appointed to represent the minors. The act under which this proceeding is taken does not require any guardian ad litem to be appointed, and

provides that, if the court has jurisdiction to administer the estate of the decedent, (about which there is no question here,) it has jurisdiction to make the order for the mortgage; and it further provides that "no irregularity in the proceedings shall impair or invalidate the same or the mortgage given in pursuance thereof," etc. Code Civil Proc. § 1578, subd. 6. The non-appointment of the guardian ad litem is an irregularity, (*Emeric v. Alvarado*, 64 Cal. 600, 2 Pac. Rep. 418;) hence there is no merit in the point last made.

Judgment affirmed.

97 Cal. 490

ELDER v. KUTNER et al. (No. 18,027.)

(Supreme Court of California. March 9, 1893.)

WRONGFUL ATTACHMENT—DAMAGES—LIABILITY OF SURETIES—ACTION ON BOND—PLEADING.

1. Under Civil Code, § 3300, providing that for the breach of an obligation arising from contract the measure of damages is the amount which will compensate the party aggrieved for all detriment "proximately" caused thereby, or which, in the ordinary course of things, would be likely to result therefrom, sureties on an attachment bond are not liable in damages to the person whose land is attached by reason of the impairment of his credit and his inability to sell such land because of the attachment lien thereon, in that such damages are not the "proximate," but the "remote," result of the attachment.

2. The fact that an attachment was sued out maliciously does not affect the liability for damages of the sureties on the bond, since in an action against them the questions of "motive" and "probable cause" are immaterial.

3. A complaint in an action against the sureties on an undertaking in attachment to recover attorney's fees paid out in the attachment, which fails to state that plaintiff has actually paid such fees, is demurrable.

4. Where, on striking out one paragraph of a complaint, sufficient facts remain to constitute a cause of action, a demurrer will not lie thereto.

Commissioners' decision. Department

2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by John Elder against A. Kutner and another. There was judgment for defendants on demurrer to the complaint, and plaintiff appeals. Reversed.

J. P. Meux, for appellant. E. S. Heller and G. W. Jones, for respondents.

SEARLS, C. This action was brought in the superior court of the county of Fresno to recover damages against the respondents, as sureties upon an undertaking in an attachment suit against the plaintiff and appellant here, which attachment suit was dismissed. The complaint contains two counts. In the first, plaintiff, after the usual averments in reference to the suing out and levy of the attachment upon his land at Fresno, as a predicate for the recovery of damages, alleges as follows, in paragraph 9: "That between the 21st day of January, 1891, and the 27th day of August, 1891, the plaintiff had need of a large sum of money for his immediate use; desired, had an opportunity, and was able to mortgage his said premises for the purpose of raising money

for his immediate use and great pressing needs; and had opportunity of selling his said premises, but was not able to mortgage or sell the same on account of said attachment having been levied and remaining unsatisfied as aforesaid, and creating a cloud upon plaintiff's title to his said premises. That the plaintiff had to sacrifice other property—horses, mules, and stock—on his said premises, at greatly reduced and inadequate prices, for the purposes of meeting his immediate necessities and raising money. That by reason of his not being able to mortgage or sell his said premises and having to sell the horses, mules, and stock on his said premises, the plaintiff has been greatly damaged, to wit, in the sum of four hundred (\$400) dollars, the amount of said undertaking." It is further averred that the attachment was "wrongfully and unlawfully and maliciously sued out," and that the plaintiff herein "did not owe any portion of the indebtedness sued on in said action." The second count of the complaint is based upon plaintiff's supposed right to recover attorneys' fees in the attachment suit; and the only portion thereof necessary to the points made is to the effect that plaintiff was put to great expense in defending that action, "and engaged an attorney to represent him therein, and incurred attorneys' fees, to wit, the sum of one hundred dollars." Defendants' attorneys demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action; and moved to strike out that portion of the first count quoted herein in reference to damages sustained by reason of the lien of the attachment upon the land. The motion to strike out was granted, and the demurrer to the complaint sustained, with leave for plaintiff to amend, upon a failure to do which, final judgment for costs was entered against him. The appeal is from such judgment.

The first question presented for determination is as to the propriety of the action of the court below in striking out paragraph 9 of plaintiff's complaint, hereinbefore quoted. An undertaking given upon the issuing of a writ of attachment, under our statute, is a contract,—a contract to indemnify the defendant for all costs that may be awarded to him, and all damages which he may sustain by reason of the attachment in the event of his recovering judgment. An action upon such undertaking being upon contract, the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civil Code, § 3300. The liability of the defendants arises under their contract, and is limited by its terms and conditions. *McDonald v. Fett*, 49 Cal. 354. By that contract they did not undertake to become liable for the remote and possible consequences which in some contingency might follow, but for the proximate consequences naturally and ordinarily resulting from the effect of the writ. The impairment of plaintiff's credit, his inability to sell the land levied upon or to contract a loan up-

on the security of such land, was not a proximate, but a remote, consequence of the attachment. The attaching creditor did not deprive plaintiff of the possession or use of his land, did not commit waste thereon, or do or cause any act to be done beyond levying upon the land in the manner prescribed by the statute for the levy of attachments upon real property. In *Miller v. Stewart*, 9 Wheat. 702, it was said: "Nothing can be clearer, both on principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract." *Roe v. Thomas*, 19 Mo. 613. The plaintiff, it is true, avers that his property was maliciously attached. If this was true, he could maintain an action on the case against his attaching creditors, in which the injury he complains of here could be redressed, provided, always, there was no probable cause for issuing the writ. *Reidhar v. Berger*, 8 B. Mon. 160. In an action against the sureties on the undertaking, however, the questions of motive and probable cause cut no figure. In *Heath v. Lent*, 1 Cal. 410, it was held, in an action on a bond given upon suing out an attachment against the property of a debtor who was a merchant, where the sheriff had levied upon no property except real estate, and the debtor had never been disturbed or molested in his possession, (1) that evidence as to the effect of an attachment upon the credit and reputation of merchants ought not to have been admitted, on the ground that damages resulting therefrom were too remote and contingent; (2) that evidence of depreciation of value of the real estate attached was not admissible. The case of *Ah Thae v. Quan*, 3 Cal. 216, overrules the case of *Heath v. Lent* to the extent of holding that fees paid to counsel to procure the dissolution of an injunction was a direct loss, consequent upon the wrongful issuing of an injunction, for which a recovery could be had upon the bond. *Prader v. Grim*, 13 Cal. 586, and later cases are to the same effect. There is a marked distinction between cases in which personal property is attached and taken into possession by the sheriff, as it must be to constitute a valid lien, and those in which real estate is taken under a like writ; and, when we say the damages sought to be recovered in that portion of the complaint stricken out are too remote for recovery on the bond, we must be understood as applying the remark to cases involving real estate only. We think there was no error in the order of the court striking out the portion of the complaint in question.

2. As to the order sustaining the demurrer. The second count of the complaint failed to state a cause of action. It has been repeatedly held by this court that counsel fees in a proper case for their recovery cannot be recovered until they have been actually paid. *Wilson v. McEvoy*, 25 Cal. 169; *Prader v. Grimm*, 28 Cal. 11. The fact of payment, being essential to a recovery, should be averred. We search the complaint in vain for any such allegation. The averment is that plaintiff "engaged an attorney to represent him therein, and incurred attorneys' fees, to

wit, the sum of one hundred dollars." This, at most, is but an assertion that he incurred a liability. The damage accrues from the payment, and not from incurring the liability so to do. The demurrer to the first count of the complaint should have been overruled. Strike out the ninth paragraph, and we still have a consecutive and orderly statement of a set of facts which entitles the plaintiff to recover nominal damages. For this reason we recommend that the judgment be reversed, and the court below directed to overrule the demurrer to the first cause of action in plaintiff's complaint, with leave to defendants to answer the same.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to overrule the demurrer to the first cause of action in plaintiff's complaint, with leave to defendants to answer the same.

97 Cal. 482

BLACK v CLASBY, Constable, et al. (No. 18,066.)

(Supreme Court of California. March 9, 1893.)

CONVERSION—NECESSITY OF DEMAND.

Where a constable, under a writ of attachment against one person, seizes the goods of another, which at the time of the seizure are in the custody of a person other than the defendant in the writ, he becomes a trespasser ab initio, and no previous demand is necessary to authorize a recovery therefor; and if this rule is changed by the amendments taking effect May 2, 1891, to sections 549 and 689 of the Code of Civil Procedure, so that a written claim is necessary, this does not apply where the property was seized by the officer April 16, 1891, on which day the right of action for the conversion was complete.

Department 1. Appeal from superior court, Colusa county; A. E. Bridgford, Judge.

Action by Mary B. Black against John Clasby, constable, and others, for the alleged conversion of personal property. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

H. M. Albery and K. Albery, for appellants. B. F. Howard, for respondent.

HARRISON, J. The defendant Clasby was the constable of the first judicial township in the county of Colusa, and as such officer seized and took into his possession, under a writ of attachment issued out of the justice's court for that township, in the action of W. W. Ludy vs. Henry B. Black, certain personal property belonging to the plaintiff. At the time of its seizure a portion of the property was in the possession of the plaintiff, and another portion in the possession of one Spencer, who was holding it as bailee for the plaintiff, but none of it was in possession of the defendant in the writ. A few days after its seizure, the plaintiff orally demanded the property of the constable, and, upon his refusal to surrender it, brought this action for the value of the property alleged to have been converted, against him and

the two other defendants, who were sureties upon his official bond. Judgment was rendered in her favor, and the defendants have appealed therefrom.

When the sheriff, under a writ of attachment or of execution against one person, seizes the goods of another, which at the time of seizure are in the custody either of the owner or of a person other than the defendant in the writ, he is a trespasser ab initio, and no previous demand is necessary to authorize a recovery therefor. *Boulware v. Craddock*, 30 Cal. 190; *Murfree, Sher.* §§ 270, 270a. The appellants claim that by the amendments of 1891 to sections 549 and 689 of the Code of Civil Procedure (St. 1891, p. 20) this rule has been changed, and that under the present provisions of these sections the judgment herein cannot be sustained, for the reason that the plaintiff did not present to the constable a written claim for the property in the form therein designated. We do not find it necessary, however, to pass upon the effect of these amendments, or to construe the sections as amended, as the present case must be determined without regard to them. The property of the plaintiff herein was seized by the officer on the 16th of April, 1891, and the plaintiff's right of action for its conversion was complete on that day, and was not taken away or impaired by the foregoing amendments, as these did not take effect till May 2, 1891. The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(3 Cal. Unrep. 838)

CONLON v. GARDNER et al. (No. 18,008.)

(Supreme Court of California. March 9, 1893.)

CHANGE OF VENUE—REVIEW.

Where the evidence on the hearing of a motion for change of venue on the ground of change of residence is conflicting as to whether the residence had actually been changed when the action was commenced, the discretion of the trial court in denying the motion will not be reviewed on appeal.

Commissioners' decision: Department 1. Appeal from superior court, Amador county; C. B. Armstrong, Judge.

(Not to be published in California Reports.)

Action by Thomas Conlon against Eli Gardner and Eleanor T. Gardner. From an order denying their motion for a change of venue, defendants appeal. Affirmed.

Eagon & Rust, for appellants. Camlinetti & McGee, for respondent.

BELCHER, C. The plaintiff commenced this action to recover from the defendants the sum of \$3,000, alleged to be due him from them as commissions for the sale of certain mining property situate in the county of Amador. The complaint was filed in the superior court of Amador county on September 5, 1891, and the summons was duly served on defendants in that county on the 15th of the same month. In due time defendants demurred to the complaint, filed an affidavit of merits, and an affidavit that they were at the time of the commencement of the action, and were then, and had been ever since the — day

of June, 1891, residents of and actually residing in the county of Alameda, and demanded that the place of trial of the action be changed to the county of Alameda. The plaintiff contested the application for a change of venue, and, when the motion came on to be heard, a large number of additional affidavits were filed and read on both sides. The court below denied the motion, and the defendants appeal from the order.

The plaintiff's affidavits were positive to the effect that defendants had resided in Amador county for a good many years, and continued to reside there until September 25, 1891. The defendants' affidavits, on the other hand, were positive to the effect that defendants left Amador county and became permanent residents of Alameda county on July 18, 1891, and that they thereafter had only gone back to the former county two or three times on business. It was, however, admitted that their household furniture and some of their children remained in their old home until September 25th. The question, then, presented for decision by the trial court was one of fact, viz. where did defendants actually reside on September 5th, the date of the commencement of the action? The evidence upon this question was clearly and squarely conflicting, and it has been held that in such a case an order like that appealed from here will not be disturbed on appeal. *Creditors v. Welch*, 55 Cal. 469; *Hastings v. Keller*, 69 Cal. 606, 11 Pac. Rep. 218. And if, as said in *Tuller v. Arnold*, 93 Cal. 168, 28 Pac. Rep. 863, this rule does not apply where the evidence is all documentary, still "this court will not interfere with the discretion of the trial court, except where it can plainly see that there has been an abuse of such discretion." Here we do not think it can be said that the court plainly abused its discretion in denying the defendants' motion.

The order should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(3 Cal. Unrep. 843)

WOLTERS v. THOMAS. (No. 18,007.)

(Supreme Court of California. March 10, 1893.)

NOVATION—LIMITATIONS—PLEADING.

1. S., being indebted to plaintiff, gave him a written order on defendant, who was indebted to S.; and plaintiff presented the order to defendant's foreman, who accepted it. Defendant afterwards denied the foreman's authority to accept it, but, on being shown it, and told the circumstances, agreed to pay plaintiff whatever should be due S. from him. Held to constitute a novation.

2. Under Code Civil Proc. § 458, providing that, "in pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated, generally, that the cause of action is barred by the provisions of section, (giving the number of the section and subdivision thereof, if it is so divided, relied upon)," a plea of the statute of limitations, alleging that a cause of action is barred by Code Civil Proc. § 339, is insufficient, since such statute contains several subdivisions.

3. The objection to the answer need not be taken by special demurrer for uncertainty.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; G. G. Clough, Judge.

(Not to be published in California Reports.)

Action by J. C. Wolters against J. H. Thomas to recover a claim against defendant, alleged to have been assigned to him. From a judgment for plaintiff, defendant appeals. Affirmed.

Goodwin & Goodwin, for appellant. C. E. McLaughlin, for respondent.

TEMPLE, C. This appeal is from a judgment, and was taken within 60 days after its rendition. The question presented is whether the trial court erred in overruling defendant's motion for nonsuit. It does not appear that any further evidence was introduced after the motion was made. The complaint shows, by proper averment, that on the 19th day of July, 1887, the defendant was indebted to Sing Lee Co in the sum of \$432.37, and that Sing Lee Co was indebted to plaintiff in the same amount; that plaintiff agreed with Sing Lee Co to release him from such indebtedness if he would give an order upon defendant for that amount, provided defendant would accept such order; that thereupon Sing Lee Co gave him an order upon defendant, in writing, whereby he requested defendant to pay the amount to plaintiff; that the order was presented to defendant's foreman, who accepted the same, in writing, and thereupon plaintiff gave Sing Lee Co credit for that sum on his books; that, shortly afterwards, plaintiff met defendant, and showed him the order, and explained to him all the facts; that defendant said that his foreman had no authority to accept the order, but that it was all right, for whatever sum he owed Sing Lee Co; that subsequently, upon a settlement between defendant and Sing Lee Co, it was found that defendant was indebted to Sing Lee Co in the full amount of the order, and that sum was charged up against Sing Lee Co on account of the order, and is retained by defendant, who has never paid any part of it to Sing Lee Co or to plaintiff, though plaintiff has often demanded the same. The complaint contains many other averments not essential to the determination of this appeal. On the trial the evidence failed to show that the foreman had any authority to accept the order for defendant, and did show that the amount of defendant's indebtedness to Sing Lee Co was only \$371.25, instead of \$432.37 as alleged. In other respects, the allegations of the complaint were substantially proven, so far as set out above. It also appeared that, before receiving the order from Sing Lee Co, plaintiff called upon defendant's foreman, to ascertain the amount due Sing Lee Co, and was informed that the sum was \$432.37, and therefore the order was drawn for that sum. The intent was to include whatever was due from defendant to Sing Lee Co. Two points are made by the appellant: The first is that the cause of action alleged is upon a written order,

and the evidence does not sustain the allegation. The cause of action proved, if any, is upon an assignment of an open account. The second, that the action is barred by the statute of limitations.

1. While the complaint sets out a written order, and avers that it was duly accepted by the defendant, it also shows that defendant was at the time indebted to Sing Lee Co, and, upon being shown the order, and told the circumstances, agreed to pay plaintiff whatever should be found due Sing Lee Co. I think a cause of action is stated, aside from the alleged acceptance. The facts would certainly show a contract of novation, if not a cause of action upon the order. See *Joyce v. Wing Yet Lung*, 87 Cal. 424, 25 Pac. Rep. 545.

2. The plea of the statute of limitations is in the following words: "And, as further defense to said action, alleges that the same is barred by the provisions of section 339, Code of Civil Procedure of the State of California." That section reads as follows: "Within two years: (1) An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state. (2) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape. (3) An action to recover damages for the death of one, caused by the wrongful act or neglect of another." Section 458, Code Civil Proc., provides: "In pleading the statute of limitations, is not necessary to state the facts showing the defense, but it may be stated, generally, that the cause of action is barred by the provisions of section, (giving the number of the section and subdivision thereof, if it is so divided, relied upon,)" etc. It is manifest that the answer does not comply with this section. Counsel say that the answer is equivalent to saying that the cause of action is barred by each of the subdivisions contained in the section referred to. But, if this is the effect, it clearly is not a compliance with the statute. Tested by ordinary rules of pleading, the absurdity of this claim is very obvious. It would be an averment, not only in the same defense, but in the same sentence, that the cause of action is founded upon a contract not in writing, upon a liability incurred by an officer, and that it is an action to recover damages for the death of one, caused by the wrongful act of another. The substituted mode of pleading was allowed to avoid useless prolixity, but was so conditioned as to secure all necessary definiteness in pleading. The rule contended for would nullify these conditions.

Counsel further contend that the objection should have been made by special demurrer, on the ground of uncertainty or ambiguity. But the objection is not that there is uncertainty in the statement of facts, but that no facts are stated. It is only by a compliance with the statute that such a defense can be made without

stating facts. That there must be strict compliance, in such cases, has often been held. *Manning v. Dallas*, 73 Cal. 421, 15 Pac. Rep. 34; *Young v. Wright*, 52 Cal. 407; *Judah v. Fredericks*, 57 Cal. 339.

Counsel say that there are numerous cases in which such pleas have passed here without challenge. The only case cited is *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. Rep. 545. That case discloses no such plea, nor does it contain any language to justify such assertion. An examination of the record in that case shows that the section and subdivision thereof were pleaded. I think the judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(3 Cal. Unrep. 832)

In re HARVEY.

Appeal of CHAMPLIN. (No. 18,004.)

(Supreme Court of California. March 7, 1893.)

INSOLVENCY—SECURED CLAIMS—ALLOWANCE—COSTS—WRONGFUL ATTACHMENT.

1. On a contest of a claim against an insolvent's estate, it appeared that the insolvent had become indebted to claimant's assignor, B., for the price of certain land and merchandise, and gave him the notes constituting the claim in question. As part of the same transaction, B. gave a bond conditioned to convey the land to the insolvent on payment of the amount of the notes. *Held*, that the title to the land was reserved to secure the entire debt, and that the claim was properly rejected where claimant attempted to prove the full amount of the notes, without either deducting the value of the land, as required by section 44 of the insolvency act, or conveying his interest in it to the assignee.

2. Costs incurred in wrongful attachment against the estate of an insolvent cannot be recovered, under section 65 of the insolvency act, as said section applies only to costs which would have been a legal charge.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; G. G. Clough, Judge.

(Not to be published in California Reports.)

Proceedings in the matter of the insolvency of T. M. Harvey. Certain orders were made refusing claims presented by George Champlin, and settling the assignee's account, from which Champlin appeals. Affirmed.

M. P. Chipman and D. W. Jenks, for appellant. W. Rigby and J. J. May, for assignee. E. E. Copeland, for insolvent.

TEMPLE, C. This appeal is from two orders made in the proceedings in the matter of the insolvency of T. M. Harvey. By one order the court refused to allow two claims presented by the appellant against the estate of the insolvent. By the order it settled the final account of the assignee, and distributed the proceeds of the estate, without considering the objections of appellant to the account or the proposed order. As appellant had no interest in the insolvent's estate after his two claims were rejected, it is obvious that, if the first order was correctly made,

appellant was not injured by the second. It does not appear when the proceedings in insolvency were commenced, but the adjudication was made at the instance of the creditors of T. M. Harvey, September 19, 1890. On the 2d of November, 1890, Champlin filed his claims, verified by his affidavit, as required by the insolvent act. Upon notice given by the assignee that he would contest the claims, the matter was submitted upon affidavits, and the claims were held not provable against the insolvent and rejected. Among others, the affidavit of T. M. Harvey, the insolvent, was read, from which it appeared that the insolvent and J. L. Harvey became indebted to one J. H. Beecher on the 27th day of September, 1889, in the sum of \$4,110, for certain merchandise and for a lot in the town of Adin, county of Modoc. For this sum the debtors gave three notes, each payable to the order of the makers, and then indorsed by them and delivered to said Beecher. They were all payable one day after date. At the same time, and as part of the same transaction, and as part consideration for the notes, Beecher executed and delivered to them his bond, conditioned "that, if the above bounden obligor shall on or before the 1st day of August, 1891, make, execute, and deliver unto said T. M. Harvey and James L. Harvey (provided that the said T. M. Harvey and James L. Harvey shall on or before that day have paid to the said obligor the sum of four thousand one hundred and ten dollars gold coin of the United States of America) a good and sufficient conveyance," etc. Beecher, of course, retained the title to the land, and, so far as shown, still retains it. In June, 1890, affiant states, Beecher transferred the notes to Champlin, who is his brother-in-law, and who took the notes with full notice of all the facts. On the 18th of July, 1890, Champlin commenced a suit upon the notes in the superior court of Tehama county, and caused an attachment to be issued, which was levied upon the property of the insolvent in the county of Modoc. Just two months afterwards T. M. Harvey was adjudged an insolvent. A motion was made in the court in which the attachment suit was pending to dissolve the attachment on three grounds: (1) The indebtedness was secured; (2) was not due; and (3) T. M. Harvey had been adjudged an insolvent. When the motion was made does not appear, but it must have been after the adjudication. It was granted November 12, 1890. The order dissolving the attachment does not state upon what ground it was dissolved, but it is evident that the attachment was improperly sued out, for the land was held in trust as security for the debt even in the hands of Beecher's assignee. *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. Rep. 608, and 26 Pac. Rep. 789. Besides, if the insolvency proceedings had been commenced within one month after the attachment, the adjudication would have ipso facto operated as a dissolution, and no such motion would have been required.

Appellant's affidavit denies that appellant knew of the existence of the supposed security when he purchased the notes, and

he contends that the value of the lot is much less than the debt, and that the purchase price of the land formed an inconsiderable part of the consideration for the notes. By the terms of the bond, however, which may be considered a declaration of a trust by Beecher, it is evident that the Harveys would be compelled to pay the entire debt before they could demand a deed. If, therefore, the bond constituted security for the payment of the notes, in the hands of the assignee, at all, it was for the full amount. Appellant did not attempt to prove his claim for the balance of the debt after deducting the value of the security, as provided in section 44 of the insolvent act. Indeed, he could not do this unless he could agree with the assignee as to the value of the security. But he made no effort in that direction, for he claimed that he had no security, and was entitled to prove his full debt. Of course, for the same reason, he did not convey his claim upon the property to the assignee, and permit the property to be sold under the order of the court. The claim, therefore, was properly rejected by the court.

The second claim presented by Champlin against the estate of the insolvent was for \$713.33, being the costs incurred in the attachment proceedings. It is evident that the attachment was wrongfully sued out. Under such circumstances appellant could not have recovered such costs from the defendant if he had not been adjudged an insolvent. As the proceedings in insolvency are for the purpose of appropriating the property of the insolvent to the payment of his debts, it must follow that such costs could not be allowed against his estate. The provisions of section 65 of the insolvency act can only apply to costs which would have been a legal charge against the insolvent. I think the order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders are affirmed.

97 Cal. 527

In re MULHOLLAND. (No. 21,000.)

(Supreme Court of California. March 16, 1893.)

FINES—IMPRISONMENT UNTIL PAYMENT.

1. Pen. Code, § 1446, relating to proceedings in police courts, provides that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every dollar of the fine. Section 1205, which was a similar provision, till amended by St. 1891, p. 52, provides that the imprisonment "must not exceed one day for every two dollars of the fine." *Held*, that section 1446 was not affected by the amendment to section 1205, which is a limitation on the powers of superior courts.

2. The fact that the law provides different degrees of punishment by different courts for the same offense does not render it invalid.

At chambers.

Petition by one Mulholland for a writ of habeas corpus. Denied.

N. S. Wirt, for petitioner.

PATERSON, J. The petitioner was convicted in the police court of the city and county of San Francisco, January 16, 1893, of the crime of battery, and sentenced to pay a fine of \$100, or, in default of the payment thereof, to be imprisoned at the rate of one day for each dollar of said fine remaining unpaid. The petitioner claims that the court below had no authority to imprison him for more than 50 days; that the sentence ought to have been no greater than one day for each two dollars of the fine. In support of this contention he relies upon section 1205 of the Penal Code, as amended March 10, 1891, (St. 1891, p. 52.) That section, as originally incorporated into the Code, provided that the judgment should specify the extent of imprisonment, "which could not exceed one day for every two dollars of the fine." Section 1446, Pen. Code, relating to proceedings in justices' and police courts, provided that a judgment that the defendant pay a fine might also direct that he be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every two dollars of the fine. Both of these sections were amended in 1874 by inserting the words "one dollar" in lieu of the words "two dollars," as used in each section. Section 1446 has remained the same as thus amended. The amendment to section 1205, approved March 10, 1891, provides that the imprisonment "must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted." In my judgment, the recent amendment to section 1205 in no way affected the operation of section 1446. I think that the legislature intended that the justices' and police courts should remain clothed with the discretion which they have exercised under section 1446 ever since its adoption. The amendment to section 1205 is a limitation upon the powers of the superior courts, which alone have jurisdiction of misdemeanors, with one or two exceptions, (section 115, Code Civil Proc.) for which the punishment may be greater than six months' imprisonment or \$500 fine, or both. In certain cases the superior court may impose as a penalty for a misdemeanor several years' imprisonment in the county jail, or \$5,000, or both such fine and imprisonment. It is altogether likely that the members of the legislature had observed in some instances an abuse of discretion in the exercise of this authority by the superior courts under the provisions of the statute, and desired to limit their power in that regard.

I do not think there is any merit in the point made by counsel for petitioner that the "punishment must be the same in all courts for the same offense." As was said in *Ex parte Soto*, 88 Cal. 627, 26 Pac. Rep. 531: "Section 1446 of the Penal Code does not imperatively require that the direction for imprisonment in case of nonpayment of a fine shall be at the rate or in the proportion of one day for one dollar. It is in terms permissive. The discretion of the magistrate is absolute whether or not to impose any imprisonment whatever." The justices' and police courts having this dis-

cretion, and the court being limited in the exercise thereof to the maximum term of imprisonment prescribed as a penalty or part of the penalty, there is very little danger of petty offenders being subjected to a harsher or more burdensome rule than the one which is applied to more serious offenders. It is true, a person charged with a felony may be convicted of a misdemeanor of which the justices' and police courts have jurisdiction, and be sentenced by the superior court to a greater term of imprisonment than he would have received if he had been tried before a justice of the peace for the same offense, (such a thing is possible,) but that fact does not invalidate the law. The various superior and justices' courts throughout the state are constantly trying criminal cases of the same nature and imposing different sentences. It is impossible to lay down any fixed rule by which the judges may determine the exact penalty to be imposed in each case, and the fact that criminals are subjected to different degrees of punishment for the same offense in different courts does not affect the validity of the law. *Seriegrour v. State*, 1 Chand. 51. The petitioner is remanded to the custody of the sheriff.

97 Cal. 510

BOYD v. ODDOUS. (No. 19,024.)

(Supreme Court of California. March 10, 1893.)

NEGLECTANCE—PLEADING—INSTRUCTIONS.

1. A complaint in an action to recover for personal injuries sustained through the negligence of another is not demurrable by reason of its failure to allege absence of contributory negligence on the part of plaintiff.

2. Where a party requests numerous instructions, and the court gives a general charge, purporting to cover the instructions asked, an objection to the refusal of the court to give the instructions on the ground that they were proper, and that they were not covered by the charge of the court, is too general to be noticed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by W. M. Boyd against Jacques Oddous. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

W. V. Biscailuz and Gould & Stanford, for appellant. Burnett & Gibbon, for respondent.

VANCLIEF, C. Action for damages alleged to have been suffered by plaintiff from the bite of a dog owned and kept by defendant; it being alleged that the dog was vicious and accustomed to bite mankind, of which defendant had notice, and that plaintiff was bitten in consequence of the negligent manner in which defendant kept the dog. The answer admits that defendant owned and kept the dog, but denies all other material averments of the complaint; and, as an affirmative defense, alleges "that, if the plaintiff had used ordinary caution," he could have avoided coming in contact with the dog. This seems to have been intended as an averment of contributory negligence on the part of the plaintiff. The verdict of the jury was in favor of the plaintiff, as-

sessing the damages at \$450, according to which judgment was rendered. Defendant appeals from the judgment and from an order denying his motion for new trial.

1. The first and principal point urged here by counsel for appellant is that the complaint fails to state a cause of action, because it does not negative contributory negligence on the part of the plaintiff; and, therefore, that defendant's demurrer to the complaint and his motion for nonsuit should have been sustained. No authorities are cited which tend to support this point; but the contrary doctrine seems to be firmly established in this state. *Robinson v. Railroad Co.*, 48 Cal. 409; *Yik Hon v. Waterworks*, 65 Cal. 619; *Magee v. Railroad Co.*, 78 Cal. 430, 21 Pac. Rep. 114.

2. There is no foundation in the record for the point that the court permitted evidence of special damages not pleaded, as no such evidence appears; nor does it appear that any evidence of damage was objected to on the ground that the damage was not specially pleaded.

3. It is contended that the evidence does not justify a verdict of negligence on the part of the defendant, and, if it does, that the jury should have found contributory negligence of the plaintiff. Upon both of these issues the evidence was conflicting, and therefore the verdict as to neither should be disturbed.

4. Some very indefinite objections are made to the instructions given to the jury. Counsel for defendant requested the giving of seven distinct instructions, which appear in the record. The plaintiff also asked instructions which do not appear. As to the instructions asked, the court said: "I have been requested, by both plaintiff and defendant, to give certain instructions, and have concluded to give the instructions entire by the court, covering the points that are made in these instructions as far as possible. You can save your exceptions on both sides to the refusal of the instructions asked for, and I will charge the jury orally." The instructions orally given cover about 4½ pages of the transcript; and, as often happens in cases of oral instructions, they are not so perspicuous as they probably would have been had they been deliberately written; but, considering them together, they seem to be free from error prejudicial to the defendant. As to the refusal of the court to give the seven instructions requested by defendant, counsel for appellant only say: "Here it will be seen, we think, that instructions asked by appellant were proper, and that they were not covered by the court's charge to the jury." This is too general. The proper instructions said to have been asked, and not substantially given, should have been specified by counsel. Upon an ordinarily careful reading, I have discovered none such. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 500)

ROGERS v. DUHART. (No. 19,095.)

(Supreme Court of California. March 10, 1893.)

TRESPASS ON LAND—ACTION BY LESSEE NOT IN POSSESSION—PLEADING.

A complaint stated that the executors of a certain estate let to plaintiff certain land of the estate for eight months from a date stated, "and thereupon plaintiff took possession of and has ever since held the same;" that defendant entered upon the described property, and drove into and kept cattle and sheep thereon, and destroyed all the grass thereon, and so kept them there for nearly four months, without plaintiff's consent. All the facts alleged were true, except that plaintiff was not in possession during the time mentioned. *Held*, that plaintiff was entitled to recover, though he could not maintain trespass *quare clausum*, for want of possession; since, under the Code, technical forms of action are discarded, and the allegation of possession was immaterial, and may be treated as surplusage.

Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Rogers against Duhart to recover damages caused by defendant by pasturing stock on certain land. From a judgment for plaintiff, defendant appeals. Affirmed.

Wells, Monroe & Lee, for appellant. J. L. Murphy, for respondent.

PATERSON, J. The complaint alleges that the executors of the estate of Miguel Leonis let and demised unto the plaintiff certain lands belonging to the estate for the term of eight months from and after February 1, 1891, and thereupon plaintiff took possession of and has ever since held the same; that on February 1, 1891, the defendant "entered upon the plaintiff's said described property, and drove into and kept upon the said land about 400 head of cattle, and about 3,000 head of sheep, and trod down and depastured and destroyed all the grass and herbage thereon, and so kept the said cattle and sheep upon the same continually thereafter and until on or about the 17th day of April, 1891, * * * without the consent of plaintiff, and to his damage in the sum of \$2,000." The facts of the case are not disputed. They show that defendant had the right to pasture 400 head of cattle upon the lands until the 1st day of September, 1890; that, after his right expired, the executors gave him "permission to pasture upon the said lands his gentle band of cattle, consisting of 50 or 60 head, until the 31st day of December, 1890, in consideration of the said defendant watching over the place and keeping the cattle of all other parties off;" that at the time of giving said permission the executors notified the defendant "that he must remove his cattle on the 31st day of December, 1890, and that under no consideration was the defendant, Duhart, to keep or allow any sheep to run upon the said ranch, and that was the only permission given defendant, by either of the executors, to be or have his cattle upon said ranch after the 1st day of September, 1890;" that a few days after September 1st one of the executors told the defendant to remove his

cattle from the ranch, and that he gave said executor "to understand that he had removed them, though he did not state so in so many words, (he stated that he had sold them, or was about to sell them;) that the defendant permitted 2,000 head of sheep, 300 head of cattle, and 25 head of horses belonging to him to graze upon the land in question from January 1, 1891, until April 17, 1891; that neither the plaintiff nor the executors had knowledge of the fact that plaintiff's sheep, cattle, and horses were upon the lands subsequent to December 31, 1890, but supposed that he had removed them from the premises, in accordance with his instructions, and that they did not know that he had abused the privilege granted to him on or about September 1, 1890; that the lands described in the complaint were uninclosed pasture lands, and neither plaintiff nor any one on his behalf took possession of the land or any part thereof until about the 12th day of April, 1891; that plaintiff has sustained damages in the sum of \$900 by reason of the wrongful act of the defendant, as charged in the complaint.

The briefs are devoted chiefly to a discussion of the question whether an action trespass *quare clausum fregit* can be maintained by one who was not in the actual possession of the land at the time the acts complained of were performed. The respondent refers to cases showing that actual possession is not in all cases essential, and the appellant insists that the exceptions are confined to cases in which the plaintiffs were the owners,—where the title draws to it the possession for the purpose of redressing injuries to the estate. It would be a useless thing to attempt to reconcile the cases on this subject. Decisions adhering to the common-law rules of pleading are seldom of any value in determining the sufficiency of a pleading under the Code, and sometimes lead to serious departures from its letter and spirit. With us mere forms of action are cast aside. Every action is now in effect a special action on the case, (*Jones v. Cortes*, 17 Cal. 487; *Goulet v. Asseler*, 22 N. Y. 225; *Matthews v. McPherson*, 65 N. C. 189; *Brown v. Bridges*, 31 Iowa, 145;) and the rigid formalism and subtle distinctions found in the rules governing the common-law forms of action are as inapplicable and inane under the modern plan of procedure as the highly dramatic speech, senseless repetitions, and symbolic gestures of the formulae prescribed for the five forms of civil actions by the decemvirs of ancient Rome. Does the complaint state in ordinary and concise language facts sufficient to constitute a cause of action? That is the question, and not whether it is sufficient to show trespass *quare clausum*, trespass *vi et armis*, or any other technical form of action, *ex delicto* or *ex contractu*. The common-law rule is that, if plaintiff declare in trespass *quare clausum* where the action should be case, he will be nonsuited at the trial; but under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of re-

lied, whatever it may be. The bill of exceptions herein states facts which would entitle plaintiff to relief in an action on the case, which includes torts not committed with force, actual or implied, injuries committed to property of which plaintiff has the reversion only, and in fact all injuries not provided for in other forms of action. The fact that the plaintiff alleges he was in possession is immaterial. The allegation may be treated as surplusage. "Superfluity does not vitiate." "The nature of the right of action has not been changed, nor has the amount of damages recoverable been affected; but the special and technical rules which govern the use of the two common-law actions mentioned [trespass and case] have certainly been abrogated." Pom. Rem. & Rem. Rights, § 232. The damages recoverable in the common-law action of trespass *quare clausum* are for the wrong done to the plaintiff's possession as well as to the inheritance, and, where the entry is with actual force, treble damages are frequently allowed. While the plaintiff is not permitted to recover such damages under the facts proved in the case, he is certainly entitled to recover such damages as would have been recoverable if the action were the common-law "action of case." To hold that the plaintiff could not recover would be to restore the old distinctions between these technical actions. Section 232, *supra*, note 2. There is nothing decided in any of the cases upon which the appellant relied opposed to the views which we have expressed. The statements upon this subject in *Holman v. Taylor*, 31 Cal. 340, and *Pollock v. Cummings*, 38 Cal. 685, are dicta. In *Uttendorfer v. Saegers*, 50 Cal. 497, it was alleged that the defendant forcibly entered upon the premises, and tore down the buildings, etc. It was claimed by the appellant that the action was trespass *quare clausum*. Respondent denied this, asserting that it was an action by the owner for damages done to the inheritance. The court held with the appellant, but did not hold that the action could not be maintained unless the plaintiff was in possession. The case simply holds that evidence of the possession of the tenant was material on the question of damages. The question of the sufficiency of the complaint or of the facts found to constitute a cause of action in case was not considered in any of the cases referred to. In *Heilbron v. Heinlen*, 72 Cal. 371, 14 Pac. Rep. 22, the court held that the defendants were entitled to show that at the time of the acts charged in the complaint they were in quiet and peaceable possession of the land, claiming the same under certificates of purchase and patents, and had continuously used and occupied it for 10 or 11 years prior to the commencement of the action. The decision followed the doctrine announced in *Page v. Fowler*, 37 Cal. 100, viz. that a personal action cannot be made the means of litigating and determining the rights to the possession of real property, as between conflicting claimants. In *Bank v. Turman*, (Cal.) 30 Pac. Rep. 966, it appeared that the plaintiff did not have title, and he neither had possession nor the

right of possession. In the case at bar there is no pretense that the defendant was claiming adversely to any one. He vacated the premises promptly upon receiving a written notice on behalf of plaintiff demanding possession, and so states in his answer. He was never at any time after September 1, 1890, a tenant. Admitting that, when a tenancy is shown, the presumption from his continued possession is that he holds in the same capacity, there is here shown an express agreement by the terms of which he was simply to have the privilege of pasturing 50 or 60 head of cattle on the land, in consideration of his services in caring for the property, and seeing that other stock did not trespass on the land. The presumption is therefore overcome. *Bertie v. Beaumont*, 16 East, 33. Defendant contends that he was a tenant at sufferance after December 31, 1891, but this is a mistake. He was a mere servant. *Haywood v. Miller*, 3 Hill, 90; *Robertson v. Georgia*, 7 N. H. 308. His possession was the possession of his employer. He could not have maintained an action against any one for trespass, nor would he have been a necessary party plaintiff with the owner in a suit to recover damages for injury to the property. *Ogden v. Gibbons*, 5 N. J. Law, 599. Whether he be regarded as a servant or licensee, the result is the same. He was there for a particular purpose, and the moment he abused the privilege, or committed any act hostile to the interests of his employer or licensor, he became a trespasser. *Lyford v. Putnam*, 35 N. H. 563; *Looram v. Burlingame*, 16 La. Ann. 199; *People v. Fields*, 1 Lans. 222; *Haskin v. Record*, 32 Vt. 575.

Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

SIVERS v. SIVERS et al. (No. 15,145.)

(Supreme Court of California. March 11, 1893.)

CONTRACT—CONSTRUCTION—TIME OF PERFORMANCE—PAROL EVIDENCE—RES JUDICATA.

1. A contract recited that defendants, husband and wife, jointly and severally agree to pay plaintiff a certain sum "advanced or loaned to us, or any further sum of money which he may loan to us at such time as circumstances may occur,—that is to say, that, if in any event either of us should die, then the survivor shall assume the debt, and pay it as if both were living; and we further agree that if the money * * * is not paid before the expiration of five years from the first day of January, 1889, last past, then we jointly or severally agree to give a mortgage to" plaintiff on land described. Held, that no time of payment was fixed by the contract.

2. In an action on such contract it was competent for plaintiff to show by oral testimony when such contract was agreed to be performed.

3. Where the evidence shows that the money was agreed to be paid when defendants sold the land described in the contract, and that the land was sold prior to plaintiff's demand and the commencement of the action, a finding that the money became payable on demand was proper.

4. In such case it appeared that plaintiff sued on such contract in justice's court, and

that a demurrer to the complaint was sustained by the justice, whereupon plaintiff dismissed the action. *Held*, that such action was no bar to the subsequent action in the superior court.

Department 1. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

Action by John H. Sivers against John A. Sivers and Eliza Sivers on a contract for the payment of money. From a judgment for plaintiff, defendants appeal. Affirmed.

Rogers & Chilstrom, for appellants. F. D. Brandon, for respondent.

HARRISON, J. The defendants executed to the plaintiff the following instrument, in consideration of the loan to them by the plaintiff of the sum of \$300: "San Francisco, January 26, 1889. The undersigned agreement entered into between J. H. Sivers, of San Francisco, and John Sivers and Eliza Sivers, his wife, that the said John Sivers and Eliza Sivers do jointly and severally agree to pay to the said John H. Sivers the sum of three hundred (\$300) dollars advanced or loaned to us, or any further sum of money which he may loan to us at such time as circumstances may occur,—that is to say, that, if in any event either of us should die, then the survivor shall assume the debt, and pay it as if both were living; and we further agree that if the money or loan or moneys so advanced is not paid before the expiration of five years from the first day of January, 1889, last past, then we jointly or severally agree to give a mortgage to the said J. H. Sivers upon the land or property which we own or occupy, described as follows: Southeast quarter of section 4 in township 27 north, of range 6 west, Tehama county, California. [Signed] John Sivers, Eliza Sivers." The court finds as a conclusion of law "that, no time of payment being specified in the obligation herein sued upon, the same became payable immediately upon the demand made by plaintiff for the payment thereof," and rendered judgment in favor of the plaintiff.

It is also alleged in the complaint and found by the court that at the time of the execution of the instrument it was agreed between the parties that the defendants should pay the sum named in the instrument whenever they should sell the real estate therein described, and that such sale had been made prior to the plaintiff's demand and the commencement of the action. This finding of the court was made upon oral testimony thereof, and the appellants contend that it was incompetent to show such agreement by such testimony, for the reason that the written instrument must be held to embrace all the terms of the agreement between the parties. The instrument executed by the parties does not by any specific terms designate the time for its performance. That the provision for payment by the survivor in case one of the makers should die did not postpone the time for payment until that event is shown by the clause providing that in that event it is to be paid "as if both were

living," thus indicating that at some time both were liable to pay it; and the agreement for a mortgage, if it was not paid within five years, did not give to the makers five years in which to make payment, but created an additional obligation in favor of the plaintiff, which ceased to be operative upon their sale of the property to be mortgaged. The instrument, therefore, being silent in respect to the time for the payment of the money, it was competent for the plaintiff to show that a period or event had been agreed upon between the parties thereto at which the payment should be made, and such agreement could be shown by oral testimony. This evidence did not contradict or vary any of the terms contained in the instrument. The rule which excludes evidence affecting the terms of a written instrument does not apply when the parties have not incorporated into the instrument all of the terms of their agreement, and when the evidence offered or the agreement sought to be proved is not inconsistent with the terms embodied in the instrument. Evidence of a contemporaneous oral agreement as to any matter upon which the instrument is silent, and which is not inconsistent with its terms, cannot be said to contradict or vary the terms of the written instrument. *Whart. Ev.* §§ 1015, 1026; *Guidery v. Green*, 95 Cal. 630, 30 Pac. Rep. 786. Inasmuch, however, as the instrument does not specify any time for its performance, the finding of the court that the money therein named became payable immediately upon the demand therefor was correct, (Civil Code, § 1657;) and the further findings respecting the foregoing oral agreement did not prejudice the appellants. If the money was payable immediately upon demand, they were not prejudiced by the fact that the demand was not made until after they had sold the property, or by the fact that it had been agreed that a demand should not be made until after such sale.

The proceedings in the justice's court did not constitute a bar to this action. After the plaintiff had brought his action in the justice's court upon the foregoing instrument, the defendants demurred thereto, and in sustaining their demurrer the justice "filed" his decision in the action as follows: "The case came on to be heard before me on the 20th day of October, 1891, on defendants' demurrer to the amended complaint, and submitted to the court without argument, and was taken under advisement until the 21st inst., at which time the court rendered judgment sustaining defendants' demurrer to the amended complaint. Stay two days." And thereafter, November 10, 1891, the plaintiff filed a dismissal of the action in that court. This action of the justice did not constitute a judgment of the court. There had been no trial upon the merits, and his action in sustaining the demurrer was but an order in regard to the sufficiency of the complaint, and not a judgment. A judgment is the final determination of the rights of the parties in an action or proceeding, whereas an order upon a demurrer is only a decision upon the correctness or sufficiency of practice in seeking to

tain a judgment. It may form the basis for rendering a judgment, but it is not itself a judgment. If a judgment had thereafter been entered upon that order, it must have been that the action be dismissed without prejudice to a new action. Code Civil Proc. § 890, subd. 3.

The position of the appellants that the suit in the justice's court is still pending, for the reason that no judgment of dismissal was entered therein, cannot be considered, since this defense was not presented in the court below.

The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

97 Cal. 530

DAMMON v. BEECHER et al. (No. 18,021.)
(Supreme Court of California. March 16, 1893.)

LIABILITIES OF PARTNERSHIP.

Where money is deposited with the managing member of a partnership, a receipt given therefor in the partnership name, and the money is used in purchasing for partnership purposes, the firm will be liable therefor though one of the partners was absent at the time of the deposit, and was not informed of such transaction.

Department 1. Appeal from superior court, Shasta county; Edward Sweeney, Judge.

Action by S. D. Dammon against J. S. Beecher and Peter Crumbaugh for money had and received. From a judgment for plaintiff, and an order denying a new trial, defendant Crumbaugh appeals. Affirmed.

L. V. Hitchcock, for appellant. C. P. Sprague, for respondent.

GAROUTTE, J. The defendants were partners doing a general merchandise business. Beecher was the general manager thereof, Crumbaugh living at a distance, and being seldom at the place of business. While defendants were so engaged as partners, on the 31st of July, 1886, plaintiff deposited with the firm the sum of \$1,050. The defendant Crumbaugh was absent, as he usually was, from his place of business at the time the deposit was made. The money was handed to defendant Beecher as a member of the firm, who deposited it with the firm funds, giving a receipt therefor in the name of the firm, and it was thereupon used in the business of Beecher & Crumbaugh, Beecher failing to inform Crumbaugh of the transaction. This action was brought to recover from the partnership the amount of money so deposited. The only question involved in this appeal is as to the liability of the appellant, Crumbaugh, upon the foregoing state of facts. If Beecher had used the money for his individual purposes, with some reason it might be urged that no liability was created against Crumbaugh, for the transaction of the receipt of the money was outside of the regular business of the partnership. But here the money was used for the purchase of partnership goods and the payment of partnership debts. It was directly applied to the satisfaction of Crumbaugh's liabilities, and

Cal.Rep. 32-34 P.—9

this was all done by the partner who received the money in the name of the partnership, and who had the entire charge and control of the business. Beecher had full power to borrow money for the use of the firm, and sign notes in the name of the firm, and thus bind his partner. Looking at this transaction in its most favorable light for the appellant, he should not be placed in a better position towards the plaintiff than if Beecher had given a firm note for the money, rather than a firm receipt. Beecher and the plaintiff, Dammon, both testified that the money was left with the firm, and the receipt so indicates. The fact that one partner was not present at the moment the money passed from plaintiff into the safe of the firm is immaterial. Under all the circumstances of the case, we are bound to hold that when the managing partner used this money for the benefit of the partnership, the partnership was liable for money had and received. It may be conceded that the act of a partner, who, being a trustee, improperly employs the money of his cestui que trust in the partnership business, does not of itself create a liability in favor of the beneficiary against the firm; but the present case is much broader in its facts. This entire question is exhaustively discussed in the case of *In re Ketchum*, 1 Fed. Rep. 815, and the doctrine there declared goes to much greater length than is necessary to support the plaintiff's claims in the present case. For the foregoing reasons let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

97 Cal. 513

SCOTT v. GLENN. (No. 18,094.)
(Supreme Court of California. March 11, 1893.)

RENDITION OF JUDGMENT—NOTICE.

In an action wherein defendant has filed a cross complaint, making plaintiff and others parties defendant thereto, a notice reciting "that the court has rendered its decision and findings and judgment" therein, directed "to the plaintiff" and his attorneys of record, service of which is accepted by one of the attorneys, who indorses the acknowledgment of service as "attorney for plaintiff and defendants to cross complaint," is a notice of the rendition of the decision to all of the losing parties. *Stonesifer v. Kilburn*, 29 Pac. Rep. 332, 94 Cal. 33, distinguished.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by A. E. D. Scott against G. R. G. Glenn for money had and received. Defendant filed a cross complaint, making plaintiff and others parties defendants. There was a judgment for defendant. From an order denying a motion for a new trial, defendants in the cross complaint appeal. Affirmed.

Geo. B. Graham, for appellants. J. P. Meux, for respondent.

BELCHER, C. This action was commenced to recover a sum of money alleged to have been received by the defendant for the use and benefit of certain parties, who

had sold and assigned the indebtedness to the plaintiff. The defendant answered, and also filed a cross complaint, making the plaintiff and his alleged assignors parties defendant and asking for affirmative relief against them. The defendants named in the cross complaint answered thereto, denying most of its averments. The case was tried by the court upon the issues raised by the pleadings, and the findings and judgment were that the plaintiff take nothing by his action, and that the defendant have and recover the relief demanded in his cross complaint. The findings and judgment were filed on September 17, 1891, and on the next day the attorney for defendant served upon the attorneys for the plaintiff and defendants to the cross complaint a notice reading as follows: "[Title of Court and Cause.] To the plaintiff, and Messrs. T. P. Ryan and G. B. Graham, attorneys of record: You will take notice that the court has rendered its decision and findings and judgment, and defendant's memorandum of costs have been this day filed in the above-entitled action. Dated September 17, 1891. J. P. Meux, Attorney for G. R. G. Glenn." On this notice was indorsed an acknowledgment of service, as follows: "Service of the within notice is hereby admitted, this 18th day of September, 1891. Geo. B. Graham, attorney for plaintiff and defendants to cross complaint." On March 21, 1892, the defendants in the cross complaint served upon Glenn and filed in the court a notice of their intention to move for a new trial of the action, stating that the motion would be made upon a statement of the case to be settled and allowed by the court. Subsequently the moving parties presented to the court their statement of the case, and asked that it be settled and allowed; but the defendant Glenn appeared by his attorney, and objected to the settlement and allowance, upon the sole ground that the notice of intention to move for a new trial was not served in time. The motion was submitted upon the above-mentioned notices, and the court, after hearing the arguments of counsel, "found that the said statement of the case and bill of exceptions was in all respects true and correct, but that the notice of intention to move for a new trial was not served in time, and thereupon and for that reason denied the motion of said defendants to said cross complaint." From the order thus entered, this appeal is prosecuted by all of the defendants to the cross complaint.

The Code provides that the party intending to move for a new trial must, within 10 days after notice of the decision of the court, file with the clerk and serve upon the adverse party a notice of his intention. Section 659, Code Civil Proc. It is, however, argued for the appellant—and this is the only point made—that the notice of decision served here, when properly construed, was a notice to the plaintiff and his attorney alone, and that "no notice of the rendition of the decision was ever given to the defendants in the cross complaint." We do not think the notice can be thus limited, particularly in view of the acceptance of service which was in-

dorsed upon it. In our opinion, it must be treated as a notice to and accepted by all of the losing parties. The case does not fall within the rule declared in *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. Rep. 332. There it was held that the settlement of a bill of exceptions was a "proceeding" in an action, within the meaning of section 473 of the Code of Civil Procedure, and that the court had power to relieve against the objection that the bill was not served in time, when it appeared that the default in the service resulted solely from excusable mistake or neglect. Here no claim for relief, under the section of the Code cited in that case, was made, and we fail to see how any such claim could be made. The order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

97 Cal. 516

FOLEY v. BULLARD et al. (No. 15,305.)
(Supreme Court of California. March 11, 1893.)

NOTICE OF APPEAL—PARTIES.

In an action to foreclose a street assessment on land of several defendants, wherein judgment is rendered for plaintiff, from which some of the defendants appeal, the nonappealing defendants need not be served with notice of appeal, as they are not adverse parties, within Code Civil Proc. § 940, since there is no personal liability, but the judgment must be satisfied out of the land. *Millikin v. Houghton*, 17 Pac. Rep. 641, 75 Cal. 539, distinguished.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by John Foley against James A. Bullard and others on a street assessment. There was a judgment for plaintiff, and some of the defendants appeal. Plaintiff moved to dismiss the appeal because notice thereof was not served on the nonappealing defendants. Motion denied.

Geo. D. Collins, for appellants. J. C. Bates, for respondent.

GAROUTTE, J. Foley recovered a judgment foreclosing a street assessment upon certain realty of defendants. Some of the defendants appealed from the judgment, but did not serve notice of appeal upon their codefendants. Respondent now moves to dismiss the appeal for that reason. The motion should be denied. The nonappealing defendants are not adverse parties, within the meaning of the statute.¹ Their rights will not be adversely affected by a reversal of the judgment. Under the authority of *Robinson v. Merrill*, 87 Cal. 11, 25 Pac. Rep. 162, it may be that the practical effect of a reversal of a judgment in this case will be a reversal as to all the defendants. If such is the result, then these codefendants certainly are not

¹Code Civil Proc. § 940, provides that a notice of appeal must be served on the adverse party, or his attorney.

adverse parties. If a judgment of reversal leaves them in statu quo, then this appeal does not affect their rights, and they are not entitled to notice. If a judgment of reversal as to defendant appellants has not the practical effect of a reversal as to all the defendants, then these defendants not appealing are left in statu quo by such reversal. In this character of action, there is no personal liability, but the realty alone must be looked to for the satisfaction of the judgment. For these reasons, so far as the subject-matter of this litigation is concerned, it is of no interest to the defendants not appealing what may be the final result of the pending appeal. In *Millikin v. Houghton*, 75 Cal. 539, 17 Pac. Rep. 641, plaintiff appealed from the order setting aside an execution issued against all the defendants. It is very apparent that all the defendants had an interest in sustaining the order, and therefore should have been served with notice of the appeal. Let the motion to dismiss be denied.

We concur: PATERSON, J.; HARRISON, J.

97 Cal. 523

JONES v. JUSTICE'S COURT OF LOS ANGELES CITY. (No. 19,027.)

(Supreme Court of California. March 13, 1893.)

JUSTICE OF THE PEACE—NOTICE OF TRIAL.

1. Code Civil Proc. § 850, provides "that when all the parties to an action in a justice's court served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiff and the defendants who have appeared thereof." *Held*, that the provision requiring such notice of the day of trial is imperative, and a judgment entered without it will be vacated on a writ of review.

2. Under Code Civil Proc. § 873, providing that the trial must commence at the expiration of one hour from the time specified in the notice mentioned in section 850, the notice must be given in writing, and, with proof of service, must form a part of the record.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Petition by Ellen Jones against the justice's court of Los Angeles city. Petition granted, and defendant appeals. Affirmed.

Willis & Appel, for appellant. Horace Bell, for respondent.

PER CURIAM. The petitioner herein applied to the court below for a writ of review, and judgment was entered in her favor, directing the appellant to vacate and set aside a judgment entered in the justice's court of Los Angeles city, on the 4th day of June, 1891, in favor of one Broseau, and against petitioner, Ellen Jones. The ground upon which the petitioner herein asked for the writ was that neither she nor her attorney ever had any notice that the case pending in the justice's court had been set for trial, and the learned judge of the court below sustained the petitioner's contention in that regard, and granted the writ prayed for. Section 850, Code Civil Proc., provides that "when all

the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiff and the defendants who have appeared thereof." Appellant contends that, the justice having acquired jurisdiction, the failure to notify the defendant of the time fixed for trial was mere error, which could have been corrected only upon appeal. We do not think the contention a sound one. Justices' courts have peculiar and limited jurisdiction, and the powers conferred upon them by the statute must be strictly pursued. The statute requiring notice of the day fixed for trial to be given is imperative, and it is just and right that it should be strictly enforced, because no man should be deprived of his property without notice and opportunity to be heard. It was the intention of the legislature to relieve parties to actions in a justice's court from the necessity of making daily inquiry at the justice's office to learn when the case is to be tried. We do not think the cases cited by the appellant are opposed to the views we have expressed. *Clark v. Superior Court*, 55 Cal. 199, was an application for a writ of prohibition to annul an order of the superior court, dated April 13, 1880, directing the clerk of the court to file a decision and judgment, made by the judge of the district court on December 26, 1879. All the case decides is that, where the superior court has acquired jurisdiction of the parties and of the subject-matter, a judgment based upon findings made by the district court after a trial therein, but not filed until after the district judge went out of office, is merely erroneous. *Weimmer v. Sutherland*, 74 Cal. 341, 15 Pac. Rep. 849, decides that a justice's court has no power to review its own judgment, unless statutory authority therefor is given, and that, under section 859, Code Civil Proc., it can review no judgment except a judgment by default. In *Reagan v. Justice's Court*, 75 Cal. 253, 17 Pac. Rep. 195, it appeared that the defendant, who had been duly examined, failed to appear within the time required by law, but filed a demurrer one day too late. This demurrer was stricken out, and judgment entered against him by default. A motion was made, under section 859, Code Civil Proc., to have the default set aside, and this motion was denied. We held that the justice had regularly pursued the authority conferred upon him, and, if error intervened, it could not be corrected upon certiorari. *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. Rep. 143, simply holds that it is mere error for a justice to proceed to trial in a misdemeanor case without a jury; and *Heinlen v. Phillips*, 88 Cal. 559, 26 Pac. Rep. 366, holds that the provision of section 892 requiring the justice's court to render judgment at the close of the trial is merely directory.

It is claimed by appellant that it appears from the justice's return to the writ that he had evidence before him prior to entering upon the trial that notice had been given to the defendant, and that his decision upon such evidence, even if errone-

ous, cannot be reviewed in this proceeding. The return shows that, on the 27th of May, the justice set the case for trial June 4, 1891, at 2 P. M., and, by the entry in his docket, that June 4th, "at this 2 P. M., Willis and Appel in court as attorneys for plaintiff. No one appears for defendant. Counsel for appellant stated that notice of trial had been served on counsel for defendant, and that he would produce same. After waiting until 3:30 P. M., the court proceeds to try the case. Neither the defendant nor her attorney appears in court." It is also claimed that because it appears from the return to the writ that at a subsequent day, when a motion was made by the defendant to vacate the judgment, an affidavit of the service of a notice of trial was filed, the denial by the justice of this motion to vacate the judgment is a conclusive determination that the defendant had a proper notice of the time fixed for the trial. This portion of the return is as follows: "Sept. 12. Willis and Appel filed affidavits of service of notice of trial." The provision in section 873, Code Civil Proc., that the trial must commence at the expiration of one hour from the time specified in the notice mentioned in section 850 implies that this notice should be given in writing, and form a part of the record, and that there should be an entry thereof, and also of the mode in which it was given, in the justice's docket, so that there may be affirmative evidence of his authority to render a judgment. This notice and the proof thereof are as essential to the authority of the justice to proceed upon the trial of the case as is the summons and return of service thereof to his entering a judgment of default. The giving of the notice is a duty which the statute imposes upon the justice before he has any authority to proceed with the trial; and, while it is not necessary that he serve the notice himself, he ought not to accept the verbal statement of the plaintiff that the notice had been served upon the defendant. The justice did not embody in his return the affidavit of service of the notice, and the superior court was not required to accept the above memorandum in his docket as any evidence that the affidavit contained proof that the notice had been given. If, however, it be conceded that the affidavit was itself before the superior court, inasmuch as all intendments upon this appeal are in support of its judgment, we must presume that upon looking into the affidavit the court was satisfied that it did not show that any notice had been given. The return did not, moreover, purport to show that the justice had given any notice, nor did it contain or refer to the service of any notice given by him; and, as all notices are required to be in writing, (Code Civil Proc. § 1010,) such notice, if it had existed, would have formed a part of the return by the justice. As it is not there, the superior court was justified in finding that it had not been given, and, consequently, that the judgment of the justice was rendered without authority.

There are objections made to the form of the proceedings, and to the judgment of the superior court, but we think they are

immaterial; that the appellant could not have been prejudiced thereby; and they should therefore be disregarded.
Judgment affirmed.

97 Cal. 532

GOULD v. WISE et al. (No. 19,021.)

(Supreme Court of California. March 16, 1893.)

MORTGAGES—PRIORITIES—DELIVERY.

1. Defendant agreed with A. to sell him certain land, part cash, and balance secured by mortgage. Defendant went with A. to a notary's office, where a deed was executed. While the mortgage was being prepared, A. said, "Let me see that deed," and took it from the table, and went, without defendant's knowledge, to plaintiff, from whom he negotiated a loan. A. then returned to defendant, paid him the money, and executed the mortgage, which defendant at once recorded. Prior to this time plaintiff had the deed and A.'s mortgage to her recorded. Held, that defendant's mortgage was entitled to priority, as there had been no delivery of the deed to A. at the time he negotiated the loan from plaintiff.

2. Defendant's negligence in allowing the deed to be removed from the room was not such as would justify an estoppel against a plea of nondelivery of the deed.

Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Frederick S. Gould, executor of Julia S. Gould, deceased, against John Wise and others, to foreclose a mortgage. From a decree for plaintiff, defendant Wise appeals. Reversed.

Willis & Appel and Houghton, Silent & Campbell, for appellant. Richards & Carrier and Del Valle & Munday, for respondent.

GAROUTTE, J. Upon the 6th day of March, 1888, appellant, Wise, entered into an agreement with Charles O. and Asa Adams to convey to them certain land. Upon March 12, 1889, Charles Adams, one of the parties to the agreement, transferred his interest in the property to his copurchaser, Asa Adams. On the same day Asa Adams, having procured the deed from his copurchaser, applied to appellant Wise for a deed of the premises contracted for, representing to him that he would pay \$1,000 cash, which, together with \$500 which had been paid at the date of the execution of the contract, would amount to \$1,500 paid on the purchase price, and that he would execute the mortgage provided for in the agreement aforesaid for the balance. Appellant at the time was weak and infirm from old age and sickness, and was conveyed by Asa Adams in a vehicle to the office of a notary, and there the deed and the notes and mortgage set forth in the cross complaint herein were executed in the manner hereinafter stated. Before the payment of the \$1,000, Adams, without the consent of Wise, took the deed from the notary's office, presented it to R. W. Poindexter, a real-estate agent who was loaning money for the deceased, Julia F. Gould, and there executed the note and mortgage set forth in plaintiff's complaint. He thereupon returned to the notary's office, where Wise

was awaiting him, executed the notes and mortgage to Wise, and gave him a check for the cash payment, and Wise thereupon had his mortgage recorded. Prior to this time Poindexter went to the recorder's office, recorded the deed from appellant to Adams, and also the mortgage given to plaintiff. Appellant was ignorant of the transaction between Adams and Poindexter, and had no notice whatever concerning plaintiff's mortgage. When respondent's mortgage became due he commenced this action, and impleaded therein appellant, Wise, who answered, and filed his cross complaint, seeking to foreclose his mortgage, and claiming that it was prior and superior to plaintiff's mortgage.

The sole question involved in this case arises as to the relative priority of these respective mortgages. Upon the trial judgment went for the respondent, and this appeal is prosecuted from that judgment, and from the order denying a new trial. We will not enter into a discussion of the question whether the contract of sale constituted an equitable mortgage lien, of which the respondent had constructive notice, and which continued down to and merged in the mortgage made to Wise under the provisions of his contract. The case can be disposed of, and therefore should be disposed of, upon much more simple grounds. At the time respondent loaned the money and took the mortgage as security for the loan, Adams had no title to the land, and, as a necessary consequence, respondent got no security for the money loaned. This view of the matter is not directly presented in appellant's argument, but it goes to the heart of the case, and is so apparent from a reading of the evidence that we cannot avoid its consideration. Appellant gave the only evidence bearing upon this branch of the case, and his testimony was as follows: "I am eighty-three years old. I was sick on the 12th of March, and Adams came to my house in a buggy. He had a deed for my property with him, ready. He got me to sign it in the wagon. Then he took me to a place to give a mortgage. He was to give me one thousand dollars, and a mortgage and notes for the balance. He hurried me up so that he could get the money out of the bank before it was closed. A man came out of a door with a pen and ink, and swore me, and I signed the deed. Then Adams drove off, and took me to another place. He had spoke to a man to make out the mortgage, and he stayed there a little bit, and the man was making out the mortgage and writing it up. I thought I was to have the first mortgage. He says, 'Let me see that deed.' He got the deed, and cleared out with it. I didn't like it very good. I hadn't got no mortgage yet, and he left the mortgage and these notes laying there. He was not gone more than half an hour. He didn't leave the notes and mortgage with anybody; left them laying where the man was writing them. When he came back we drove to the courthouse, and I recorded my mortgage. He gave me a check for seven hundred dollars, and paid me most of the balance of the one thousand dollars afterwards in small

sums. The deed laid on the table, and he says, 'Let me see that deed.' He reached over and pulled it away. I did not think he was going away, but he was gone. He signed the mortgage and notes when he came back, and gave me the check then." This evidence, sifted of immaterial matters, discloses that after the deed was signed and acknowledged, and while lying upon the table in the presence of both parties, it was taken therefrom by Adams, who thereupon left the room with the deed in his possession. At that moment the conveyancer was engaged in preparing the notes and mortgage which formed the principal consideration for the deed, and which were to be delivered contemporaneously with the deed. Upon this state of facts it is apparent that no delivery occurred at the time Adams obtained possession of it, and that, as a consequence, no title was in him at the time he negotiated the loan, and no mortgage lien was secured upon the realty by the mortgagee at that date as against the grantor, Wise. Delivery is the force that vitalizes the instrument. Here there was no life in the instrument, because there was no delivery. Delivery is dependent upon the intention—the consent—of the grantor, and here there was an entire absence of intention to make a delivery until the notes and mortgage were also delivered. The respective acts of the grantee and grantor as to the delivery of the deed and the securities were to be concurrent. The delivery of the deed was dependent upon the assent of the grantor, and his assent was dependent upon the performance of acts by the grantee. The grantee's possession of the deed upon any other terms or conditions was against the assent of the grantor, and for that reason the instrument had no life. This principle is elementary, but is fully discussed in *Everts v. Agnes*, 4 Wis. 343; *Henry v. Carson*, 96 Ind. 412; *Fitzgerald v. Goff*, 99 Ind. 28; *Jones v. Loveless*, Id. 317.

Again, it has been repeatedly held that the fraudulent procurement of a deed deposited as an escrow from the depository by the grantee named therein will not operate to pass the title, and the subsequent purchaser from such grantee, without notice, and for a valuable consideration, derives no title thereby, and will not be protected. *Everts v. Agnes*, 6 Wis. 453; *Shirley v. Ayres*, 14 Ohio, 308; *Stanley v. Valentine*, 79 Ill. 544; *Harkreader v. Clayton*, 56 Miss. 383; *Henry v. Carson*, supra; *Tisher v. Beckwith*, 30 Wis. 55. The foregoing cases are conclusive to the effect that, if a grantee secure possession of a deed clandestinely, or in any manner without a fulfillment of the agreed conditions, there has been no delivery with the assent of the grantor, and therefore no title has passed. These principles of law being established, there is nothing remaining to defeat appellant's rights in the premises, unless he was guilty of such negligence in allowing the deed to be taken from his presence and from the room as to create an estoppel against him in favor of respondent, as an innocent third party; and we think no such state of facts is disclosed by this record. The principle of eq-

uity that where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to cause the loss must bear it, is entirely too broad in its scope to be invoked in this character of action. That principle is specially applicable where the loss has been occasioned by reason of a trust or confidential relation having existed, to some extent at least, towards the third party. But we have failed to find a case where an estoppel has been successfully pleaded under the circumstances here presented. To create an estoppel against the grantor in this character of action, if one can be created, requires the proof of that degree of negligence upon his part which could only result from the want of ordinary care. As was said in the case of *Burson v. Huntington*, 21 Mich. 417, in discussing this principle with reference to the delivery of a promissory note: "The maker, therefore, cannot be held responsible for any negligence. There was nothing to prove negligence, unless he was bound to suspect and treat as a knave, a thief, or a criminal the man who came to his house, apparently on business, because he afterwards proved himself to be such. This we think would be preposterous." In *Tisher v. Beckwith*, 30 Wis. 55, Chief Justice Dixon, in speaking to this subject, said: "It might possibly be that a case of that kind could be presented where the negligence of the supposed grantor in this respect was so great, and his inattention and carelessness to the rights of others so marked, that the law would on that account estop him from setting up his title as against a bona fide purchaser for value under such a deed." Even conceding some negligence upon the part of the grantor, Wise, in allowing the deed to be removed from the room, it certainly does not reach that degree of negligence which would justify an estoppel against a plea of nondelivery of the deed. For the foregoing reasons let the judgment be reversed, and the cause remanded.

We concur: HARRISON, J.; PATERSON, J.

97 Cal. 590

COYNE v. RENNIE. (No. 19,088.)

(Supreme Court of California. March 23, 1893.)

MUNICIPAL CORPORATIONS—SALARY OF CHIEF OF POLICE—REDUCTION.

1. Const. art. 11, § 8, provides that a city charter can be amended only on the vote of electors of the city, and the approval of the legislature. Charter San Diego, c. 9, art. 3, § 1, fixing the salary of the chief of police, provides that "the common council, in the month of January, 1891, and every four years thereafter, shall readjust and fix anew the amount of all official salaries." *Held*, that a reduction of the salaries was not an amendment of the charter, but was the execution of a power conferred on the common council by the charter itself.

2. The chief of police was not bound to hold office, and, after the salary was reduced, having voluntarily held it and accepted the reduced salary, until the expiration of his term, a demand for additional salary, made eight months afterwards, was properly refused.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Application by Joseph Coyne for a writ of mandamus to compel Gilbert Rennie, as auditor of the city of San Diego, to issue a warrant for certain salary. From a judgment dismissing the proceeding, plaintiff appeals. Affirmed.

Parrish, Mossholder & Lewis, for appellant. William H. Fuller, for respondent.

PER CURIAM. This is a proceeding for a writ of mandate to the respondent in his official character as auditor of the city of San Diego, commanding him to issue his warrant for an unpaid portion of plaintiff's salary as chief of police. The respondent demurred to the petition for the writ. The court sustained the demurrer, and dismissed the proceeding. Plaintiff brings this appeal from the judgment of dismissal, and contends that the court erred in sustaining the demurrer.

The petition shows that since May, 1889, the city of San Diego has been a municipal corporation by virtue of a charter generally known as a "Freeholders' Charter;" that from the date of the organization of the corporation until June 1, 1891, the petitioner held the office of chief of police; that by section 1, c. 9, art. 3, of the city charter, the salary of the chief of police was fixed at \$1,800 per annum; that for the last four months of his official term, viz. February, March, April, and May, 1891, petitioner had been paid for salary only \$100 per month, by reason of an ordinance of the city adopted January 31, 1891, by which the salary of chief of police was reduced to \$1,200 per annum; and that after the expiration of his term of office, to wit, on February 24, 1892, the petitioner demanded of the auditor warrants upon the treasurer of the city for the unpaid portions of his salary for said four months, amounting to \$200, which the auditor (respondent) refused to issue, for the alleged reason that the salary of the chief of police had been reduced, as aforesaid, by ordinance. Section 1, c. 9, art. 3, of the charter of San Diego, after fixing the salaries to be paid to certain city officers, including the chief of police, provides: "The common council, in the month of January, eighteen hundred and ninety-one, and every four years thereafter, shall readjust and fix anew the amount of all official salaries provided for in this charter." It is contended by appellant that, notwithstanding this provision in the charter, the city had no power to reduce his salary, inasmuch as such reduction would be equivalent to an amendment of that clause in the charter fixing his salary; and under the provisions of section 8, art. 11, of the constitution, the charter can be amended only upon the vote of electors of the city and the approval of the legislature. The vice of this argument, however, rests in the assumption that the reduction of the salaries is an amendment of the charter. Instead thereof, it is the execution of a power conferred upon the common council by the charter itself, and is within the direct lines of the authority

conferred by the people in the adoption of that instrument, as much as would be the redistricting of the city into wards in the year 1892, and every five years thereafter, which is authorized in section 12, c. 2, art. 1, of the same charter. The section is to be construed as if it was a direct provision that the salaries of the city officials shall be fixed in the month of January, 1891, and every four years thereafter, but that, until so fixed, they shall be at the amounts specified therein. It is well settled that the mere appointment or election of a municipal officer for a specified time and salary creates no contractual relation, if such officer is at liberty to resign whenever he may elect to do so. "Neither acts of the legislature nor ordinances of city councils or boards naming terms and salaries are in the nature of contracts with officers. Although the term and salary may be named in the charter, yet there is no contract for a stipulated time or price that is binding on the public." *Love v. Jersey City*, 40 N. J. Law, 458; *Dill. Mun. Corp.* §§ 231, 265. The appellant was not bound to hold the office, or to perform the duties thereof; and, after the salary was reduced, having voluntarily held the office and accepted the reduced salary until the expiration of his term, his demand upon the auditor for additional salary, made eight months afterwards, was properly refused.

The judgment is affirmed.

(97 Cal. 575)

RILEY v. MARTINELLI et al. (No. 18,084.)
(Supreme Court of California. March 21, 1893.)

EXECUTION SALE—TITLE ACQUIRED—UNRECORDED DEED—EVIDENCE OF NOTICE—INSTRUCTIONS.

1. Where a judgment creditor bids in at a sheriff's sale and is given a deed of land, recorded in the name of the judgment debtor, but held in trust by such debtor for his wife, she having paid the purchase price, and permitted title to be taken in the husband's name, under an agreement that he was to convey it to her, such creditor acquires a good title thereto, where he had no notice of the wife's equity; *Civil Code*, § 1107, providing that grants of estates in land are conclusive against the grantor and every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith acquires title by an instrument first duly recorded. *Breeze v. Brooks*, 9 Pac. Rep. 670, 11 Pac. Rep. 885, and 71 Cal. 169, and *Id.*, 31 Pac. Rep. 742, distinguished.

2. In an action by such wife against the judgment creditor to obtain a judgment decreeing her to be the owner of such land, evidence of a witness as to declarations made to him by her as to her ownership of such land was properly refused, where it was not offered for the purpose of showing defendant's knowledge of such declarations.

3. Where, in an equity case, one issue is submitted to a jury, and the court afterwards adopts their verdict, and finds on all the issues of the case, errors in refusing instructions asked are immaterial. *Hewlett v. Pilcher*, 24 Pac. Rep. 782, 85 Cal. 545, followed.

Commissioners' decision. Department 1. Appeal from superior court, Yolo county; J. E. Prewett, Judge.

Action by Ellen L. Riley against F. Martinelli and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Eugene Aram and Craig & Hawkins, for appellant. F. E. Baker and R. Clark, for respondents.

SEARLS, C. This action is brought to obtain a judgment decreeing Ellen L. Riley, the appellant, to be the owner of certain premises situate in Woodland, Yolo county; that a sheriff's sale thereof to defendant F. Martinelli be declared null and void, etc. J. T. Riley, one of the defendants, and Ellen L. Riley, the plaintiff, were at the several dates herein mentioned husband and wife. About January, 1880, plaintiff and her husband negotiated for the purchase of the premises in question, which negotiations culminated in the purchase and paying for the same by the plaintiff, who took a deed of conveyance therefor in the name of her husband, which deed was duly recorded in the office of the county recorder of the county of Yolo. The purchase price of the land was \$375, and was paid by the plaintiff from her separate property. She also, according to her testimony, built a dwelling house upon the land, at an expense of \$1,000, which was also paid for by her out of her separate property. Plaintiff and her husband, J. T. Riley, occupied the premises as a family residence up to the time of the levy of the execution hereinafter mentioned, and subsequent thereto, which was known to defendant Martinelli, but there was nothing in the manner or method of the residence or occupation or use of the property which imparted or tended to impart notice to any person that plaintiff had or claimed to have any separate property interest or estate in or to said premises. There was a private understanding between plaintiff and her husband, before the conveyance, that the title to the premises should be conveyed to the latter, and that thereafter, when plaintiff desired him to do so, he would convey to her. Plaintiff often requested her said husband to make such conveyance, but he failed and neglected so to do. Plaintiff stated to her friends that she claimed said premises as her property, but such claim was not openly proclaimed, was not known by the defendant Martinelli or by the public generally. Defendant Martinelli held a mortgage against property of the husband, J. T. Riley, other than the premises in question, which he foreclosed, and under which he sold; and, there being a deficiency, judgment was docketed in his favor and against J. T. Riley, upon which judgment execution issued to the sheriff, who levied upon the premises in question in this action and in due time, and, after proper notice, sold the same as by law required, said Martinelli, the judgment creditor, becoming the purchaser for \$1,265.73, the amount of his judgment and costs. A certificate of sale was issued to him as purchaser, and a duplicate thereof recorded in the office of the county recorder of the county of Yolo. The time for redemption expired July 10, 1891, and no redemption was made or had. Before purchasing the property, Martinelli examined the records of the county, and found it stood in the name of the husband, J. T. Riley, and that there was a mortgage

thereon executed by the latter. The findings show that Martinelli, up to the time of his purchase, had no notice of any equitable claim of plaintiff in or to the premises. Martinelli received a sheriff's deed of the premises after the filing of the original complaint herein, but before the amended complaint was filed, viz. August 5, 1891. As between the plaintiff, who is appellant here, and her husband, there is no question but that the latter held the legal title to the premises in trust for the former.

The doctrine is well established that where land is purchased in the name of one person, and the consideration is paid by another, the land will be held by the grantee in trust for the person furnishing the consideration. *Bayles v. Baxter*, 22 Cal. 575; *Hidden v. Jordan*, 21 Cal. 92; *Millard v. Hathaway*, 27 Cal. 119; *Currey v. Allen*, 34 Cal. 254. The doctrine is well established, also, that the lien of a judgment and execution attaches to the real, instead of the apparent, interest of the judgment debtor in and to his property; and that, under ordinary circumstances, a sale made under such lien transfers no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and before the sale. *Freem. Ex'ns*, § 335; *Freem. Judgm.* §§ 356, 357; *Frink v. Roe*, 70 Cal. 296, 11 Pac. Rep. 820. "The purchaser at an execution sale takes his title subject to such liens, easements, and equities as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in good faith and without any notice, actual or constructive, of the existence of such lien, easement, or equity." *Freem. Ex'ns*, § 336. This doctrine does not, however, reach the point under consideration in this case. We may concede that the rule enunciated above applies to a third party purchasing at a sale under execution, and the question still remains, does the judgment creditor, who purchases at his own sale, and pays no money, but credits the amount of his bid on his judgment, stand in the same position as a third party who has purchased at a like sale and paid a money consideration? In other words, is the judgment creditor who bids at his own sale, and, as the effect thereof, satisfies his judgment in whole or in part, a purchaser for value in that sense which entitles him to protection? The authorities are by no means uniform on the question. In Iowa, in *Gower v. Doheney*, 33 Iowa, 36, a case in which the judgment debtor held lands under an implied trust in pursuance of which, subsequent to the judgment, he conveyed to the cestui que trust, the latter failed to record his deed, and the lands were purchased by the judgment creditor at execution sale without notice of the deed or of the equitable estate, and it was held that the execution creditor took his title freed from the equity. The decision was based upon the equitable theory that, where one of two innocent parties must suffer, the loss should fall upon that party who has been guilty of the first negligence. Other cases in Iowa hold that when a creditor merges his judgment into

a title, without notice, actual or constructive, of private equities, he becomes a purchaser, and is entitled to protection equally with any subsequent bona fide purchaser. In Indiana the court held both ways on the question. See *Vitito v. Hamilton*, 86 Ind. 197, and *Carnahan v. Yerkes*, 87 Ind. 62. In the latter case it was held that "an execution creditor who bids off property at a sale upon his own execution, and applies the bid to the payment of his own judgment, is not regarded as a bona fide or innocent purchaser." It is sufficient to say that a large number of cases to like effect are to be found, holding with more or less uniformity that a plaintiff purchasing at a sale under his own writ takes subject to all equities against the defendant in execution, whether he has notice of them or not. This view is founded upon the theory that to constitute a person a "bona fide purchaser," within the meaning of the law, he must, upon the faith of the purchase of the property, have advanced for it a valuable consideration, and that a creditor antecedent to his purchase, who pays for the purchase by a credit on his own demand, has parted with no consideration on the faith of the purchase, and is not such a bona fide purchaser as is entitled to protection against equities of which he has no notice. It is believed, however, that the current of modern authority tends to the doctrine that a judgment creditor purchasing at his own sale, equally with a third party making a purchase under the execution, is protected against latent equities of which he had no notice; and we can see no good reason for the distinction to which we have alluded. If A. advances money to B., which is not paid, and he obtains judgment, issues execution, levies upon the property of B., attends the sale, and, being the highest bidder, purchases the property, it is difficult to see why he is in a different position from any other purchaser. In such a case, the law seizes the property and sells it to the highest bidder, and the judgment creditor takes it, not in his capacity as creditor, but as purchaser. The law of this state, with a view no doubt of benefiting the debtor, by causing his property to bring the best attainable price, permits and encourages the creditor, alike with others, to purchase at sales under execution, and, having done so, the fact that he advanced the purchase price last month or last year should not militate against his rights, or alter his status in the eye of the law. It has repeatedly been held in this court that a conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration, within the meaning of section 1214 of our Civil Code. *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. Rep. 680; *Gassen v. Hendrick*, 74 Cal. 444, 16 Pac. Rep. 242; *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. Rep. 659; *Frey v. Clifford*, 44 Cal. 335. In this state we think the question has been settled in consonance with this view. In *Hunter v. Watson*, 12 Cal. 377, (Baldwin, J., delivering the opinion of the court, Field, J., concurring,) it was said: "But a judgment creditor purchasing at

his own sale, without notice, is a 'bona fide purchaser,' within the act. The cases are not agreed upon this subject, but the weight of authority and the reason of the rule are as we have stated it." The act referred to in the foregoing quotation was the recordation act of 1850. Section 1107 of our Civil Code is as follows: "Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded." In *Forman v. Wallace*, 75 Cal. 552, 17 Pac. Rep. 680, it was held that a sheriff's certificate of sale of real property "is the evidence of the equitable interest which the purchaser has in the land, and is an 'instrument,' whereby an interest is created, within the meaning of section 1107 of the Civil Code," and in favor of the proposition *Page v. Rogers*, 31 Cal. 301, was cited. *Forman v. Wallace* held also that the filing and recording of the certificate of sale imparted constructive notice to all the world, and that the right acquired thereunder was prior and paramount to the title of a prior unrecorded deed, of which the holder of the sheriff's certificate had no notice at the date of recordation.

The plaintiff here cannot be said to be in a better position than she would have been had she held an unrecorded conveyance of the property. It was in her power for many years to have enforced her equitable right to the property; but having failed to do so until a sale thereof, and the recording of the evidence of such sale under an execution against her husband, who was the ostensible owner thereof, and in whose name the title was recorded, she comes too late to ask for relief against one clothed with the legal title and an equal equity. There is nothing in the views herein expressed in conflict with either of the decisions in *Breeze v. Brooks*, 71 Cal. 169, 9 Pac. Rep. 670, and 11 Pac. Rep. 885; *Id.*, 31 Pac. Rep. 742. In that case Patrick Brooks was the equitable owner of land the legal title to which stood in the name of John Brooks. The latter obtained credit from the plaintiffs in the cause, who believed him to be the owner. John Brooks conveyed the legal title to Patrick, the owner of the equity, who caused his deed to be recorded. Subsequently the plaintiffs brought suit against John on their demand, obtained judgment, sold the land under execution, became the purchasers, and in due time obtained a sheriff's deed, under which they sought to subject the land to their claim. There they sought to show that Patrick Brooks was estopped by his acts in the premises from asserting title; here the estoppel comes from the effect of our recording act, which establishes what the court has held to be a salutary and binding rule.

At the trial the court submitted to a jury the following single issue and question, against plaintiff's objection and exception, to wit: "Did Martinelli, on January 10, 1891, have notice that the property belonged to Mrs. Riley?" To which the jury answered, "No." Counsel for

plaintiff asked the court to submit to the jury the questions, in substance, (1) whether at the date of his purchase Martinelli had actual notice that plaintiff claimed the property, etc., which was substantially submitted; (2) whether at the said date he had constructive notice of such fact, which was refused by the court. Counsel then asked certain instructions in reference to actual and constructive notice, substantially as defined in sections 18 and 19 of the Civil Code, which were refused by the court, and the refusal excepted to. We think the court, on its own motion, instructed the jury as to the question submitted, as far as was necessary. It was an equity case, and the court adopted the answer of the jury, it is true, in its findings of fact, but it proceeded at length to find upon all the issues in the case. This being so, the refusal to give instructions is not cause for a reversal of the case. *Hewlett v. Pilcher*, 85 Cal. 545, 24 Pac. Rep. 781. The evidence was sufficient to warrant the findings.

There was no error in striking out the testimony of the witness Balzari as to declarations made to him by the plaintiff in reference to her ownership of the property, because it was not proposed to bring knowledge of such declarations home to defendant Martinelli. Again, the finding of the court as to plaintiff's ownership of the property cured the error, if any there was. Upon a review of the whole record, it is believed the cause was fairly tried and properly decided, and that the order overruling the motion for a new trial and the judgment should be affirmed; and we so advise.

We concur: BELCHER, C.; VAN-CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

99 Cal. 593

LOS ANGELES COUNTY v. BALLERINO
et al. (No. 19,036.)

(Supreme Court of California. March 9, 1893.)

DELINQUENT TAXES—COLLECTION—PENALTY—
LIMITATION OF ACTIONS.

1. Under St. 1880, p. 136, providing that "any county, or city and county," where taxes are delinquent, may sue in its own name for the recovery thereof, "whether the same be for county or city, or city and county and state purposes or taxes, or either of them," a county may sue for delinquent taxes levied for county purposes only; and defendant cannot claim that it ought also to have sued for delinquent state taxes, levied in the same year, and not to have split its demand, thus subjecting defendant to two actions, when it is not alleged in the answer that another action to recover the state taxes is pending, or has been prosecuted to judgment.

2. An action to recover delinquent taxes is not within Code Civil Proc. § 339, providing that an action "upon a contract obligation or liability not founded on an instrument in writing" must be brought within two years after the cause of action accrues, but it is within section 338, providing that an action on a liability created by statute, other than a penalty

or forfeiture, must be brought within three years.

3. Pol. Code, § 3770, directs that 5 per cent. on the amount of the delinquent tax be collected in addition to such delinquent tax. *Held*, that the added per cent. is not such a penalty or forfeiture as is excepted from the operation of Code Civil Proc. § 338, or as falls within section 340, requiring an action "upon a statute for penalty or forfeiture when the action is given to an individual and the state" to be brought within one year after the cause of action accrues; but the statute contemplates that it shall be collected at the same time and in the same manner as the delinquent tax, and the right to recover it is not lost until the cause of action on the delinquent tax is barred.

4. Where a party defends an action for delinquent taxes on the ground that his property was fraudulently assessed in excess of its real value, he must show by his answer that he has paid or tendered the amount which would have been due if his property had been assessed at a fair valuation, and he must offer to pay what the court shall find equitable and just; otherwise evidence cannot be admitted as to matters alleged in the answer in regard to the unjust discriminations made against him in the assessment.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the county of Los Angeles against one Ballerino and others to recover delinquent taxes. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Horace Allen, for appellants. James McLachlan, for respondent.

DE HAVEN, J. This is an action by the county of Los Angeles to recover from the defendant Ballerino taxes levied for county purposes in the year 1888 upon certain real property and improvements owned by him in that county. The prayer of the complaint is for judgment against that defendant for the amount of the tax, "with five per cent. thereon for delinquencies, and two per cent. per month interest thereon from the last Monday of December, 1888, * * * and for a decree * * * that said real estate be sold, as provided by law," etc. The superior court gave judgment for plaintiff in accordance with the prayer of the complaint. The defendant appeals.

1. The act of April 23, 1880, (St. 1880, p. 136,) authorizing the bringing of suits to recover delinquent taxes, and prescribing the form of complaint therefor, provides in its first section that "any county or city and county, where such taxes are delinquent, may sue in its own name for the recovery of delinquent taxes, whether the same be for county or city, or city and county and state purposes or taxes, or either of them." This statute gives to plaintiff the right to maintain this action. *County of San Luis Obispo v. White*, 91 Cal. 432, 24 Pac. Rep. 864, and 27 Pac. Rep. 756. It is claimed by defendant that the plaintiff ought also to have sued in this action for the delinquent state taxes for the year 1888; that, having authority to sue for both state and county taxes, it ought not to have split its demand, thus subjecting the defendant to two actions, when the whole matter in controversy

could have been settled in one suit. But the question the defendant thus presents in argument does not arise upon this record, as it is not alleged in the answer that any other action is pending to recover the state taxes, or that any such action has been prosecuted to judgment; and the defendant is certainly not injured because the plaintiff did not sue for all that it was entitled to demand.

2. The action was not commenced until more than two years after it accrued, and defendant contends that it is barred by subdivision 1 of section 339 of the Code of Civil Procedure, which provides that an action "upon a contract, obligation, or liability, not founded upon an instrument in writing," must be brought within two years after the cause of action accrues. This, however, is not such an action, but is one which arises upon a liability created by statute other than a penalty or forfeiture within the meaning of section 338 of the same Code. *San Francisco v. Luning*, 73 Cal. 610, 15 Pac. Rep. 311; *San Francisco v. Jones*, 20 Fed. Rep. 188; *Lewis v. Rothchild*, 92 Cal. 625, 23 Pac. Rep. 805; *State v. Mining Co.*, 14 Nev. 226. The 5 per cent. upon the amount of the delinquent tax, which, under section 3770 of the Political Code, the tax collector is directed to collect in addition to such delinquent tax, and which additional sum is included in the amount sued for in this action, is not such a penalty or forfeiture as is excepted from the operation of section 338 of the Code of Civil Procedure, or as falls within the provisions of subdivision 1 of section 340 of the same Code, requiring "an action upon a statute for a penalty or forfeiture when the action is given to an individual or to an individual and the state" to be brought within one year after the cause of action accrues. The statutory penalty there referred to is one which an individual is allowed to recover against a wrongdoer as a satisfaction for the wrong or injury suffered, and without reference to the actual damages sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong. The action to recover such a penalty is a penal action, founded upon a statute, and is the action which, under section 340 of the Code of Civil Procedure, must be brought within one year. But this is not such an action. Even in so far as the plaintiff seeks to recover the additional percentage which defendant has incurred by reason of his delinquency, the statute contemplates that the added per cent. sued for here shall be collected at the same time and in the same manner as the delinquent tax, and the right to recover is not lost until the cause of action upon such delinquent tax is barred. It is not, in terms, imposed as a penalty or punishment by section 3770 of the Political Code, (*High v. Shoemaker*, 22 Cal. 363,) and is only a mere incident to the cause of action arising upon the statutory liability to pay the taxes duly levied upon property which has been assessed in accordance with law.

3. As one defense to the action, the defendant alleged in his answer that the assessor fraudulently and corruptly assessed

his real estate at the exorbitant valuation of \$120,000, an excess of \$101,400 over and above its cash value; and in this connection the answer further alleged "that the said assessor did willfully and fraudulently and corruptly discriminate against this defendant in making his assessments; for instance, that while he imposed an assessment on his parcel of real property at more than \$800 per acre, he at the same time assessed the adjoining farm at \$200 per acre, and other farms of better land at \$50 per acre; that such exorbitant assessment on this parcel of real property was not from error of judgment on the part of said assessor, but it was done from corrupt and fraudulent motives, as aforesaid." Upon the trial the defendant offered to show by witnesses that the cash value of his property upon which the assessment in question was made in the year 1888 did not exceed \$50 per acre, and he offered to show by the assessment roll for that year that 67 acres of adjoining land belonging to another person was assessed at only \$15,000, or about one fourth the amount for which the land of defendant was assessed the same year. This offered evidence was excluded by the court, and we see no error in the ruling. It is undoubtedly true that a taxpayer may enjoin the collection of a tax founded upon an assessment fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes, (*Merrill v. Humphrey*, 24 Mich. 170; *Leferts v. Board of Supervisors*, 21 Wis. 688; *Iron Co. v. Hubbard*, 29 Wis. 51;) and it is equally true that the fact of such a fraudulent assessment would be available to the taxpayer as an equitable defense in an action brought to enforce the collection of a tax founded upon an assessment of that character. But in appealing to a court of equity for relief by way of injunction against such fraudulent assessment, the plaintiff must show by his complaint that he has paid or tendered the amount of taxes which would have been due from him if his property had been assessed at what he concedes would have been a fair valuation, and he must, in addition, offer to pay what the court shall find to be equitable and just, (*Merrill v. Humphrey*, 24 Mich. 170; *State Railroad Tax Cases*, 92 U. S. 616; *Huntington v. Palmer*, 7 Sawy. 355;¹ *Bank v. Kimball*, 103 U. S. 732; *Montgomery v. Sayre*, 65 Ala. 564; 1 High, Inj. § 491;) and we think the same facts should appear in an answer which seeks to defend against the collection of a tax upon the ground of a fraudulent assessment. Tested by this requirement, the answer of defendant fails to state facts sufficient to constitute an equitable defense to this action growing out of such alleged fraudulent assessment. It contains no allegation that defendant ever paid or offered to pay what would have been right for him to pay upon what he concedes would have been a fair valuation of his property, nor does he offer to pay what the court shall ascertain to be just; and for this reason there was no error in

excluding the evidence offered by him tending to prove the matters alleged in his answer as to the value of his land and the discrimination made against him in his assessment. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

97 Cal. 507

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE DE LOS ANGELES v. WEIDEMANN et al. (No. 19,105.)

(Supreme Court of California. March 10, 1893.)

FORECLOSURE OF MORTGAGE—DEFICIENCY DECREE—PARTIES—TENANTS IN COMMON.

1. Where a complaint in foreclosure names a partnership as a party defendant, and an amended complaint is filed, naming each member of the partnership individually as defendants, a judgment for a deficiency cannot be rendered against the partnership; the fact that service of summons and the original complaint was made on the partnership being immaterial.

2. A complaint in an action to foreclose a mortgage alleged that defendant W. executed a conveyance of the land on which the mortgage is sought to be foreclosed to defendants A., S., and R., forming the copartnership of R. & Co., which mortgage the grantees in such conveyance agreed to pay; that defendants A. and S. and the representatives of R., deceased, claim an interest in such land. The prayer was for judgment against defendants. *Held*, that the complaint shows that the title was in A., S., and R. as tenants in common, and not as a firm.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by La Societe Francaise de Bienfaisance Mutuelle de Los Angeles against Henry Weidemann and others to foreclose a mortgage. There was judgment of foreclosure, and that defendants Roth & Co. pay any deficiency if the sale of the land failed to satisfy the mortgage, and they appeal. Reversed.

Rosenbaum & Sheeline and Reymert & Orfilia, for appellants. Bicknell & Denis, for respondent.

PATERSON, J. This is an appeal by Roth & Co. from that portion of the decree of foreclosure and order of sale which adjudges and decrees that, if the moneys arising from the sale shall be insufficient to pay the amount found due to the plaintiff, together with the costs and expenses of sale, the clerk shall docket a judgment for the balance against Roth & Co., a copartnership, together with interest on such deficiency judgment at the rate of 7 per cent. per annum; and also from the deficiency judgment against defendant entered by the clerk upon the return of the sheriff. The action was commenced on October 22, 1890, and summons was issued on the same day. The defendants named in the original complaint were Henry Weidemann and Roth & Co., a copartnership composed of A. Roos, S. Scheeline, and Joseph Roth. The note and mortgage upon which the action was based were executed and delivered by defendant Weidemann to the plaintiff March 29, 1888. It was alleged in the complaint "that the defendants Roth &

Co., a copartnership composed of A. Roos, S. Scheeline, and Joseph Roth, have or claim to have some interest in or claim upon said premises, or some part thereof, as purchasers, mortgagees, and judgment creditors, or otherwise, which interest or claims are subsequent to and subject to the lien of the plaintiff's mortgage." A decree in the usual form was prayed for, including a deficiency judgment against Henry Weidemann in case the property should be sold for less than the amount of the judgment. Summons was duly served upon the defendants, but no appearance was made by any of them. On November 12, 1891, plaintiff filed an amended complaint in which the defendants named were "Henry Weidemann, A. Roos, S. Scheeline, and Bertha Roth, A. F. Benard, and O. Bozio, executrix and executors, respectively, of the last will of Joseph Roth, deceased." In this amended complaint it was alleged that on January 22, 1890, Weidemann sold and conveyed the property to "A. Roos, S. Scheeline, and Joseph Roth, they—the said Roos, Scheeline and Roth—then constituting the firm of Roth & Co., of the city of San Francisco;" that the deed contained the following provision: "Subject, however, to a certain mortgage of \$2,000 held by the French Benevolent Society of Los Angeles, California, which payment the grantees herein hereby assume and agree to pay." This amended complaint was served upon all of the defendants, none of whom appeared. The court heard the evidence offered by the plaintiff, and thereupon rendered the decree which includes the deficiency judgment against Roth & Co. above referred to. The property was sold by the sheriff, who reported to the court that he had sold the land at public auction to the plaintiff, who was the highest bidder therefor, for the sum of \$2,000. After deducting his fees and expenses, amounting to the sum of \$54.50, there remained a balance due and unsatisfied of \$1,265.75. Thereupon the clerk made the proper entries in the judgment docket for a deficiency judgment against the appellants and in favor of the plaintiff for the sum of \$1,265.75.

It is claimed by the appellant that there is nothing in the complaint upon which to base the deficiency judgment against Roth & Co., and we think the contention is sound. The partnership was not named as a party defendant in the amended complaint. When the amended complaint was filed and served, the original ceased to perform any other function as a pleading, and the fact that service of the summons and the original complaint was made upon Roth & Co. is immaterial. It is claimed by respondent that "after the amendment of the complaint the action retained its identity, whatever the title given in the amended complaint, and each member of the firm being sued, the firm was sued." This proposition as to the effect of an amended complaint adding or dropping parties defendant is palpably erroneous, but the amended complaint shows very clearly that the conveyance by Weidemann was not to the firm of Roth & Co., but to Roos, Scheeline, and Roth, as ten-

ants in common. It is alleged in the complaint that "said A. Roos, S. Scheeline, and Joseph Roth, did thereby assume and agree to pay," etc.; also, "that the defendants A. Roos, S. Scheeline, and Bertha Roth, A. F. Benard and O. Bozio, executrix and executors of the estate of said Joseph Roth, have, or claim to have, some interest in or claim upon said premises." The prayer of the complaint is for judgment against "the said defendants Henry Weidemann, A. Roos, S. Scheeline, and Bertha Roth, A. F. Benard, and O. Bozio," and for judgment and execution against the defendants for any deficiency. Conceding that a partnership as such can take a conveyance of land, the language of the deed itself cannot be construed as a grant to the copartnership. It is as follows: "That the said party of the first part [Weidemann] for and in consideration of the sum of \$4,000 * * * does by these presents grant, bargain, sell, and convey unto the said party of the second part, and to their heirs and assigns forever, * * * subject, however, to a certain mortgage of \$2,000, * * * which payment the grantees herein hereby assume and agree to pay, * * * to have and to hold all and singular the said premises * * * unto the said parties of the second part, and to their heirs and assigns forever." That portion of the decree described in the notice of appeal, and the deficiency judgment entered by the clerk against Roth & Co., are reversed.

We concur: HARRISON, J.; GAROUTTE, J.

97 Cal. 484

GUTZEIT v. PENNIE et al. (No. 15,261.)

(Supreme Court of California. March 9, 1893.)

FORECLOSURE OF MORTGAGE—BOND ON APPEAL—STAY OF EXECUTION—RIGHTS OF JUNIOR MORTGAGEE.

1. Code Civil Proc. § 945, provides that, if a judgment direct the sale of land, the execution cannot be stayed, unless the undertaking on the part of appellant provides against waste, and when the judgment is for the sale of mortgaged premises, and the payment of any deficiency, the undertaking must provide for such payment. *Held*, that where a judgment in mortgage foreclosure directs the payment of a junior mortgage out of the surplus after payment of the prior mortgage, and, if the surplus be not sufficient, then that appellant, one of defendants, be made personally liable for the remainder, an undertaking to stay the execution is insufficient, in which the sureties are liable only in case of waste, and no provision is made for payment of the deficiency.

2. Where a junior mortgagee, who is made one of defendants in foreclosure proceedings by the prior mortgagee, by suitable pleadings between himself and the mortgagor, has the amount of his mortgage determined, and provision is made in the judgment for the sale of the premises, he has the same right to have the judgment executed as though he had instituted the action, and he did not waive his right to the enforcement of the judgment by not objecting to the insufficiency of the undertaking to stay execution at the time such undertaking was given.

Department 1.

Action by one Gutzeit against J. C. Pennie and others, Bozo Radovich, and Elia

Chielovich, for the foreclosure of a mortgage. From the judgment defendant Radovich appealed. Afterwards an order of sale was issued, and placed in the hands of the sheriff for execution. Appellant moves for a writ of supersedeas. Denied.

Eugene N. Deuprey, for petitioner. J. R. Patton, for respondents.

HARRISON, J. Motion for a writ of supersedeas. The plaintiff brought this action for the foreclosure of a mortgage executed by one Palmer upon certain lands in Santa Clara county. After the execution of the mortgage, Palmer conveyed the property, and thereafter died. The defendants in the action are persons who have acquired an interest in the mortgaged premises, under Palmer, subsequent to the date of the mortgage. Palmer's grantee made an agreement with the appellant, Radovich, for a conveyance of a portion of the mortgaged premises, under which Radovich entered into possession, and thereafter made a mortgage of said premises to the respondent Chielovich. Chielovich, in addition to his answer to the plaintiff's complaint, set up this mortgage by way of a cross complaint against Radovich, and issue was joined thereon by Radovich. The court rendered judgment in favor of the plaintiff for the amount of his claim and for a sale of the premises, and also in favor of Chielovich for the amount of his claim against Radovich, and directed that out of the proceeds of said sale the sheriff, after paying the claims of the plaintiff, and certain other prior liens,—amounting in the aggregate to about \$33,000,—should, if there were any surplus proceeds in his hands therefor, pay to Chielovich the amount of his claim against Radovich, and, if the surplus proceeds therefor were insufficient to make such payment, judgment should be docketed in his favor against Radovich for the deficiency. Radovich appealed from the whole of the said judgment, making both the plaintiff and Chielovich respondents, and gave an undertaking in the sum of \$300 for the costs of appeal, and also an undertaking in the sum of \$10,000 against waste; that amount having been fixed by the judge of the court. The undertaking against committing waste, after reciting the order of the judge fixing the amount, is that the surety, "in consideration thereof and of the premises, does undertake and promise, and does acknowledge itself bound in the sum of ten thousand dollars, that, during the possession of such real property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and does undertake and promise that this undertaking for a stay of proceedings herein is given in compliance with the provisions of section 945 of the Code of Civil Procedure of the State of California, and in conformity to the order of court in this connection, as aforesaid." After the appeal had been taken, Chielovich caused an order of sale to be issued upon the judgment, and placed it in the hands of the sheriff for execution, and, the sheriff being about to sell the premises under said order of

sale, Radovich applied to this court for a writ of supersedeas pending the appeal, and urges in support thereof that the undertaking given by him is sufficient to stay the execution of the judgment.

Section 942, Code Civil Proc., provides that an appeal from a judgment directing the payment of money does not stay the execution of the judgment unless an undertaking be given on behalf of the appellant, in double the amount of the judgment for the payment of the judgment in case it be affirmed. And section 945 provides that, "if the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that, during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon;" and the same section further provides that "when the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." In *Johnson v. King*, 91 Cal. 307, 27 Pac. Rep. 644, it was held that, if the appellant from a decree of foreclosure which provides for the payment of a deficiency upon the sale would stay the execution of the judgment, he must give an undertaking for the payment of such deficiency, even though he is not the party against whom the deficiency judgment was rendered; and this rule was affirmed in *Spence v. Scott*, 95 Cal. 152, 30 Pac. Rep. 202.

The judgment in the present case, after providing for the sale of the mortgaged premises, and the payment of the claims whose lien is prior to that of Chielovich, provides that, if any surplus proceeds shall thereafter remain, the sheriff shall pay therefrom to Chielovich the sum of \$3,849.40, with interest from the date of the decree to the date of sale, or so much thereof as such surplus proceeds will pay, and that, if the surplus moneys shall be insufficient to pay said amount to defendant Chielovich, "the judgment of this court shall be docketed for such balance against the defendant Bozo Radovich in favor of said Elia Chielovich, and that the defendant Bozo Radovich, who is personally liable for the payment of the debt secured by the said defendant's mortgage, pay to the said defendant Elia Chielovich the amount of such deficiency and judgment, with interest thereon at the rate of seven per cent. per annum from the date of said last-mentioned return and judgment, and that the defendant Elia Chielovich have execution therefor against Bozo Radovich." This provision in the judgment brings the case within the express language of the statute, and upon the authority of the foregoing cases the undertaking must be held insufficient to stay the execution of the judgment. The clause in the undertaking, that it is given in compliance with the provisions of section 945 in the Code of Civil Procedure, does not extend its effect beyond the condition for which it was executed. The order of the court lim-

its the condition of the undertaking to the commission of waste on the part of the appellant, and in any action upon the undertaking the surety could be held liable only upon proof that waste had been committed on the part of the appellant. In any attempt to recover from the surety the amount of any deficiency in the judgment, he would have a perfect defense in the fact that his undertaking made no provision therefor. The provision of section 945, requiring the judge to fix the amount of the undertaking against waste, is distinct from the clause which requires that the undertaking must also provide for the payment of a deficiency; and the authority of the judge to fix the penalty of the undertaking is limited to the object named in the clause in which it is granted. For the purpose of staying the execution of the judgment the appellant must give an undertaking against waste, and also an undertaking to pay the deficiency; the former in the amount that may be fixed by the judge, and the latter for the entire deficiency, whatever that amount may prove to be.

It was competent for Chielovich to cause the clerk of the court to issue the order of sale upon the judgment, and place it in the hands of the sheriff for execution. By virtue of his cross complaint against Radovich, he was the plaintiff, as against Radovich, for the purpose of foreclosing his mortgage, and the judgment thereon, although rendered in the same action with that of the plaintiff, Gutzeit, was a judgment in his favor against Radovich, which he had the right to enforce. In any sale of the premises under such judgment, he could receive no portion of the proceeds until after the satisfaction of the prior liens, but, unless the execution of the same was stayed, he had the right to have the premises sold for the purpose either of receiving therefrom the amount of his judgment against Radovich, or, if there should be a deficiency, of ascertaining the amount of such deficiency, and collecting the same from other property of Radovich. The plaintiff could not either capriciously, or by any arrangement with the appellant, allow the judgment in his favor to remain unexecuted, and the amount of its lien upon the mortgaged premises thereby to increase, to the detriment of the junior mortgagee; but, after the entry of the judgment by which the amount and priority of the several liens upon the premises was determined, either party to the judgment had the right to its execution. A junior mortgagee has a right, in an action to foreclose his mortgage, to bring before the court the holder of a prior mortgage, which has matured, and obtain a decree for the sale of the premises and the satisfaction of his own mortgage, after payment of the amount of the prior mortgage; and when, in an action brought by the holder of the prior mortgage, a junior mortgagee, by suitable pleadings, as between himself and the mortgagor, has the amount of his mortgage determined, and provision made in the judgment for its sale, he has the same right to have the judgment executed as though he had himself instituted the action.

Chielovich did not waive his right to the enforcement of the judgment by reason of not objecting to the insufficiency of the undertaking at the time it was given. He had obtained a judgment in his favor, and there remained nothing more for him to do in order to entitle him to its enforcement. He was at liberty to enforce it at any time during its life. If the appellant would stay its execution, it was incumbent upon him to give such an undertaking as the statute requires, and he assumed the burden of a compliance with the statute. If he omitted to take such steps as would constitute a compliance, it was his fault, rather than that of Chielovich. The motion for a writ is denied, and the temporary restraining order heretofore made herein is discharged.

We concur: PATERSON, J.; GAROUTT^{SR} J.

97 Cal. 542

PEOPLE v. GILLIS. (No. 20,944.)

(Supreme Court of California. March 18, 1893.)

CRIMINAL LAW—EVIDENCE—APPEAL—RECORD.

1. In a prosecution by the state, a question to the prosecuting witness as to whether he employed the attorney who was assisting the district attorney in the prosecution was competent, as tending to show whether the witness was interested in the proceedings to the prejudice of defendant.

2. Where the record is so incomplete that the appellate court is unable to form an opinion as to the propriety of a ruling of the court below which was excepted to, the ruling will not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

William Gillis was convicted of simple assault, and appeals. Reversed.

M. L. Rawson and H. E. Doolittle, for appellant. W. H. Hart, Atty. Gen., and Johnstone Jones, Dist. Atty., for the People.

SEARLS, C. The defendant, William Gillis, was prosecuted by information for an assault with a deadly weapon upon the person of one Till Vasquez, and upon trial by a jury was convicted of "simple assault." Judgment was rendered upon the verdict, imposing a fine of \$200. From the judgment, and from an order denying a motion for a new trial, this appeal is taken. Two errors are assigned by the appellant.

1. At the trial the prosecution was conducted by District Attorney Johnstone Jones and J. L. Copeland, Esq., as associate counsel. Upon cross-examination, counsel for defendant asked Till Vasquez, the prosecuting witness, the following question: "Have you employed Mr. Copeland in this case?" The question was objected to as immaterial and irrelevant. Counsel for appellant insisted the question was intended to show the interest of the witness. The court sustained the objection, remarking: "It is presumed the prosecuting witness has interest. I do not think it necessary." This ruling is assigned as error. It is a well-settled doctrine that in

determining the guilt or innocence of one charged with crime it is proper to inquire of a witness for the prosecution, on cross-examination, whether he has not expressed feelings of hostility towards the prisoner. Questions of like character, tending to show animus, are equally proper. It has been contended that in the case of a prosecuting witness who has been directly injured by the alleged offense, bias and feeling are to be presumed by the jury, and the propriety of permitting or refusing questions of this character should be confined to the discretion of the trial court, and that error assigned upon its action should not be upheld. In the light of the former rulings of this court, I am not at liberty to consider this distinction. In *People v. Blackwell*, 27 Cal. 66, which was a criminal action, the prosecutrix was asked by defendant's counsel, on cross-examination, "if she had employed Budd & Carr and Heslep & Jenkins to assist the district attorney in the prosecution?" The district attorney objected to the question on the ground that the proof was incompetent. The objection was sustained, and the defendant excepted. This court, in its opinion, reversing the judgment, said: "We cannot determine, nor is it either necessary or proper for us to inquire, what, if any, effect an affirmative answer to the question would have had on the minds of the jury. The defendant had a right to ask the question. If a witness retain counsel in a case to which he is not a party, and in the result of which he has no interest, it is a fact going to the credibility of the witness. The witness may have thus interposed on considerations of humanity, or of public justice, or he may have been influenced by private grudge; but the party against whom the witness is produced is always entitled to inquire of the witness as to the fact, and, if admitted, it goes to the jury for whatever it is worth; and such explanation of motives as the witness may give for his action goes with it." *Baker v. Joseph*, 16 Cal. 173, and 1 Greenl. Ev. §§ 449, 450, are cited in support of the opinion. *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. Rep. 859, and the late case of *People v. Thomson*, 92 Cal. 506, 28 Pac. Rep. 589, are to the same effect. In the case last cited a witness for the prosecution in a case of homicide testified, on cross-examination, that "shortly after the shooting he went to the scene of the homicide, and took his rifle with him. Question. What did you take your rifle with you for?" An objection to this question was sustained, and the ruling was held erroneous. I am of opinion a like conclusion should be reached upon the error assigned in this case.

2. The second error assigned is based upon the action of the court in ruling out the answer contained in a deposition taken on behalf of the defendant. At the taking of the deposition, counsel for defendant asked the following question: "Do you know what the reputation of William Gillis, the defendant in this action, is; that is, what his general reputation is for peace and quiet, and as a law-abiding citizen?" It does not appear that any ob-

jection was made to the question at the time and place of taking the deposition. It was objected to, however, at the trial, as not being in statutory form, and as incompetent; the objection was sustained by the court, and the ruling excepted to. The position taken by counsel for defendant in their brief seems to be and is that the deposition in question was taken by stipulation of counsel before a notary public, in the presence of counsel for the people and for defendant; that no objection was taken to the question at the time or previous to the hearing, and that it was then too late. The record is searched in vain for light on this subject. It nowhere appears when or where or before whom the deposition was taken, whether within or out of the state, whether in the presence or absence of counsel for the people. In short, there is an entire absence of such a statement as will enable us to form an opinion as to the propriety of the action of the court below. As error will not be assumed, but must be shown by the record, it must be held that the second error urged is without foundation. For the reasons given relating to the first error it is advised that the judgment and order denying the motion for a new trial be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

(3 Cal. Unrep. 839)

AUBURN OPERA-HOUSE & PAVILION ASS'N v. HILL. (No. 18,097.)

(Supreme Court of California. March 9, 1893.)

CORPORATIONS—SUBSCRIPTIONS TO STOCK—CONTRACT—CONSTRUCTION—LIABILITY OF SUBSCRIBER—WAIVER OF CONDITIONS.

1. In an action by an opera house company to recover a subscription to its capital stock, it appeared that a "prospectus" recited in detail the objects of the intended corporation, the amount of stock, etc., and that the subscriptions were to be called in on installments; that defendant signed the prospectus for a certain number of shares; that four calls had been ordered by the board of directors, and payment demanded; and that defendant had failed to pay. *Held*, that plaintiff was entitled to recover.

2. Such prospectus stated that the building was "to be built by a corporation with a capital stock of \$20,000, consisting of one thousand shares at twenty dollars per share." *Held*, that it was not a condition precedent to defendant's liability that \$20,000 of plaintiff's stock should be first subscribed for.

3. It appeared that defendant was one of plaintiff's directors for two months, during which time he signed the articles of incorporation, was present at meetings of the board when the calls for the first two installments were ordered, and voted in favor of accepting the building lot, and that he served as a member of the building committee, prepared several plans for building, and consulted various architects and contractors about the same. *Held*, that, though the subscription for the full amount of stock mentioned in such contract was a condition precedent to defendant's liability, he had waived any objection on the ground that such amount was not subscribed.

Department 2. Appeal from superior court, Placer county; W. H. Grant, Judge.

(Not to be published in California Reports.)

Action by the Auburn Opera-House & Pavilion Association against George M. Hill on a contract of subscription to stock in such corporation. From a judgment for defendant, plaintiff appeals. Reversed.

The complaint set out the prospectus in full, which constitutes the alleged contract signed by defendant, as follows: "Object: To build an opera house and pavilion, combined, in Auburn, Placer county, California. To be built by a corporation with a capital stock of \$20,000, consisting of one thousand shares at twenty dollars per share. The property to be owned by the shareholders, and controlled and managed by a board of trustees. The building to be used for opera-house purposes, balls, large assemblies, reunions, and conventions, and with the pavilion annex for district fair exhibits, circus exhibits, celebrations, and drill hall. The revenues to pay dividends on stock will be derived from rentals of storerooms below and offices above on street front, and theatric-als, balls, fairs, etc., etc., from rear portions of building. The location of the building, and the selection of the trustees, to be determined by the subscribers of the majority of the stock. As the district fair is again approaching, the above suggestions, if carried out, will solve the vexed question of a permanent exhibit hall for our district fair, besides furnishing a much-needed public building for Auburn. The subscriptions to be called in on installments, as needed to purchase a site, and erect and furnish the building." The names of subscribers, with the number of shares and the amount subscribed, follow. It was also stated in the complaint that, when stock to the amount of \$17,660 was subscribed, it was agreed among all the subscribers—defendant being one—that such sum was sufficient for the purpose intended, and waived the procuring of subscriptions to the full amount; that defendant was actively promoting said corporation; that the subscribers selected five trustees, among whom was defendant; that they purchased ground selected by such shareholders, and paid the money therefor, and also for the building erected thereon; and that plaintiff, by its board of directors, made calls and demands for installments on the several subscribers as follows: One fourth of each subscription, May 2, 1890; one fourth, July 6, 1890; one fourth, August 26, 1890; and one fourth, October 2, 1890,—at which times such calls and demands were made on defendant, but he failed and refused to pay the same, or any part thereof. It appeared that defendant was elected a director May 2, 1890, and remained such until July 6, 1890, when his resignation was accepted; that while a director he signed and acknowledged the articles of incorporation, served as a member of the building committee, prepared several drafts and plans for building, and consulted various architects and contractors about such building; and that as such director he was present at the meeting when the first call for an installment was ordered, and voted in favor of accepting the building lot which had

been previously reported; also, that the second call, made while defendant was still a director, was ordered by a unanimous vote. It was contended by defendant that the prospectus was too indefinite and uncertain to constitute a contract; that, if it did constitute a contract, it required that stock should be subscribed for to the amount of \$20,000 before it became binding on any of the subscribers; and that defendant had not waived such condition.

J. O. Hamilton and G. W. Hamilton, for appellant. Johnson, Johnson & Johnson and John M. Fulweiler, for respondent.

PER CURIAM. 1. Under defendant's contract of subscription for the stock of plaintiff, as contained in the prospectus signed by defendant, and upon the facts alleged in the complaint as to plaintiff's calls or demand for the amount agreed to be paid for such subscribed stock, the plaintiff is entitled to maintain this action. *Light Co. v. Johnson*, 93 Cal. 546, 29 Pac. Rep. 126; *Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. Rep. 859.

2. It was not a condition precedent to defendant's liability that \$20,000 of plaintiff's stock should be first subscribed for; but, were it otherwise, the defendant has waived the objection which he now makes upon this ground. *Hotel Co. v. Callender*, supra. Indeed, the acts of defendant constituting such waiver are stronger than those held to have that effect in the case cited. Judgment and order reversed.

(97 Cal. 475)

SUTTON v. SYMONS et al. (No. 18,163.)
(Supreme Court of California. March 8, 1893.)

APPEAL—TIME OF TAKING—RECORD.

1. An order striking out the statement on motion for a new trial being an order after final judgment, an appeal therefrom must be taken within 60 days.

2. A preliminary motion to strike out a portion of the transcript on the ground that it is no part of the record will not be granted, because, if the matters objected to form no part of the record, they will not be considered when the case is under consideration on the merits.

Department 1. Appeal from superior court, Tuolumne county; Joseph Budd, Judge.

Action by Fred Sutton against William Symons and others. From the judgment entered, defendants appealed. Plaintiff moves to dismiss the appeal, and to strike out a part of transcript. Appeal dismissed, and motion to strike denied.

Moses G. Cobb and J. B. Curtain, for appellants. F. W. Street, for respondent.

PER CURIAM. Respondent has moved to dismiss the appeal from an order of the superior court of Tuolumne county striking out appellants' statement on motion for a new trial, upon the ground that it was not taken in time. Such an order is an order made after final judgment, and an appeal therefrom must be taken within 60 days. The appeal in this case was taken too late, and must be dismissed.

Calderwood v. Peyser, 42 Cal. 110; Clark v. Crane, 57 Cal. 633.

Respondent also makes a motion to strike out certain portions of the transcript upon the ground that they are no part of the record. The motion will be denied. Such a practice is not recognized in this court. If the matters to which counsel object form no part of the record, they will not be considered by the court when the merits of the appeal are before us for determination. The motion to dismiss the appeal will be granted. The motion to strike out will be denied.

97 Cal. 546

HARRIS et al. v. BARNHART. (No. 18,086.) (Supreme Court of California. March 18, 1893.)

RECORD ON APPEAL—RES JUDICATA—MOTION FOR NEW TRIAL—STAY.

1. A claim that the evidence was insufficient to justify the verdict will be disregarded when the evidence is not in the record.

2. Error cannot be predicated on instructions when the evidence on which they are based is not brought up; and when the record states that the court gave certain other and additional instructions it will be assumed that the law of the case was properly presented.

3. Code Civil Proc. § 1049, provides that an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed. *Held*, that where a former judgment is pleaded in bar to another action within the year allowed for appeal, but no objection is taken to the sufficiency of the pleading on the ground that a year has not elapsed, it is proper on the trial, which occurs more than a year after the entry of the judgment, to admit the evidence of the former judgment in bar of the action.

4. The pendency of a motion for a new trial does not stay proceedings under the judgment, and is no objection to the introduction of the judgment in evidence in bar of another action for the same cause during the pendency of such motion.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by B. C. Harris and Hannorah Harris against Henry Barnhart to have an absolute deed, executed by plaintiffs, declared a mortgage, on the ground that it was given merely as security. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

J. B. Webster, L. W. Elliott, and Thompson & Paulsell, for appellants. F. T. Baldwin and W. N. Rutherford, for respondent.

SEARLS, C. Plaintiffs, who are husband and wife, brought this action to recover \$3,600. According to the allegations of the complaint, the plaintiffs, on the 15th day of December, 1884, were indebted to defendant in the sum of about \$4,374, a balance due upon a promissory note of \$8,000, made by them to the latter. That on said date, and as security for the payment of such balance, they executed, acknowledged, and delivered to defendant an absolute deed of certain premises, consisting of 10 acres of land, with the improvements thereon, known as the "Stockton House," situated near Stockton. The complaint avers that it was intended by

all the parties to the transaction that the deed should be taken as security, etc. It further avers that defendant, in February, 1885, sold the premises for \$8,000, and the action is brought to recover the excess received by him over and above his demand against plaintiffs. The action was commenced August 26, 1889. The answer denies that the deed was executed and delivered as security, and avers that it was an absolute conveyance, in consideration of the indebtedness of plaintiffs to him, amounting to \$6,000, and was not intended or received as security, etc. Defendant, as a further answer, and as a bar to the action under the statute of limitations, sets up subdivision 4 of section 338, and subdivision 1 of section 339, of the Code of Civil Procedure, as defenses to the action. As a further answer, defendant alleges that on the ——— day of July, 1889, in an action then pending in the same court between the same parties, and for the same cause of action, judgment was rendered in his favor and against the plaintiffs, wherein it was adjudged "that said plaintiffs are not entitled to recover in this action, and that defendant is entitled to a judgment for his costs." It is further averred in the usual form that such judgment has not been reversed, vacated, or set aside, and remains in full force and effect. The cause was tried before a jury. Defendant had a verdict, upon which judgment was rendered in his favor for costs of suit. Plaintiffs moved for a new trial, based upon the minutes of the court, and from an order denying the motion and from the judgment this appeal is taken.

Plaintiffs, in their notice of motion for a new trial, specified several particulars in which it was claimed the evidence was insufficient to justify the verdict, but the evidence in support thereof is not to be found in the record, and they must therefore be disregarded. Like considerations apply to the instructions given at the request of the defendant, except that marked "2," in relation to the effect of the former judgment. Also to those asked on behalf of plaintiffs and refused. Not having the testimony before us upon which they are predicated, it is impossible to say whether or not the court erred. Another reason for not disturbing the judgment on account of the instructions given and refused is that it appears from the record "that the court, at the request of the plaintiffs and the defendant, and on the court's own motion, gave certain other, further, and additional instructions to the jury." As these additional instructions are not embodied in the record, it must be assumed that, taken with those given and refused, the law of the case was properly presented to the jury. At the trial defendant was permitted by the court, against the objection of plaintiffs, to introduce in evidence the judgment roll in the case of B. C. Harris et al. vs. H. Barnhart, No. 3,635; the object being evidently to support the defense of a former adjudication of the same subject-matter set out in the answer. Plaintiffs excepted to the ruling of the court admitting the judgment roll, and later to the instruction No. 2, given by the court at the request of the defendant, hold-

ing that the facts and issues passed upon in the former case were conclusive in the present action, and these rulings are assigned as error. The verdict in this case was rendered February 28, 1891. At the date of the trial, and when the judgment roll in the former cause was admitted in evidence, a motion for a new trial in such former cause was pending and undetermined. I am satisfied that if the record was properly admitted it proves the subject-matter of this action to be res adjudicata. The parties in each action are the same; the same conveyance of the same property is set out in each action. Plaintiffs in the former as in this action claim that the instrument was given merely as security for a pre-existing debt. Defendant in each case claims that the conveyance was intended to be just what on its face it purported to be, and was executed in consideration of a debt due and owing to him from the plaintiffs. The only perceptible difference is apparent, rather than real. In the former case plaintiffs alleged that they were illiterate, and were induced to sign the conveyance upon the representations of defendant that it was a power of attorney under which he would sell the premises, and when so sold would pay them \$3,000, and cancel their note. The court found against plaintiffs on this proposition, and to the effect that the deed of conveyance was fully explained to and understood by plaintiffs, and was not represented to them to be a power of attorney. The very gist of that action, as well as of this, was as to whether a conveyance, admitted to be absolute on its face, was signed, sealed, and delivered as an absolute conveyance of the property described therein, or merely as security. When its character was once put in issue, tried, and determined, and such determination crystallized by a final judgment, it became a finality as between the same parties, provided such judgment was not suspended and rendered inoperative by the pending motion for a new trial, or by section 1049 of the Code of Civil Procedure.

The only question remaining is, was the judgment offered in evidence suspended by the pendency of a motion for a new trial, or from other cause? It has been repeatedly held by this court that the operation of a final judgment is suspended by an appeal therefrom, and that pending such appeal the judgment is not admissible in another case as evidence even between the same parties. *Woodbury v. Bowman*, 13 Cal. 635; *McGarrahan v. Maxwell*, 28 Cal. 75; *Thornton v. Mahoney*, 24 Cal. 569; *Murray v. Green*, 64 Cal. 363, 28 Pac. Rep. 118; *Freem. Judgm.* § 323. The contention of appellants is that the judgment was not a final one, for the reason that a motion for a new trial was pending, and by reason of the fact that one year had not expired since entry of judgment. A motion for a new trial does not operate as a stay of proceedings under the judgment. *People v. Loucks*, 28 Cal. 69. Section 1049 of the Code of Civil Procedure provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless

the judgment is sooner satisfied." If it be held that during the period of one year next after the entry of a judgment, during which period, under our law, an appeal may be taken, the action is to be deemed as pending, and the judgment is so far in abeyance as not to be a bar to another action for the same cause, and it must be conceded there seems good reason for so holding, still it is not apparent that appellants are gainers thereby. The former judgment was rendered, as before stated, July 16, 1889. It was offered in evidence on or about February 28, 1891,—a period of more than one year after entry. It is true that at the date of the plea of the judgment, viz. November 30, 1889, one year had not elapsed since the entry of the judgment. The evidence, when offered, was admissible, and sufficient to constitute a defense to the action, and it is not perceived that an inherent defect at a former period could be urged against it after the infirmity ceased. The vice, if any, was in the answer, which showed upon its face that the judgment had been rendered within one year. No objection having at any time or place been urged against this pleading, it was proper for the court below to admit the evidence, and enter judgment upon the verdict. Objection was made to the introduction in evidence of the record in the former cause, it is true, but it was based upon its supposed defects in not showing a former adjudication of the same cause of action, that a motion for a new trial was pending, and that one year had not elapsed since the rendition of the judgment. If, as hereinbefore, we still assume the position of appellants that a judgment is ineffectual as evidence in a plea of former adjudication until the time for an appeal therefrom has expired, the true course of a defendant in such a case would be to plead the pendency of the former action in abatement until the judgment therein became final, when a supplemental answer averring the proper facts, in bar of the action, would be in order.

In conclusion, I am of opinion: (1) That a motion for a new trial, in the absence of an order of the court to that effect, does not stay or suspend the operation of a final judgment in the cause. (2) That where an appeal is pending, and until the time therefor has expired, a final judgment, unless satisfied, is not evidence in bar of recovery, in another action for the same cause. (3) That until the time for an appeal has expired, if the judgment has not been sooner satisfied, the action is, under section 1049 of the Code of Civil Procedure, to be deemed as pending, and the proceedings therein are admissible under proper pleadings in abatement of a subsequent action for the same cause. (4) That in this cause, the time for an appeal having expired before the judgment was offered in evidence, it was admissible in support of a plea in bar of the action, and, no objection having been urged upon the ground of the insufficiency of the answer pleading such judgment, it was properly admitted in evidence. (5) That defects in the answer were waived by acquiescence and by failure to object there-

to. It must not be understood that any reflection is cast upon the diligence or acumen of counsel for appellants in the assertion that they waived the rights of their clients by failure to object to the answer. Doubtless they were aware of the fact that, if they did so, it would simply involve, as a consequence, the filing of a supplemental answer, and no gain would have accrued to their clients. It is recommended that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

97 Cal. 553

DRISCOLL v. MARKET ST. CABLE RY. CO. (No. 14,232.)

(Supreme Court of California. March 18, 1893.)

STREET RAILWAYS—INJURY TO PERSONS ON TRACK.

In an action against a street-railway company for causing the death of plaintiff's intestate, it appeared that, on a dark night, deceased approached a street occupied by defendant's tracks, and, when a car going east had passed, started to cross the street, when a car going west ran over him, and killed him. There was slight evidence that the car was moving faster than the statutory eight miles an hour, and it was admitted that the persons in charge of the car wholly failed to ring the bell, as required by the ordinance, from a point 25 feet from the crossing till the same was passed. *Held*, that there was no such absence of substantial evidence to support a verdict for plaintiff as would warrant the court in setting it aside.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Margaret Driscoll, administratrix of Alexander Driscoll, deceased, against the Market-Street Cable Railway Company, for causing the death of the deceased. There was judgment for plaintiff, and, its motion for a new trial being overruled, defendant appeals. Affirmed.

Frank Shay, for appellant. Frank Sullivan, for respondent.

McFARLAND, J. On December 10, 1884, Alexander Driscoll was struck and killed by a car of defendant at the intersection of McAllister and Larkin streets, in San Francisco; and his widow, as administratrix, brought this action to recover damages for his death. The jury returned a verdict for plaintiff in the sum of \$7,775, for which judgment was rendered. The defendant appeals from the judgment, and from an order denying a new trial. The only point urged by appellant is that the evidence is insufficient to justify the verdict; the positions of appellant being that the evidence does not show that the accident was the result of any negligence of appellant, and does show that it was the result of the negligence of the deceased.

The question presented is certainly one of some difficulty. The rule is well established that this court will not disturb a verdict where there is a conflict of evi-

dence on material points, and where there is evidence to support the verdict; but such conflict and such evidence must be real and substantial. When a jury catches at a mere semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions, by taking money from one party, and giving it to the other, without legal cause, the trial judge should, without hesitation, set the verdict aside; and, in the event of his not doing so, this court will grant a new trial. Street railroads are an established feature of modern city life. They are a convenience and a necessity to all classes of people, and are desired by all. But their operation on crowded streets is necessarily attended with considerable danger to pedestrians,—a danger which all people are bound to know, and against which they should protect themselves by the use of at least reasonable caution. While, therefore, the owners of these railroads are to be held to due care in the management of their lines, they, when exercising such care, are not responsible in damages to a person who, in a careless or reckless or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. The person in charge of a car, with a clear track before him, has a right to assume that people will not suddenly undertake to cross in front of it; otherwise, he could not make any headway, and no street-car line could be successfully operated, either for the profit of the owner, or the convenience of the public. And the general rule is that, where the negligence of the injured party is a contributing proximate cause of the accident, he cannot recover damages. But whether or not his negligence did so contribute, in any particular case, is generally a question around which conflicting evidence will be gathered; and in such case a railroad company, which was itself guilty of negligence at the time of the accident, cannot often expect to be relieved from an unfavorable verdict.

Section 501 of the Civil Code provides that the speed of a street car shall not exceed eight miles an hour; and an ordinance of the city and county of San Francisco provides, substantially, that every car shall have attached to it a bell or gong of sufficient size and weight to be distinctly heard, when rung or sounded, at a distance of at least 100 feet, and that the persons in charge of a car must keep the bell ringing, or the gong sounding, from a point 25 feet from a street crossing until the crossing shall have been passed.

In the case at bar the deceased, at the time the car struck him, was walking northerly along the easterly crossing of McAllister street, where it intersects Larkin. On McAllister street the appellant has two parallel tracks, on the northerly of which the cars going west run, and on the southerly the cars going east. The deceased was struck by a car going west, on the northerly track; and, according to the custom of appellant, a car thus going comes to a standstill at a certain point, called "Stop," which is 37 feet east of the center of the said crossing. After starting again, it goes to a point called "Let Go,"

about five or six feet east of the crossing; and at the point "Let Go" the gripman suddenly releases the grip from the cable, and the car runs along Larkin street from the impetus given by the cable, and without being attached to the latter. This is necessary because the cable is crossed by another cable running along Larkin street. The custom above stated was followed by the gripman of the car by which the deceased was killed. There was some evidence that the car, at the time of the accident, was running faster than eight miles an hour, though such evidence was exceedingly slight. It is admitted that the rate of speed at which the cable itself ran was only eight miles; but two of the witnesses testified that, after the car was released from the cable at the point "Let Go," it ran faster than the cable. The position of appellant, that it was physically impossible for the car, after it was detached from the cable, to have run faster than the cable, is hardly tenable; for there was a slight artificial down grade at that point for a few yards,—1 7-8 inches from the "Let Go" to the center of Larkin street. But the testimony of the witnesses who swore to the increased speed was so unsatisfactory, and the increased speed itself so improbable, that a verdict founded on such speed alone, as constituting negligence on the part of appellant, could hardly be sustained. But it is clear that the employee of appellant in charge of the car failed to ring the bell as provided by said ordinance, and as due care required. There was a conflict of evidence as to whether or not the bell was rung at all until after the deceased was struck. Witnesses differed about it having been rung once just before or at the time the car started from the point "Stop," thirty-seven feet away; but the evidence is uncontradicted, and the fact is admitted, that the bell was not rung after leaving said point until after the deceased had been struck. This was clearly negligence, because it was in violation of a reasonable ordinance, and also because the omission was in itself, under the circumstances, careless. *Siemers v. Eisen*, 54 Cal. 418; *Higgins v. Deeney*, 78 Cal. 578, 21 Pac. Rep. 428; *Orcutt v. Railroad Co.*, 85 Cal. 291, 24 Pac. Rep. 661; *Shear. & R. Neg.* § 13. It is true that failure to ring a bell, or to comply with some other statutory requirement, will not make a railroad company liable, if such failure is not the proximate cause of the accident, or if it was caused by the negligence of the injured party; and in the case at bar it is contended by appellant that it was the negligence of the deceased, and not the failure to ring the bell, that caused the injury. The contention is that, upon the evidence, we must hold, as a matter of law, that the negligence of the deceased was the proximate cause of the injury; but, after a thorough examination of the record, we do not think that such contention can be maintained.

There is a conflict of evidence as to the actual conduct of the deceased, and the circumstances under which he acted, at the time of the accident. He was crossing McAllister street from the south side,—going north. It is beyond dispute that

about that time another car of appellant came down McAllister street, going east, and crossed said street on the south track, and stopped a few yards east of the crossing, although there is a conflict in the evidence as to the precise point which said car had reached when deceased started across the street. It was, however, clearly at a point where it was, to a greater or less extent, (as it was further east or west,) an obstruction to the observation of the deceased. The jury had warrant in the evidence to find that he started as soon as the east-bound car had passed the crossing; that the time was after daylight; and that the night was "dark and foggy," although there was a headlight on the car. The two tracks are about $4\frac{1}{2}$ feet apart, and the deceased had nearly crossed the second or north track when the north side of the car struck him. One or two persons shouted to him to get out of the way, but it does not appear that he heard the warning. Under these circumstances, the appellant being in default for not giving the proper warning, we think that the question whether deceased was guilty of contributory negligence was a proper one for the jury; that deceased cannot be held, as a matter of law, to have been so guilty; and that there was sufficient evidence to warrant the jury in finding that he was not. Counsel for appellant, in his very thorough and able brief, has cited a number of cases in which it was held that the plaintiff could not recover because he had not exercised sufficient caution in attempting to cross a railroad track. Those were cases, however, where the accidents occurred on ordinary steam railroads running through the country at comparatively long intervals of time; and the rule there laid down can hardly be applied in all its strictness to street railroads in crowded cities, where a car that can be speedily stopped passes a crossing every two or three minutes, and where people necessarily cross the streets frequently and hurriedly. *Shea v. Railroad Co.*, 44 Cal. 414; *Swain v. Railroad Co.*, 93 Cal. 183, 28 Pac. Rep. 829; 1 *Thomp. Neg.* p. 396, and cases there cited. Of course, if all people exercised the greatest care and caution in approaching and crossing railroad tracks, such accidents as the one here involved would rarely, if ever, occur; but the law does not expect or require such extreme care. Ordinary care is all that is required; and ordinary care is that degree of care which people of ordinarily prudent habits—"people in general"—could be reasonably expected to exercise under the circumstances of a given case. And considering all the evidence and circumstances in the case at bar, and particularly the fact that the deceased had a right to rely upon the usual and required signal of bell ringing when a car is approaching a crossing, we cannot say that the jury abused its power in holding that the deceased was not guilty of contributory negligence. The judgment of the learned judge of the court below, who heard all the evidence, and refused a new trial, is also entitled to great consideration. It is, no doubt, what is sometimes called a "close case;" but, in our opinion,

there is no such absence of substantial evidence to support the verdict as would warrant us in setting it aside.

There is nothing in the point that the gripman could not have rung the bell because his hands were necessarily otherwise engaged. If it was not convenient for him to have performed that duty, the conductor should have done it; and it was no excuse that the conductor was temporarily absent from his post. Neither is there anything in the point that the ordinance requires, in terms, that the persons immediately in charge of the car, and not the company, shall give the warning. The judgment and order appealed from are affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

97 Cal. 586

GORDON v. BOOKER. (No. 18,083.)

(Supreme Court of California. March 21, 1893.)

BOUNDARIES—SECTION CORNERS—EVIDENCE—ADVERSE POSSESSION.

1. In an action to quiet title, it appeared that plaintiff's land was north, and defendant's land was south, of a half-section line, the location of which depended on the location of the half-section corner on the east line of the section. The surveyor who ran the half-section line found a stake on the east line of the section, which he assumed to be the half-section corner. Three surveyors, and two other persons, testified that the stake found was the government corner. There was no evidence that a corner had been found at a different place in that vicinity. Measurements from a known corner, $1\frac{1}{2}$ miles south of the half-section line, would place the corner 24 feet north of the stake found, but a line due west from such point would locate the west half-section corner 20 feet north of its known location. *Held*, that the court erred in holding the half-section corner to be 24 feet north of the stake found, since evidence based on courses and distances from other known points is inadmissible to change the location of an original corner, when found.

2. A finding that defendant had been for five years in possession of the strip in dispute is not sustained by evidence that the strip has been lying open and unoccupied, and that defendant only claimed the land lying south of the half-section line.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Alexander Gordon, administrator of James H. Hamilton, deceased, against Jane E. Booker, to quiet title. There was judgment for defendant, and plaintiff appeals. Reversed.

Firman Church, J. P. Meux, and Garber, Roalt & Bishop, for appellant. Geo. L. Hood and W. S. Crawford, for respondent.

HAYNES, C. This action is brought by plaintiff to quiet title to certain lots in the Central addition to the city of Fresno. The defendant had judgment, and the plaintiff appeals from the judgment and an order denying his motion for a new trial.

The half-section line running east and west through section 4 is the north boundary line of the city of Fresno. Plaintiff's lots lie on the north side of this line, and

defendant's on the south side. The point in controversy is the location of this half-section line, and upon the trial that point turned upon the location of the half-section corner on the east line of section 4. Teilman surveyed and platted Central addition, and ran the half-section line, and plaintiff claims to this line. The court found the line to be 24 feet north of the line so surveyed. In making this survey, Teilman found a stake which he assumed and believed to be the half-section corner. Five other witnesses—at least three of them being professional surveyors—testified that the corner from which Teilman made his survey was a "charcoal" or "government" corner; and there was no evidence tending to show that a stake or corner had ever been seen at a different place in that vicinity. This testimony was prima facie sufficient to establish it as a government corner, and to justify a finding to that effect. The finding of the court was based on a survey and measurement from the southeast corner of section 9, a distance of a mile and a half south of the stake in question. A ditch or canal had been dug on the south line of section 9, and for several miles east of that section. Defendant's witness, who dug this canal, testified that he took up the stakes, and set them on the south side of the canal, but the distance they were removed is not definitely shown. But, assuming that the southeast corner of section 9 was definitely established, a survey from that point could be used but for one purpose, viz. to show that the half-section corner in question was not in fact a government corner. It could not be used to show that the government surveyor made an error in placing it there. In *Hall v. Tauner*, 4 Pa. St. 244, it was said: "It has ever been held that the marks on the ground constitute the survey. The courses and distances are only evidences of the survey." This court, in *Ferris v. Coover*, 10 Cal. 629, said, "preference is given to monuments, because they are least liable to mistake;" and in the same case, quoting from *Fulwood v. Graham*, 1 Rich. Law, 497, said: "That in locating lands we are to resort—First, to natural boundaries; second, to artificial marks; third, to adjacent boundaries; fourth, to courses and distances; but it has never been said that each of these occupied an inflexible position. It sometimes might occur that an inferior means of location might control a higher, when it was plain there was a mistake." Evidence based upon courses and distances from other known points is admissible to fix a corner where no corner is found, but never to change the location of an original corner when found. It seems to have been considered that, because townships are subdivided by commencing at the south and east sides, therefore points to the south are more reliable than those on the north; but such is not the case. A survey by courses and distances from the nearest established corner is least liable to error. The northeast corner of section 4 is upon the north line of the township, and that corner is not disputed. Several measurements from that corner to the half-section corner in question made the distance 2,623

feet, while the government field notes call for 2,624.8 feet,—a difference of only 1.8 feet from the corner found by Teilman. The conflict of testimony cannot be said to be material. The evidence of defendant, based on course and distance, being of a lower order, because of its greater uncertainty, cannot be said to raise a material conflict with the higher order of proof unless it demonstrates to a reasonable probability that the corner as found now upon the ground is not the corner established by the government, and this it fails to do.

The line found by the court is erroneous in another particular. The half-section corner on the west line of section 4 is not disputed, and that corner is shown to be 2,619 feet south of the northwest corner of the section. Assuming that the north line of the township is a due east and west line, as we must, in the absence of evidence to the contrary, the half-section line found by the court, starting from a point 24 feet north of the stake in the east line, and running "due west," would intersect the west line of the section 20 feet north of the half-section corner, while that line should be drawn from one corner to the other, regardless of a variation from the due east and west course.

If the sixth and seventh findings are to be understood as finding that defendant had been for more than five years in possession up to the line fixed by the court, such finding cannot be sustained. Defendant testified that "all this strip of land in controversy has been lying out, open, unfenced, and uncultivated." And again: "I never claimed anything except what was actually embraced in fractional block 340. That is all I ever claimed, or claim now." It does not appear that either party had actual possession of the strip in controversy, while the constructive possession of each extended only to the true line.

I think the findings discussed herein are not justified by the evidence, and that the judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

REYBURN v. BOOKER. (No. 18,082.)

(Supreme Court of California. March 21, 1893.)

Commissioners' decision, Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. J. Reyburn against Jane E. Booker to quiet title. There was judgment for defendant, and plaintiff appeals. Reversed.

Firman Church, J. P. Meux, and Garber, Boalt & Bishop, for appellant. Geo. L. Hood and W. S. Crawford, for respondent.

HAYNES, C. This cause was submitted and decided in the court below upon the evidence heard in No. 18,083, Gordon, Adm'r, v. Jane E. Booker, under stipulation of counsel, and is submitted here upon the same briefs by

appellant; no brief for respondent. The judgment was for defendant, and this appeal is from the judgment and an order denying plaintiff's motion for a new trial. Upon the authority of *Gordon v. Booker*, 32 Pac. Rep. 593, (No. 18,083, this day filed,) I advise that the judgment and order appealed from be reversed, and a new trial granted.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons above given the judgment and order appealed from are reversed, and a new trial granted.

97 Cal. 600

ORANGE COUNTY v. HARRIS. (No. 14,645.)

(Supreme Court of California. March 23, 1893.)

COUNTY OFFICERS—COMPENSATION—CONSTITUTIONAL LAW.

1. St. 1883, p. 361, (County Government Act,) § 164, providing that "the salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, their deputies and assistants," operates as a repeal of that provision of Pol. Code, § 3770, which gives one half of certain additional fees collected on delinquent tax lists to the collector for preparing the list.

2. St. 1883, p. 300, (County Government Act,) § 8, provides that whenever a board of supervisors shall, without authority of law, order any money paid as salary or fees, and such money shall have been actually paid, it may be recovered back in a suit in the name of the county against the person to whom it was paid, together with 20 per cent. damages for the use thereof. *Held*, that the provision for the recovery of such damages is not unconstitutional, as taking property without due process of law.

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by the county of Orange against one Harris. Plaintiff had judgment, and defendant appeals. Affirmed.

Chas. S. McKelvey and W. L. Campbell, for appellant. W. H. H. Hart, Atty. Gen., and F. W. Sanborn, for respondent.

PATERSON, J. This is an action to recover from the defendant, who is sheriff and tax collector of Orange county, the sum of \$657, together with 20 per cent. damages. The action is based upon the provisions of section 8 of the county government act, which provides, in substance, that whenever any board of supervisors shall without authority of law order any money paid as salary or fees, and such money shall have been actually paid, it shall be the duty of the district attorney to commence suit in the name of the county against the person to whom the money was paid to recover the same and 20 per cent. damages for the use thereof. Appellant's claim to the money is based upon section 3770 of the Political Code, which provides that the tax collector must collect, in addition to the taxes due on the delinquent list and 5 per centum added thereto, 50 cents on each lot, piece, or tract of land separately assessed, and on each assessment of personal property, one half of which must go to the county, and the other to the collector for preparing the list. It appears that the defendant adver-

tised 2,628 items of delinquent property, and collected, under the section referred to, \$1,314, one half of which he claimed the right to hold under the statute. Section 211 of the county government act, as amended in 1887, provides that "the salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided; and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this act otherwise provided." St. 1887, p. 207. Following this provision in the section are certain provisos, which are referred to and commented upon in *Dougherty v. Austin*, 94 Cal. 608, 28 Pac. Rep. 834, and 29 Pac. Rep. 1092. It was held in that case that the provisions for extra compensation and employment of additional deputies at the expense of the county were unconstitutional; and it may be admitted that all parts of the section fell together, the various provisions with respect to salaries being so interlaced and mutually connected with and dependent upon each other as to warrant the belief that the legislature intended the section to stand as a whole, and if it had been believed that all of the provisions could not be carried into effect, no part of the act would have been passed. *Cooley*, Const. Lim. 211. This being the case, the enactment of section 211 of the amendatory act did not operate to repeal section 3770 of the Political Code. An act, unconstitutional in itself, may contain a valid clause repealing another act, but the intention of the legislature to wipe out the previous enactment, at all events, must be clearly and unequivocally expressed. No repeal by implication can result from a provision in a subsequent statute when that provision is itself devoid of constitutional force, and it is not sufficient to effect a repeal to say in an unconstitutional act that all acts inconsistent therewith are thereby repealed. *Enl. Interp. St.* § 192; *Campau v. Detroit*, 14 Mich. 276; *Tims v. State*, 26 Ala. 170; *People v. Fleming*, 7 Colo. 236, 3 Pac. Rep. 70; *Childs v. Shower*, 18 Iowa, 272. But, conceding the contention of the appellant in this regard to be sound, *id est*, that section 211, being unconstitutional, did not repeal, section 3770 is not saved by the concession. The county government act, as originally passed, contained a section which provided that "the salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, their deputies and assistants; and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided." St. 1883, p. 361, § 164. This section did not contain the objectionable provisions found in the amendment of 1887, and, being a valid enactment, it operated to repeal the provisions of section 3770 of the Political Code. It did contain a provision that the assessor might retain 15 per cent. of all amounts collected by him for poll taxes, and it is claimed that by reason of this provision the act was unconstitution-

al and void. We do not deem it necessary to consider the question whether or not the legislature has the constitutional right to authorize the retention by the assessor of any portion of the poll taxes collected by him. It may be conceded, and still section 164 is good, so far as it affects the compensation of officers other than assessors.

There is no merit in the contention that the provision for 20 per cent. damages, if enforced, is unconstitutional, because it deprives a defendant of property without due process of law. It is no more obnoxious to such a criticism than the provisions of the Code relating to costs and damages in cases of delinquent taxes. As was said by Chief Justice Beatty in *State v. Huffer*, 11 Nev. 303, in speaking of an act prescribing an additional penalty for nonpayment of taxes in certain cases after suit. "We think the penalty is to be regarded not only as a punishment to the delinquent, but also and principally as a compensation to the state and county for the delay of payment, and the consequent derangement of their finances."

The contention of the appellant that the money was paid under "authority of law" is equally unsound. It is the legislature, and not the board of supervisors, which is charged with the duty of fixing the compensation due to the county officers, and *Miller v. Dunn*, 72 Cal. 462, 14 Pac. Rep. 27, is not in point. The other points raised by appellant, *viz.* that the subject-matter of this section is not expressed in the title of the county government act as required by section 24, art. 4, of the constitution, and that the act is not uniform in its operation, because the supervisors of certain counties are given powers not given to others, do not require notice.

Judgment affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; DE HAVEN, J.; FITZGERALD, J.; HARRISON, J.

67 Cal. 670

ESHLEMAN v. HENRIETTA VINEYARD CO. et al. (No. 18,096.)

(Supreme Court of California. March 24, 1893.)

SPECIFIC PERFORMANCE — TERMINATION OF CONTRACT — TENDER OF PERFORMANCE BY VENDOR.

In a suit for specific performance, it appeared that plaintiff agreed to purchase the land within a reasonable time after defendant perfected its title thereto; that, after the title was perfected, defendant tendered a conveyance, but plaintiff declined to accept, for reasons given, which did not relate to the title; that defendant afterwards conveyed the land to another party. *Held*, that plaintiff could not recover, as his refusal to accept the conveyance when tendered terminated the contract.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by I. S. Eshleman against the Henrietta Vineyard Company and others for the specific performance of a land contract. Defendants had judgment, from which, and an order denying a new trial, plaintiff appeals. Affirmed.

Edward Lynch, for appellant. W. D. Tupper, for respondents.

SEARLS, C. Appeal from a final judgment in favor of defendants, and from an order denying a motion for a new trial. The action was brought to enforce the specific performance of a contract for the conveyance of land based upon the following agreement: "This agreement, made the twenty-first day of January, 1886, between the Henrietta Vineyard Company, a corporation, party of the first part, and I. S. Eshleman, of the county of Alameda, state of California, party of the second part, witnesseth: Whereas, the party of the second part has this day purchased certain lands of the party of the first part, situate in section 16, township 14 south, range 21 east, amounting to about one hundred acres; and, whereas, part of said section 16, to wit, the southeast quarter of the northwest quarter of said section, is in dispute; that is to say, the party of the first part insists that he owns said quarter of said quarter section, and the party of the second part is in doubt: Now, therefore, it is agreed and understood that if the party of the first part is the owner of said quarter of said quarter section, and the same can be demonstrated by the records of the county of Fresno, state of California, then the said party of the second part hereby covenants, promises, and agrees to and with the party of the first part that he, the said party of the second part, will purchase said quarter of said quarter section, and the party of the first part covenants and agrees that he will sell and convey, by good and sufficient deed, to said party of the second part, the said southeast quarter of said northwest quarter of section 16, comprising about forty acres of land, at and for the price of \$41.66% per acre, and that he will accept said conveyance when tendered to him within a reasonable time after it shall be ascertained that the party of the first part is the owner of said quarter of said quarter section of land. In witness whereof, we have hereunto set our hands and seal this 21st day of January, 1886. Henrietta Vineyard Co. G. H. Malter, Pres. I. S. Eshleman. Witness: Minnie D. Eshleman." The theory of the complaint is that at the date of the foregoing agreement the corporation defendant claimed to own the land agreed to be conveyed, but that at that time, and for a long time subsequent thereto, several other persons also claimed, or appeared of record to claim, interests, estates, and liens in and to and upon said land, adversely to the corporation; that on the 28th day of October, 1887, the corporation could have conveyed the land free and clear of incumbrance, and offered to do so; that on or about November 5, 1887, plaintiff accepted the offer of a conveyance, tendered the price agreed to be paid, and demanded a deed; that on the 25th day of January, 1888, the corporation defendant refused, and has since refused, to convey the land. The further allegations of the complaint are mainly ancillary to this general statement. The answer negatives many of the allegations of the complaint, and avers, in

substance, that as early as February, 1886, it was able and willing to convey the land, by good title, free from incumbrance, and thenceforth, and up to November 5, 1887, repeatedly offered to convey, but that the plaintiff refused to accept a conveyance and pay for the land. The defendant corporation admits an allegation of the complaint, that on the 14th of November, 1887, it conveyed the land to one Karl Sheffler, but denies that it was so conveyed to defeat plaintiff's claim. The agreement and evidence, taken together, show that the corporation defendant had previously sold to plaintiff and his daughter a very considerable tract of land, in which the 40-acre tract involved in this action was included, but which was not conveyed by reason of the title being in doubt. Thereupon the agreement in this case was made. In selling another tract of land by the corporation defendant to one E. R. Holton, a mistake had been made in the deed, and this 40 acres described, instead of the land actually sold, and a mortgage had been given back by Holton, containing the same mistaken description. This mistake was remedied on the 13th of February, 1886, by a reconveyance of the land in question here; and on the same day satisfaction of the mortgage by the corporation defendant, by its president, was acknowledged on the margin of the record of said mortgage. A regular release of the same mortgage, dated April 28, 1887, was recorded January 11, 1888.

2. The land in question had also been sold for taxes levied upon an assessment against George H. Malter, individually, (but who was president of the corporation defendant,) for the fiscal year 1884 and 1885, and the tax certificate at the date of the agreement was held by one Henry Horstman. There was evidence tending to show that this tax matter, which related as well to other lands sold to plaintiff, was adjusted about the time of the execution of the agreement of January 21, 1886, but in what precise manner is not clear. On September 26, 1883, the sheriff of Fresno county levied a writ of attachment on the land in question in an action in which the Llewellyn Steam Condenser Manufacturing Company was plaintiff, and George H. Malter et al., copartners under the name of Malter, Lind & Co., were defendants, which attachment was not released until November 22, 1888. The cause was tried by the court without the intervention of a jury. The findings were in favor of the defendants.

It is objected that the evidence is insufficient to support the third finding of the court, which is in the following language: "That on the 21st day of January, 1886, said corporation was the owner of the land described in said agreement." If by this finding the court meant to say that on that day the corporation was vested with the legal title, it is not technically correct. The title on that day, and until February 13, 1886, stood in Holton, under the deed to him, in which, by mistake, the tract of land in question was described, instead of that which had actually been sold to him. On the last-named day it was conveyed by Holton to the corpora-

tion, as hereinbefore stated, and at the same time the Bolton mortgage was satisfied on the margin of the record. There was also evidence tending to show that the Horstman tax lien, which covered other land purchased by plaintiff from the corporation defendant, was cleared up, and the tax certificate assigned to plaintiff, or a deed given to him by Horstman, at or about the date of the execution of the agreement. The levy of the attachment against Malter, Lind & Co. upon this land, the title to which was in the corporation, created no cloud upon the title. The levy of an attachment against A. upon the land of B. gives no lien thereon, and creates no cloud upon the title of B. *Pixley v. Huggins*, 15 Cal. 135. When a deed from the corporation defendant was tendered to the plaintiff by the witness McPike, it appears that he made no objections on the score of title, but declined to accept the deed upon the ground that the land was "hogwallow land, and that he would not take it. Had made up his mind that he had land enough down there," etc. Similar expressions are shown to have been used when, at a later period, the witness Ashdown tendered the deed to plaintiff. Indeed, it is apparent from plaintiff's own testimony that he did not, at the date of the contract, want the land in question, and only agreed to take it on a compromise, and to have peace. As the title to the land was perfected before a tender of the deed was made, it is not regarded as important that it was at a date later than that mentioned in the finding. The right to have the title when he received the deed was the substance of what he could claim. We may, however, admit that the earlier efforts of the corporation defendant to convey the property to plaintiff were futile, by reason of defects in the title which would have prevented a complete title vesting in the latter. It is admitted in the complaint that on the 28th day of October, 1887, the corporation defendant was the owner of the land, and was able and could have freed it from all adverse claims, and could have conveyed it free from incumbrance, and that at said date it notified plaintiff that it was ready and willing to do so, etc. The complaint then proceeds to aver that within a reasonable time thereafter, to wit, on or about November 5, 1887, plaintiff offered to perform, and demanded a deed, etc. The finding of the court negatives the offer of performance on the part of plaintiff, and is supported by evidence. This seems conclusive of the whole case. In this view, the sufficiency of the evidence to support the finding that plaintiff's cause of action was barred by the statute of limitations need not be discussed. A finding upon the offer of plaintiff made January 25, 1888, to take the land, and pay for it, was immaterial. Having been requested to do so in October, 1887, and having neglected so to do, the defendant had a right to consider the contract terminated. That it did so consider is evidenced by its conveyance of the land to another on the 14th day of November, 1887, for the purpose of raising money thereon.

The rulings of the court on the admission and rejection of evidence are not of sufficient importance to vary the result, and, as the judgment and order must be affirmed, what might be said as to the rulings is not important. It is only where a new trial is granted that the views of this court upon questions of law, of no general interest to the profession, become important, as serving to guide the lower court in a retrial of the cause. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(37 Cal. 568)

DOUGHERTY et al. v. MILES et al. (No. 19,029.)

(Supreme Court of California. March 18, 1893.)

ADVERSE POSSESSION.

In an action to quiet title, it appeared that J. died, seized of the land in dispute, in 1857, and his administrator conveyed the land to R., under whom defendants held, though neither R. nor defendants ever occupied the land. Plaintiffs were administrators of a brother of the original owner, who took possession of the land in 1860, and for nearly 20 years before the suit claimed the whole tract, paid the taxes, and occupied a part of the tract, on which he lived, without interference by defendants or their ancestor. *Held*, that plaintiffs had acquired a title to the whole tract by prescription.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Dougherty and another, administrators of Edward Hayes, deceased, against Mary C. Miles and others, to quiet title to a certain tract of land. There was judgment for plaintiffs, and defendants appeal. Affirmed.

Works, Gibson & Titus and S. W. & E. B. Holladay, for appellants. McNealy, Trippett & Neale, for respondents.

McFARLAND, J. This is an action to quiet title to a certain tract of land, described in the complaint by metes and bounds, and generally called the "Hayes Ranch." Judgment went for plaintiffs, and defendants appeal from the judgment, and from an order denying a new trial. The action was commenced by Edward Hayes, who died during its pendency, and it was prosecuted to judgment by his administrators. Both parties claim through John Hayes, who died intestate, and seised of the land in contest, on May 20, 1857. His next of kin and only heirs were two brothers,—Edward, who commenced this action, and Robert Hayes; and Edward acquired the title and interest of Robert in the estate. At the time of the death of John, the two surviving brothers, Edward and Robert, lived in New Brunswick. A few days after the death of said John Hayes, one Gitchell was appointed special administrator of his estate, and

sold the personal property for \$696.41. Afterwards he applied for letters of general administration; and on August 3, 1857, the probate court made an order that such letters issue to him upon his giving a bond in a certain named sum. There is no evidence that he ever gave any bond, or that said general letters were ever issued to him. Neither is there any evidence that he ever made application to sell the real property of the estate, other than the recital of the court hereinafter mentioned. No bond or letters of administration or application to sell said property were among the papers on file, nor was there any evidence that either of them was ever in existence. But on November 23, 1857, the court made an order that the said real property be sold, and the order recited that there had been due publication of an application for such sale, and declared that the sale of the real property of the estate was necessary. Gitchell returned that, pursuant to said order, he had sold the Hayes ranch to George R. Ringgold for \$975. On December 28, 1857, the court approved the sale to Ringgold. On August 27, 1858, Gitchell made a deed of the Hayes ranch to Lucius B. Northrop, which recited that Northrop was the bidder at the sale. Afterwards, on January 14, 1859, Northrop made a conveyance of said ranch to said George R. Ringgold. Defendants and appellants claim title through the above proceedings as heirs and representatives of said Ringgold, who died before the commencement of this action. Neither Ringgold nor either of the defendants, nor any grantee or representative of Ringgold, was ever in possession of any part of the land. About 1860 Edward Hayes came to California to look after the estate. He found that Gitchell had sold, or attempted to sell, all the property; and, upon demand for settlement, Gitchell paid him \$173, and no more. Edward then sued him, averring that he was administrator, (whether special or general, not stated,) and that he had fraudulently, and without authority of law, sold all the property, real and personal, and appropriated the proceeds to his own use. Gitchell answered, denying that he was general administrator, and also denying some of the other averments. Judgment was rendered against Gitchell for something over \$3,000; and, the court having found fraud, he was imprisoned, but was released because Edward did not advance the cost of imprisonment. No part of the judgment was paid.

We have briefly recited the foregoing facts because they seem to be necessary to an understanding of the case; but we do not deem it necessary to determine the many questions discussed by counsel as to the validity of the probate sale,—whether Edward was estopped by his judgment against Gitchell; what should be presumed from the recitals of the order of sale, and from the lapse of a long period of time; whether the sale authorized a deed to Northrop; the effect of the discharge of Gitchell from imprisonment, etc. Waiving all of these questions, we will assume, for the purposes of this decision, that the

sale could not be attacked after three years from its date, under section 190 of the probate act. Wood, Dig. p. 410; Harlan v. Peck, 33 Cal. 515; Reed v. Ring, 93 Cal. 108, 28 Pac. Rep. 851. But we think it clear that, as found by the court, Edward Hayes, at the time of the commencement of the action, had acquired a title to the land in contest by prescription. As before stated, the alleged probate sale was made in 1857; and neither Ringgold nor any of his successors ever took possession of any part of the land in contest, although 30 years elapsed before the commencement of this action, and although Edward Hayes, for nearly 20 years of the time, was in the actual possession of part of the land, and claiming the whole. The land being unoccupied, Edward entered upon it in 1870, and inclosed and cultivated about five acres, and built a small house, and lived in it, claiming the whole tract. In 1872 he filed a petition for letters of administration of the estate of John Hayes, in which he stated that Gitchell had died, leaving the estate finally unadministered. He was regularly appointed general administrator, and duly qualified as such; and such proceedings were regularly had that in 1876 the administration was closed, and there was a final decree of distribution distributing the land to said Edward. After 1876, for some years, he did not live personally on the land, but was represented by others. Afterwards he made it his permanent home, and in 1886 or 1887 he built a new house on the land, costing about \$4,000, and lived in it until his death. He always claimed the whole tract, which was well known as the "Hayes Ranch" or "Farm," and paid all taxes on it from at least 1872; and no protest was made by any representative of Ringgold. There was no interference with Edward's possession, nor any attempt by any other person to take possession of any part of the ranch. Upon the foregoing facts, we think that the adverse possession of Edward Hayes extended to the boundaries of the Hayes ranch, as held by his ancestor John Hayes, and described in the decree of distribution.

There is one alleged error in ruling to be noticed. The complaint, after describing the land in contest by metes and bounds, has these words: "As per map made by Chas. H. Poole, July 5, 1853, and on file in the office of the trustees." Appellants offered this map in evidence, and respondents objected to it, so far as it was offered for the purpose of identifying the land sold by Gitchell as administrator, and of adding to or aiding in the description of the land sought to be described in the order of sale under which Gitchell acted. The objection was sustained, but the map was "admitted for all other purposes." This ruling is entirely immaterial, for there was no real question about the identity of the ranch sold under the probate order. We assume that it was the tract of land described in the complaint, and which had been distributed to Edward Hayes. It was a piece of land well known since before the death of John Hayes as the "Hayes Ranch." There was also an ex-

ception to a ruling about the testimony of the witness Dougherty, to which the foregoing remarks apply. We see no reason for disturbing the judgment. Judgment and order affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

97 Cal. 572

SHIPMAN v. FORBES et al. (No. 15,094.)

(Supreme Court of California. March 21, 1893.)

STREET ASSESSMENTS—WARRANT—DATE.

1. St. 1872, p. 813, § 10, which requires a date to be affixed to the warrant issued by the superintendent of streets of the county of San Francisco authorizing the collection of street assessments by the contractor doing the work, is not complied with by simply affixing the year; and a warrant so insufficiently dated cannot serve as the foundation of legal proceedings for the collection of the assessment, since section 11 requires the contractor to return the warrants to the superintendent "within 10 days after its date" to preserve the lien of the assessment, and section 13 prohibits an action from being brought on the assessment until "after the period of 15 days from the day of the date of the warrant."

2. The fact that the county auditor, on countersigning the warrant, affixed a date to his signature, does not cure the omission of the date from the warrant, since the auditor's function is limited merely to approval, and whatever is essential to the issuance and validity of the assessment must be done before it reaches him.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Shipman against Forbes and others to foreclose the lien of a street assessment. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

J. M. Wood, for appellant. Cope, Boyd, Fifield & Hoburg and Stanly, Stoney & Hayes, for respondents.

HARRISON, J. Action to foreclose a street assessment in San Francisco. The plaintiff offered in evidence the original assessment, diagram, warrant, and affidavit of demand and nonpayment, to which defendants objected upon the ground that the warrant was not dated. The warrant is in the following form: "By virtue hereof, I, C. S. Ruggles, superintendent of public streets, highways, and squares of the city and county of San Francisco and state of California, by virtue of the authority vested in me as said superintendent of public streets, highways, and squares, do authorize and empower Jas. S. Dyer, his agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be his warrant for the same. San Francisco, 1885. C. S. Ruggles, Superintendent of Public Streets, Highways, and Squares. Countersigned by Fleet F. Strother, Auditor of the City and County of San Francisco, September 7, 1888." The court excluded the evidence,

and rendered judgment for the defendants, and this ruling is now assigned as error.

Section 10 of the act of 1872, (St. 1872, p. 813,) under which the proceedings were had, directs the superintendent of public streets, highways, and squares to attach to the assessment a warrant, which shall be signed by him and countersigned by the auditor, and prescribes the form of the warrant. In this form, after giving the body of the warrant, its date and authentication are prescribed as follows: "San Francisco, (date,) eighteen hundred and _____. (Name of Superintendent,) Superintendent of Public Streets, Highways and Squares. Countersigned by (Name of Auditor,) Auditor of the City and County of San Francisco." The warrant issued in the present case follows the prescribed form, except in the matter of its date. The words "San Francisco, 1885," cannot be considered as a compliance with the statutory requirement that the warrant be dated. Other portions of the statute show that the "date" which the warrant is to contain includes the month and the day of the month as well as the year. Section 11 requires the contractor to return the warrant to the superintendent of streets "within ten days after its date," in order to preserve the lien of the assessment; and by section 13 an action upon the assessment cannot be brought until "after the period of fifteen days from the day of the date of the warrant." The form prescribed by the statute makes the date as much a part of the warrant as it does the signature of the officer, and in matters of this character, in which the property of a citizen is to be taken in invitum, it cannot be said that any requirement of the statute is to be disregarded. Every requisite having the semblance of benefit to the owner must be complied with, and, where the form of a statutory proceeding is prescribed, its observance becomes essential to the validity of the proceedings. *Smith v. Davis*, 30 Cal. 537; *Taylor v. Donner*, 31 Cal. 483; *Hewes v. Reis*, 40 Cal. 263; *Grimm v. O'Connell*, 54 Cal. 522. It is conceded on the part of the appellant that these words did not amount to the dating of the warrant, but it is contended by him that when the auditor countersigned the warrant over the date of September 7, 1888, the warrant itself took that date, and therefore was dated. The function of the auditor, however, being merely that of approval, and limited to countersigning the warrant, is not called into exercise until after the warrant has been completed. Whatever is essential to the issuance and validity of the warrant must be done before it reaches the auditor, and no act of his can supply any defect or cure any irregularity in the prior proceedings. The position of the date, September 7, 1888, after the countersigning by the auditor, shows that it was a part of his act, and not a part of the warrant itself.

The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATTERSON, J.

97 Cal. 604

WHITE v. WHITE. (No. 15,043.)

(Supreme Court of California. March 24, 1893.)

DIVORCE—PAYMENT OF COSTS—ORDER AUTHORIZING MORTGAGE.

A decree of divorce having been rendered in favor of the wife, a referee was appointed to take testimony, and report on the character and value of the husband's property, preliminary to final judgment; the decree requiring the latter to pay referee's costs and expenses. The referee having petitioned for an order directing the husband to pay a certain sum into court to be used for payment of such costs and expenses, the wife objected to the court granting the husband permission to mortgage his property to secure money to comply with such order. The evidence was conflicting as to whether he could procure the money from any other source, and the court granted an order authorizing such mortgage, and set aside the injunction and lis pendens in the case to that extent, and for that purpose, alone. *Held*, that the order was properly issued.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by George E. White against Frankie White. From an order authorizing plaintiff to mortgage his property to obtain funds for the payment of referee's costs, defendant appeals. Affirmed.

Henry E. Highton, H. C. McPike, and J. A. Cooper, for appellant. Barclay Henley and E. D. Wheeler, (Henley, MacSherry & Herrmann, of counsel,) for respondent.

GAROUTTE, J. In this action a decree of divorce was rendered in favor of appellant, and H. T. Cresswell was appointed a referee by the court to take testimony, and report thereon as to the character, condition, and value of the property of respondent, preliminary to a rendition of final judgment. The decree required that the costs and expenses of the referee should be paid by respondent. The referee filed a petition asking the court to make an order directing respondent to forthwith pay into court the sum of \$2,500, to be used in the payment of the costs and expenses of such reference. The appellant in this proceeding appeared at the hearing of the said petition, joined with the referee in asking for the order, but objected to the court granting respondent permission to mortgage his property for the purpose of securing the money wherewith to comply with the order; and the consideration of appellant's objection was the matter of contest before the court. If we understand appellant's affidavits, it was contended by her that respondent was able to procure the money from other sources, but the affidavits and oral evidence placed before the court at the hearing are sharply conflicting upon this issue, and therefore we will not discuss the evidence. The court made an order that respondent be allowed to mortgage his realty for the purpose of securing the money upon terms to be approved by the court, and set aside the injunction and lis pendens in the case to that extent, and for that purpose alone. The order of the court meets with our entire approval. No final decree in the action could be entered until the referee made his report. The

referee could not make his report until the money was forthcoming to enable him to do his work. The money could not be advanced unless a mortgage was given to obtain it. Hence the further progress of the trial was completely blocked unless the court made the order here contested. We see no reason why the court did not possess the power to make the order, and, if it did not possess such power, we see no reason why appellant should complain of that fact. Let the order be affirmed.

We concur: **HARRISON, J.; DE HAVEN, J.**

97 Cal. 610

EX-MISSION LAND & WATER CO. v.**FLASH et al. (No. 14,731.)**

(Supreme Court of California. March 24, 1893.)

FORECLOSURE—JUDGMENT—ACTION TO SET ASIDE—FRAUDULENT ORGANIZATION OF CORPORATION—LACHES.

1. Defendants, having a contract for land at \$5 an acre, employed agents to organize a corporation to purchase it at \$25. It was represented to the subscribers for stock in such corporation that the contract held by defendants was for the purchase of the land at \$25 an acre, the lowest price at which it could be obtained; and it was concealed from them that one of defendants, a large subscriber to the corporation, was interested in the contract, and that the organizers were defendants' agents. The corporation gave a mortgage for part of the price, which was foreclosed, defendants buying in the land and obtaining a deficiency judgment. *Held*, in an action to set aside the foreclosure decree and the judgment, and to cancel the notes and mortgage, that the corporation was the proper plaintiff, rather than the individual subscribers to stock.

2. In such case, as adequate relief necessarily embraced the cancellation of the notes and mortgage, the remedy by motion to set aside the foreclosure and for leave to answer was not exclusive.

3. The decree of foreclosure was rendered April 5th, the stockholders first obtained notice of the fraud June 5th, and the action was begun in December. *Held* that, as defendants were in control of the corporation till the last of September, and the delay in beginning the action had not prejudiced defendants, plaintiff's right of action was not barred.

4. Code Civil Proc. § 473, limiting the time within which one can obtain relief from a judgment or order taken against him through his mistake, inadvertence, surprise, or neglect, has no application to such a case.

5. The fact that defendants purchased the land before they put themselves in a position of trust towards the corporation by its organization did not prevent it from recovering the secret profits made by them.

6. The fact that rescission of the sale and restoration of the land to defendants was a practicable mode of relief does not exclude the relief actually sought.

7. That the decree asked for by plaintiff was more disadvantageous to defendants than to the actual organizers of the corporation, who had received cash commissions for their services, does not affect plaintiff's right to such relief.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Ex-Mission Land & Water Company against H. L. Flash and A. D. Childress to set aside a decree of foreclo-

sure and a judgment, and to cancel notes and a mortgage on which the decree was based. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Gibbon & Creighton, A. W. Hutton, and Welborn, Parker & Stevens, for appellants. Conklin & Hughes, Hunsaker, Britt & Goodrich, J. G. Garrison, and Chapman & Hendrick, for respondent.

VANCLIEF, C. The defendants, having foreclosed a mortgage on the land of the plaintiff, purchased the land at the foreclosure sale for a sum less than the amount due on the mortgage, and caused a judgment to be docketed against the plaintiff for the deficiency. The plaintiff brought this action to set aside and annul the decree of foreclosure and the judgment for the deficiency, and also to cancel the notes and mortgage on which the decree was founded, on the alleged ground of fraud in procuring the notes and mortgage. The judgment of the court below was in favor of the plaintiff, granting all the relief prayed for. Defendants appeal from the judgment and from an order denying their motion for a new trial.

The facts, as found by the court, relevant to the questions presented, are substantially as follows:

In March, 1887, the administrator of the estate of Augustine Olvera offered for sale at public auction a tract of land situated in the county of San Diego, containing 4,500 acres, pursuant to order of the superior court of the county of Los Angeles, in which said estate was then being administered. One Charles H. Forbes requested the defendants to join him in the purchase of the land, and to furnish the money to make a payment of 10 per cent. of the purchase money required to be paid at the time of the bid, which they did. On March 19, 1887, Forbes bid in the land at the price of \$5.05 per acre, and paid 10 per cent. of the purchase money, furnished by defendants, amounting to \$2,272.50, it being understood that Forbes, Flash, and Childress should be equally interested in the purchase. On April 15, 1887, the sale was confirmed by the court as a sale to Forbes alone. A copy of the order of confirmation was delivered to Forbes on April 15, but was not recorded in San Diego county until June 6, 1887. In the latter part of April, 1887, the defendants and Forbes employed H. T. D. Wilson and N. D. Coleman to sell the land, and for that purpose to organize a corporation to make the purchase from the estate of Olvera, at the price of \$25 per acre, amounting to \$112,500, for which, in case of such sale, Wilson and Coleman were to be paid a commission of \$5 per acre, amounting to \$22,500.

On May 8, 1887, a written agreement was signed between Forbes, Flash, and Childress of the first part, and Wilson of the second part, witnessing "that the said parties of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, agree to sell and convey unto the said party of the second

part, and said second party agree to buy, all that certain lot or parcel of land, situated in the county of San Diego and state of California, and bounded and particularly described as follows, to wit: "All that portion of that certain rancho situated in the county of San Diego, state of California, known as the "Rancho Ex-Mission of San Diego," described as follows, * * * containing about 4,500 acres, for the sum of one hundred and twelve thousand, five hundred dollars, gold coin of the United States; and the said party of the second part, in consideration of the premises, agrees to pay said sum to the said parties of the first part, the said sum of \$112,500 to be paid as follows, to wit, \$10,000 on or before May 20, 1887, \$27,500 within sixty days, \$20,000 within six months, \$20,000 within twelve months, \$20,000 within eighteen months, \$15,000 within twenty-four months. Deferred payments to be secured by mortgage on said land, and to bear eight per cent. interest per annum from date. The parties of the first part agree to release land under above agreement at the rate of fifty dollars per acre outside of town sites, and at rate of one hundred and fifty dollars per acre in town sites. And the said party of the second part agrees to pay all state and county taxes or assessments of whatsoever nature, which are or may become due on the premises above described. It is further agreed that time is of the essence of this contract, and in the event of a failure to comply with the terms hereof by the said party of the second part the said parties of the first part shall be released from all obligations in law or in equity to convey said property, and said party of the second part shall forfeit all right thereto, and to moneys heretofore paid under this contract, and their interest in or to said moneys or said property shall thereupon immediately cease, as fully as if said moneys had never been paid or this agreement entered into. And the said parties of the first part, on receiving such payment, at the time and in the manner above mentioned, agree to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed of grant, bargain, and sale. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties. In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written. Chas. H. Forbes, H. L. Flash, A. D. Childress, Harvey T. D. Wilson, per N. D. Coleman." This agreement was prepared by Childress, and signed by Coleman for Wilson during Wilson's absence; and the court finds that it was a sham, and not intended to be binding upon either party.

On May 20, 1887, the following agreement, called the "Subscription Contract," (plaintiff's Exhibit A,) was drawn, and subscribed by all the parties thereto at or within a few days after its date: "Los Angeles, California, May 20, 1887. We, the undersigned, hereby agree to pay for the proportion of property hereinafter de-

scribed as is set opposite our signatures, according to the terms stipulated in this writing. We agree to buy forty-five hundred acres of land in San Diego county, lying north of the city of San Diego about six miles, to wit: 'All that portion of that certain rancho situate in the county of San Diego, state of California, known as the "Rancho Ex-Mission of San Diego," described as follows, to wit, * * * "containing about forty-five hundred acres. For the foregoing land the sum of one hundred and twelve thousand five hundred dollars in legal money of the United States is to be paid on the following terms, —the same being twenty-five dollars per acre: Ten thousand dollars down, to bind the trade; twenty-seven thousand five hundred dollars within sixty days, without interest; thirty-seven thousand five hundred dollars in one year; and the balance, thirty-seven thousand five hundred dollars, in two years, from date of purchase. Deferred payments to be secured by mortgage on said land, and to bear eight per cent. (8%) interest per annum, from date. The parties buying being guaranteed a release on any part they may sell, upon their paying for the part so released at the rate of fifty dollars per acre, outside of town sites, and at the rate of one hundred and fifty dollars per acre in town sites. It is further agreed that parties selling shall furnish satisfactory abstracts fifteen days prior to the second payment, (\$27,500.00,) and that the ten thousand dollars, first payment, shall remain in the Childress Safe-Deposit Bank of Los Angeles, Cal., in trust, until said abstract or title papers are presented. C. E. Mackey, one tenth; J. H. Outhwaite, per N. D. Coleman, one tenth; A. D. Childress, two tenths; P. C. Baker, one tenth; J. W. Montgomery, one tenth; Harvey T. D. Wilson, one tenth; Nicholas D. Coleman, one tenth; Flower, Jones & Co., one tenth; R. A. Thomas, one twentieth." La Tourette, who took one twentieth, did not sign this contract, but authorized Coleman to take that share for him, and there is no question that he was a party to the contract.

On May 26, 1887, Forbes and the defendants executed to Wilson and Coleman the following instrument: "Los Angeles, Cal., May 26, 1887. Having entered into an agreement with H. T. D. Wilson and N. D. Coleman, of Los Angeles, California, for the sale of a certain tract of land, about forty-five hundred acres, lying in San Diego county, California, known as a part of lot seventy (70) of the Ex-Mission grant, for the sum of one hundred and twelve thousand five hundred dollars, on terms as shown by a bond or agreement held by them, which expires on May 21, 1887, we hereby set forth the terms of the commission we obligate ourselves to pay to said Coleman and said Wilson. We agree they shall receive the sum of twenty-two thousand five hundred dollars, as follows: Out of the first ten thousand dollars cash payment that shall be made in the purchase of said land said Coleman and Wilson shall receive three thousand dollars; out of the next payment of twenty-seven thousand five hundred dollars they shall

receive the sum of seven thousand dollars. The balance of said commission shall be paid, six thousand two hundred and fifty dollars in one year, and six thousand two hundred and fifty dollars in two years, from date of sale, with 8% interest per annum from date, by the surrender to said parties four notes of thirty-one hundred and twenty-five dollars each, signed by the company purchasing, two of said notes due in one year, and two of said notes to be due in two years, from date of purchase. This agreement, however, is subject to the consummation of sale as set forth in agreement of sale made this day. [Signed] Chas. H. Forbes. H. L. Flash. A. D. Childress."

On the 4th day of June, 1887, according to the verbal agreement and understanding of all the parties at the time the subscription agreement of May 20th was signed, the plaintiff corporation was organized with a capital stock of \$500,000, divided into 500 shares, 450 of which were subscribed for as follows: R. A. Thomas, 25; J. W. Montgomery, 50; C. E. Mackey, 50; J. H. Outhwaite, 50; P. C. Baker, 50; A. D. Childress, 100; N. D. Coleman, 50; H. T. D. Wilson, 50; and J. R. La Tourette, 25. Between the time of the execution of the subscription agreement (May 20th) and the 16th day of July, 1887, Thomas, La Tourette, Montgomery, Mackey, Outhwaite, Flower, Jones & Co., and Baker paid to the defendant Childress, as trustee, to be applied to the purchase of the land by the corporation, the sum of \$26,700, about one fifth part of which had been so paid before the organization of the corporation. Out of the money so paid to him by the persons last above named, Childress, on July 16, 1887, paid to the administrator of the estate of Olvera the balance of the purchase price of the land (\$20,452.50) and caused a deed for the land to be executed by the administrator to Forbes, in pursuance of the order confirming the sale. After making this payment there remained in his hands, of moneys paid him as aforesaid by the persons last above named, \$6,247.50. Deducting from this the 10 per cent. originally paid by defendants on Forbes' bid, there remained in Childress' hands \$3,975 after paying the whole purchase price of the land.

On July 19th, Flash and Childress entered into a written agreement, reciting their several relations to the transactions above stated, and agreeing, among other things, that Childress should act as trustee for Flash in all matters pertaining to the land transactions until all the purchase money should be paid by the corporation; and should also act as trustee for the corporation. On July 20th, Forbes conveyed the land to Childress, as trustee for the corporation, and on the same day the corporation made its promissory notes for the unpaid balance of the purchase money, (\$75,000,) payable in one and two years, to "A. D. Childress, trustee, or order," with interest at 8 per cent. per annum; and to secure these notes the corporation on the same day executed a mortgage on the land to "A. D. Childress, trustee." The notes were antedated to May 31st. It does not appear on the face of

the mortgage or notes for whom Childress was trustee, but the court found that he held the notes and mortgage for himself and Flash, Forbes having theretofore assigned all his interest to them. On January 28, 1889, on his own motion, Childress conveyed the legal title of the land to the corporation, and about the same time assigned the notes and mortgage to Flash, but to the extent of his interest in trust for himself. On February 18, 1889, Flash commenced the action to foreclose the mortgage; and on April 5, 1889, a decree of foreclosure was entered by default for the sum of \$88,875.61, including \$2,500 for attorneys' fees. On May 4, 1889, the mortgaged land was sold by the sheriff, under the decree of foreclosure, to Flash, for the sum of \$31,500, leaving a deficiency of \$58,126.14, for which a judgment was docketed in favor of Flash against the corporation. The sheriff executed a deed to Flash November 8, 1889.

The fraudulent acts by which the corporation was induced to purchase the land and to execute the notes and mortgage, as found by the court, are substantially as follows: That the defendants, by their agents, Wilson and Coleman, for the purpose of inducing Mackey, Montgomery, Thomas, La Tourette, and Flower, Jones & Co. to subscribe the agreement of May 20th, and to subscribe for stock in the corporation, represented to them that Forbes and Flash held a contract for the purchase of 4,500 acres of land from the estate of Olvera, deceased, at the price of \$25 per acre, which price was the lowest figures for which the land could be purchased. That those who would subscribe the agreement of May 20th would get in "on the ground floor at bed rock figures." That a corporation was to be immediately formed for the completion of the purchase under the said contract held by Forbes and Flash, and, upon the organization of the corporation, shares of the capital stock would be issued to the subscribers of the agreement in proportion to their subscription; and that all such representations were willfully false, except that Forbes and Flash held a contract for the purchase of the land. That defendants, by their said agents, fraudulently concealed from the subscribers last above named that the contract price of said land was only \$5.05 per acre, and also concealed the facts that Childress was interested with Forbes and Flash in said contract of purchase from the estate of Olvera, that Forbes and Flash were interested with Childress in his subscription to the agreement of May 20th, and that Wilson and Coleman were agents of defendants and Forbes to make the sale to the corporation, for which they were to be paid a commission. That, although the subscriber Outhwaite was informed by Coleman that Childress was interested with Forbes and Flash in the contract to purchase the land from the estate of Olvera at \$5.05 per acre, defendants, by their said agents, fraudulently concealed from him the facts that Wilson and Coleman were agents for the real sellers, and were to be paid said commission; and falsely represented to him that he was being admitted

to the company on an equal footing with all other members thereof. While no express misrepresentations were made to the subscriber Baker, defendants fraudulently concealed from him the facts that Childress was interested with Forbes and Flash, as a seller of the land to the corporation, and that Wilson and Coleman were agents of defendants, and as such were to be paid said commission. That each of the above-named subscribers, to wit, Mackey, Montgomery, Thomas, La Tourette, Flower, Jones & Co., Outhwaite, and Baker, believed all the false representations made to him, and none of them had any notice of the facts concealed as aforesaid, nor of the falsity of said representations, until long after the foreclosure sale; and that by reason of said false representations and concealment of facts each of them was induced to subscribe the agreement of May 20th, and to join in the organization of the corporation. That the directors of the corporation were five in number, and from the organization of the corporation until September 28, 1889, consisted of Childress, Wilson, Coleman, Thomas, and Mackey, and during all that period the corporation was under the control of Childress, Wilson, and Coleman, who, with notice of all the aforesaid fraudulent acts and concealments, willfully and fraudulently permitted said judgment of foreclosure to be taken by default. This action was commenced on December 17, 1889, one month and nine days after the execution of the sheriff's deed to Flash.

1. Counsel for appellants contend that the findings of fact show no cause of action in favor of plaintiff, for the reason that the frauds found were committed, not against the corporation, but only against the individual subscribers to the agreement of May 20, 1887, who, by virtue of that agreement, became the purchasers of the land, and subsequently conveyed it to the plaintiff, but did not assign to the plaintiff their rights of action for fraud in the sale of the land to them. I think counsel are mistaken in contending that the agreement of May 20th is a contract of purchase in any proper sense of the term. No party to it purports to be seller or agrees to sell. All are represented as agreeing with each other to purchase the land, but from whom they propose to purchase is not expressed or implied in the written agreement. The agreement as written imposes no obligation upon the owner of the land in favor of the subscribers, nor upon the subscribers in favor of such owner. From other evidence than the subscription agreement, however, the court found that it was never the intention of the subscribers, or any of them, to purchase the land, but merely to take stock in a corporation thereafter to be organized by the subscribers, which should purchase the land from the estate of Olvera, or complete a purchase thereof under the contract held by Forbes and Flash, such stock to be issued to them in proportion to their subscriptions, it being an expressed and well-understood condition of their subscriptions that such corporation should be organized to make the purchase. Childress, who represented Flash, demand-

ed this condition, as he would not personally sign the notes and mortgage for the deferred payments. Nor would Thomas subscribe without this condition. All the subscribers were informed by Wilson and Coleman, before they subscribed, that a corporation would immediately be organized to make the purchase of the land, and that they would receive shares of the capital stock for their subscriptions. Indeed, their subscriptions were intended to be, and were, substantially, subscriptions for stock of the corporation, though more formally repeated on June 4th, when the corporation came to be organized. At the time the corporation was organized, Childress, Flash, and Forbes were still the owners of the contract to purchase from the administrator of the estate of Olvera, made in the name of Forbes; and two days thereafter (June 5th) Forbes, who was not then known, except to defendants and their agents, to be interested in the transaction, recorded the order of the probate court confirming the administrator's sale to him. On July 16th the administrator's deed was executed to Forbes, for the use of Childress, Flash, and himself. On July 20th the purchase of the land by the corporation, ostensibly from Forbes, but really from Childress, Forbes, and Flash, was consummated by a conveyance from Forbes to Childress, trustee for the corporation, in consideration of \$37,500 in cash, and the notes of the corporation then made to Flash, as trustee for Forbes, Flash, and Childress, for \$75,000, secured by the mortgage of the corporation, as above stated. The \$37,000 cash paid was the money of the corporation, theretofore advanced by the subscribers, as aforesaid, through Childress, their trustee, in payment for their stock in the corporation. Such having been the real nature of the transactions, dressed in gauzy disguise, no doubt the corporation purchased immediately from the defendants and Forbes. That the defendants so understood it is further evinced by the agreement between them of July 19, 1887, and the letter of Childress to the corporation dated January 5, 1889.

The defendants, by their agents, Wilson and Coleman, and otherwise, were evidently promoters of the corporation to purchase their own property. A "promoter of a corporation" is defined by Mr. Morawitz (section 545) to be "a person who, by his active endeavors, assists in procuring the formation of a company and the subscription of its shares. * * * The word 'promoter' has no technical legal meaning, and applies to any person who takes an active part in inducing the formation of a company, whether he afterwards becomes connected with the company or not." The definition given in Cook, Stock, Stockh. & Corp. Law, (section 651,) is as follows: "A promoter is one who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which looks to the formation of a corporation. A promoter is considered in law as occupying a fiduciary relationship towards

the corporation." "The subscriptions of the shareholders are made upon the trust that the promoters are men of rectitude and business sagacity, who will use their knowledge and exercise their control over the enterprise for the benefit of the company. * * * Justice demands that the promoters of a company should not abuse the confidence placed in them by the subscribers for shares, or derive any unjust advantage through their control over the organization or management of the company." Mor. Corp. § 545. Again, at section 546, the same author says: "Accordingly it has been held that, if persons start a company, and induce others to subscribe for shares for the purpose of selling property to the company when organized, they must faithfully disclose all facts relating to the property which would influence those who form the company in deciding upon the judiciousness of the purchase. If the promoters are guilty of any misrepresentation of facts or suppression of truth in relation to the character and value of the property, or their personal interest in the proposed sale, the company will be entitled to set aside the transaction, or recover compensation for any loss which it has suffered." The above quotations are well supported by authority, the principal and leading case being that of *Phosphate Co. v. Erlanger*, 5 Ch. Div. 73, affirmed by the house of lords in 1878, 3 App. Cas. 1218, a synopsis of which is given in Mor. Corp. at section 291. See, also, *In re British Seamless Paper Box Co.*, 17 Ch. Div. 471; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. Div. 394; *McElhenny's Appeal*, 61 Pa. St. 188; *Simons v. Vulcan O. & M. Co.*, Id. 202; *Getty v. Devlin*, 54 N. Y. 403; *Mining Co. v. Spooner*, 74 Wis. 307, 42 N. W. Rep. 259, 17 Amer. St. Rep. 149, with notes. It therefore appears that the corporation was the party directly injured by the fraud, and was the proper party to bring this action.

2. While admitting that Wilson and Coleman were promoters of the corporation, counsel for appellants contend that the finding that they were authorized by the defendants to promote the corporation is not justified by the evidence. That Wilson and Coleman were the authorized agents of defendants and Forbes to sell the land, and were to be paid a large commission for their services, there is no doubt. The agreement of May 26th as to the amount and manner of payment of their commission would be nonsense on any other supposition. A large portion of the commission (\$12,500) was to be paid in notes of "the company purchasing," which notes were understood to be the notes of an incorporated company, and not the notes of the persons who subscribed the agreement of May 20th; since Childress, who subscribed that agreement for himself and Flash, had made it a condition of his subscription that he was not individually to sign notes for the deferred payments of the purchase money; but that a corporation should be formed to purchase the land and to make the notes for the purchase money. The reason he assigned for this was that, being a banker, his credit might be injured by signing such

notes individually. The evidence certainly tends to prove that the promotion of the corporation was an essential part of the scheme designed by and for the benefit of all the conspirators, including the defendants, and that Wilson and Coleman were authorized to execute the scheme. Childress, for himself and Flash, subscribed for one fifth of the capital stock of the contemplated corporation two weeks in advance of its organization. If the authority of Wilson and Coleman to sell to the particular corporation to be promoted by them for the benefit of defendants did not imply authority from the defendants to promote the corporation, it had sufficient tendency, in connection with other evidence, to prove it, to justify the finding of such authority by the court. Under this head counsel also contend that the agreement of May 8, 1887, was a contract of sale of the land from Forbes, Flash, and Childress to Wilson, but the finding of the court that it was not is fully justified by the evidence. Coleman testified that when it was presented to him by Childress, in the absence of Wilson, he protested against signing it for Wilson, for the reason that he had no specific authority to do so; and that he would not have signed Wilson's name if he had not understood that it would not be enforced against Wilson. Wilson testified that he was dissatisfied with it, and withdrew it. Besides, it is inconsistent with the agreement of May 26, 1887, in regard to the commission to be paid to Wilson and Coleman. It was evidently prepared by Childress for the purpose of concealing his interest as a seller to the contemplated corporation. Again, counsel have made extracts from the findings and complaint in which the subscribers of the agreement of May 20, 1887, are carelessly designated as "purchasers;" but, read in connection with their context, these expressions cannot be understood to mean that the subscribers of the agreement of May 20th purchased the land, except in the sense that their purchase of capital stock of the corporation gave them an interest in the land purchased by the corporation.

Appellants have specified more than 20 particulars in which they claim that the findings are not justified by the evidence, none of which are material, except such as relate to the agency of Wilson and Coleman, and to the contract of May 8, 1887, which have been answered. If the evidence justifies the finding that in promoting the corporation Wilson and Coleman represented the defendants as well as themselves, and the finding that the alleged agreement of May 8th was a sham, then the finding of all other facts herein stated are fully justified.

3. There is nothing worthy of special consideration in the points to the effect that the court erred in admitting evidence objected to by defendants' counsel, except to say that Wilson and Coleman, having represented the defendants in promoting the corporation, what they said to induce subscriptions to the agreement of May 20th was competent evidence against their co-conspirators.

4. Appellants contend that the plaintiff

is barred by its own laches, especially in that it neglected to move the court in which the foreclosure was had to set aside the judgment of foreclosure within six months after its rendition, upon which motion, it is claimed, the plaintiff could have obtained all the relief to which it is entitled in this action. But I think this point is not maintainable, even on the facts as claimed by appellants, viz. that the defrauded stockholders had general notice of the fraud on June 5, 1889,—one month after the foreclosure sale,—and within the month of June consulted a lawyer as to their rights and remedies, and thence had more than four months within which to make their motion under section 473, Code Civil Proc., to set aside the judgment. While it may be true that they had notice on June 5th that they had been defrauded, and generally of the mode and means by which the fraud had been perpetrated, yet it does not appear that they were then sufficiently informed as to the particulars, nor as to the evidence by which the fraud might be proved in a court of justice. As yet few, if any, of them, knew how many of the stockholders had participated in the fraud, or where to apply for reliable information. Three of them resided in Los Angeles and three in San Diego, and it necessarily required considerable time to bring about unanimity and concert of action. It does not appear when they were first advised that the corporation was the proper party to sue, but it must have been after they were so advised that they determined to get control of the corporation at the next ensuing annual stockholders' meeting, to be held September 28, 1889, by electing a new board of directors. There was no reasonable prospect of their getting control of the corporation before the regular annual meeting by means of a called special meeting of the stockholders under section 310 of the Civil Code, since no director could have been ousted at such special meeting except by a vote of the stockholders owning two thirds of the capital stock, and the fraudulent stockholders held four tenths of the stock. In answer to this, counsel for appellants say Wilson would have voted with the innocent stockholders, but this is only an inference of counsel, drawn from the facts that Wilson consulted with plaintiff's counsel in the latter part of June, and testified on the trial to the facts constituting the fraud. It does not appear when Wilson first fully disclosed to the innocent stockholders the facts to which he testified on the trial; and, admitting that he did so in the latter part of June, 1889, it does not follow that the innocent stockholders could then have relied upon his voting with them to oust from the office of director his co-conspirators in the fraud. At the annual meeting of September 28, 1889, a new board of directors was elected, constituted of Thomas, Montgomery, Mackey, La Tourette, and Wilson,—the first four of whom were of the victimized stockholders; and on the same day the new board adopted a resolution authorizing and directing the commencement of this action, which was commenced two months and nineteen days thereafter. The new board of directors

was elected only seven days before the expiration of the six months, within which it is contended a motion to set aside the judgment of foreclosure must have been made under section 473 of Code Civil Proc.

But a more conclusive answer to appellants' contention as to the six-months limitation is that none of the grounds upon which a party may be relieved from a judgment under section 473, Code Civil Proc., appear to have existed in this case. The judgment was not taken against the corporation through its "mistake, inadvertence, surprise, or excusable neglect," but through the fraud of its directors, in aid of the original fraud by which the notes and mortgage were procured. Having notice of the original fraud constituting a meritorious defense to the foreclosure action, a majority of the directors—Childress, Wilson, and Coleman—purposely, willfully, and fraudulently permitted the judgment to be taken by default. There was no mistake, no inadvertence, no surprise, and no excusable neglect. Therefore, conceding as I do, that the judgment and default might have been set aside, and leave to answer obtained on motion, on the ground of fraud, independently of section 473 of Code Civil Proc., yet such motion was not subject to the six-months limitation prescribed by that section of the Code. Nor was the remedy by motion, on the ground of fraud, exclusive of the remedy by regular suit in equity, unless it was perfectly adequate. *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. Rep. 232. The only relief to which the corporation would have been entitled on such motion was the setting aside of the judgment and default with leave to answer, which would have been but one step, circuitously leading to the same equitable relief which has been directly obtained by this suit. The very next step must have been the commencement of a distinct suit in equity, which, though called a cross suit, commenced by a cross complaint, would have been in fact and substance the same as this suit; and I am unable to perceive why, on the score of equitable jurisdiction, such cross suit would have been less objectionable than this suit. Should it be claimed that the corporation might have obtained complete and adequate relief in the foreclosure suit by simple answer without a cross complaint, the answer is that adequate and complete relief embraced the cancellation of the notes and mortgage, and possibly more, which is affirmative equitable relief that could not have been obtained without a cross complaint in the foreclosure suit, or a separate suit in equity.

It only remains, under this head, to consider the effect of the delay of the commencement of this action independently of the six-months limitation prescribed by section 473, Code Civil Proc. Was such delay, under the circumstances of the case, sufficient to bar the remedy? The mere lapse of time less than the statutory period of limitation will not bar an action for equitable relief unless the delay, under the circumstances, has been such as to justify the presumption that the defendant may have been prejudiced thereby. The bar of an equitable remedy in such cases is not

imposed upon the plaintiff as a penalty for his negligence, but is intended merely to protect the defendant from such consequences of the delay as may be prejudicial to his rights. In the Case of the New Sombrero Phosphate Co., supra, it was contended that the remedy was barred by laches of the complainant, similar to such as claimed in this case, but the delay was held to be insufficient. Speaking to this point, Lord Penzance said: "The nearest approach to a definition of the equitable doctrine upon this head which is to be found amongst the cases cited is the statement made in the case of *Petroleum Co. v. Hurd*, L. R. 5 P. C. 221. Delay is there said to be 'material where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterwards asserted.' * * * It conduces, I think, to clearness and to the exclusion of a certain vagueness which is apt to hang about this doctrine of delay as a bar to relief to keep these two different aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case."

Nothing of the facts or circumstances of this case indicates acquiescence of the defrauded stockholders in the wrongs complained of or a waiver of their rights. Nor was the situation of the defendants or the condition of the property so changed during or in consequence of the delay as to cause the judgment rendered against them to be more onerous than it should have been if the action had been commenced in June instead of December, 1889. Nor can the presumption be indulged that evidence which would have been beneficial to defendants might have been lost in consequence of the delay, since all persons who participated in, or appear to have had any knowledge of, the transactions, were living and testified at the trial; and all documents claimed to be material for the defense were produced. Another important circumstance in this connection is that during the first six months after the rendition of the judgment the plaintiff corporation was under the control of the defendants and their associates in the fraud, and therefore, to say the least, it would seem unjust that they should be heard to complain of laches of the plaintiff during that period, or of delay on the part of the defrauded stockholders in ousting them from the position of trust which they had taken and held for the purposes of promoting the fraud and obstructing any remedy therefor. Considering all the facts and circumstances, I think it does not appear that the trial court erred in holding the suit not barred by laches of the plaintiff.

5. Counsel for appellants further contend "that the findings do not support the judgment, for the reason that Childress and Flash bought the land for themselves and on their own account before the cor-

poration was formed or any steps taken towards its formation." It is not claimed, however, that for this reason there was no fraud, nor that the corporation was not entitled to some species of relief, but only that "the remedy allowed by the court—'secret profits'—is inapplicable, because Childress and Flash, even conceding them to have been promoters of the corporation from the time the first steps were taken towards its formation, were not promoters at the time of the original purchase from the Olvera estate." Counsel say under this head: "The point is this: Conceding misrepresentations as to the price paid the Olvera estate, as well as concealment of Childress' ownership, and that these things were fraudulent and actionable, still, inasmuch as there was no agency when defendants and Forbes bought from the Olvera estate, the recovery of 'secret profits' was not authorized or appropriate relief." By this I understood counsel to mean that there was no confidential or fiduciary relation between the defendants and the corporation in respect to the contract of purchase from the estate at the time it was made. Conceding this, it is found by the court, and for the purpose of this point is admitted by counsel, that the defendants afterwards placed themselves in a fiduciary relation to the corporation by promoting it; and while in that relation, by means of the fraudulent representations and concealments found, induced the corporation to purchase their land, whereby they made "secret profits" exceeding \$75,000. Admitting, for the sake of argument, that the relief granted (the canceling of the notes and mortgage) was equivalent to a recovery of secret profits fraudulently made, in what respect is the relief inappropriate? Surely it does no injustice to defendants, since it appears that the amount recovered is nearly \$4,000 less than their cash profits, besides one fifth of the stock of the corporation, which they still retain, for which they paid nothing. Their co-conspirators, Wilson and Coleman, also retain one fifth of the stock which is a part of the fraudulent profits, while the defrauded stockholders have only three fifths of the stock for the \$37,500 paid by them. Assuming that the price for which the land sold at the foreclosure sale (\$31,500) was equal to its value, and that the corporation has no other property than the land, the innocent stockholders have lost \$18,600 by the transaction, while the defendants and their co-conspirators have gained \$12,600, notwithstanding the relief granted to the corporation. These results may be accounted for by the facts (1) that the relief granted to the corporation was not equivalent to a recovery of all the fraudulent profits; and (2) that the relief granted to the corporation necessarily operated in favor of all the stockholders equally. Yet it does not follow from these results that the corporation was not entitled to the relief granted; nor that it was not entitled to all the fraudulent profits. An objection to the recovery of secret fraudulent profits, similar to the objection under consideration, was answered in the case of *Getty v. Devlin*, 54 N. Y. 412. In

that case the subscribers to a paper agreed jointly, and for their mutual benefit, to purchase certain lands for a specified price. The court said: "No one of the subscribers could, after this, purchase the lands for a less price, and compel his associates to allow him more than he paid. His purchase would inure to the benefit of all the subscribers. That this is so is so thoroughly settled, both upon principle and authority, that it will not be disputed. * * * If this be so as to a purchase made after the subscriptions are written, why should not the same rule be applied to a purchase made before? The wrong and breach of faith is just as great, and every reason and authority showing that the rule should be applied in one case would show that it should be applied in the other. *Bentley v. Craven*, 18 Beav. 75, is an authority quite in point." I think this is a satisfactory answer to appellants' point, grounded on the fact that defendants purchased the land from the estate of Olvera before the date of the subscription agreement of May 20th.

It is suggested that just and appropriate relief could have been granted only by a rescission of the sale and restoration of the land to the defendants, as in the *Sombrero Case*, supra. Conceding that such rescission would have been a practicable mode of relief, I do not think it exclusive of any other appropriate mode by which a court of equity might have given appropriate relief, doing no injustice to the defendants. But it does not appear that such rescission and restoration of the parties to their original status were practicable, or desired by the defendants; nor does it appear that it would have been less onerous upon the defendants, as above shown. The land should not have been restored to defendants unless they were able to refund all the money which they and their associates in the fraud had wrongfully obtained from the corporation, and caused it to expend, with interest, which must have amounted to more than \$40,000. Were the defendants solvent independently of the land? If not, could \$40,000 have been realized from the land? These, and perhaps other, difficult questions must have been solved before it could have been determined whether rescission was the proper or even practicable mode of relief. Had the defendants requested that mode, and tendered payment of the requisite sum of money in the court below, they would be in a more favorable position to advocate this point here.

6. The point is made that the effect of the decree is more favorable to Wilson and Coleman than to defendants, since they retain both their stock in the corporation and their large commissions. In answer to this it is enough to say that it is a matter that does not concern the corporation. It concerns only the defendants and their co-conspirators in the fraud, and must be adjusted, if at all, among themselves. As before remarked, the relief granted to the corporation is equally favorable to all the stockholders. The grievances of individual stockholders, suffered from the wrongs of other stockholders, could not have been redressed in this

action. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

97 Cal. 606

MARION v. BOARD OF EDUCATION OF CITY OF OAKLAND et al. (No. 15,056.)

(Supreme Court of California. March 24, 1893.)

SCHOOL TEACHER — TERM OF EMPLOYMENT — DISMISSAL.

1. Pol. Code, § 1793, provides that school teachers, "when elected, shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct." *Held*, that where a teacher was elected in 1886 "for the ensuing year," and continued in her position for the two succeeding years without further act of the board, she was not elected for life, subject to removal only for cause, but could be dismissed at the end of the year. *Kennedy v. Board, etc.*, 22 Pac. Rep. 1042, 82 Cal. 483, distinguished.

2. If the board had no power to elect for a year, then the election was void, and the teacher was employed at the pleasure of the board, subject to be discharged, as any other employe, without a fixed term of employment.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Application by Eunice D. Marion for a writ of mandamus to compel the board of education of the city of Oakland and others to draw a warrant for the payment of certain salary alleged to be due her as a school teacher. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Chas. E. Snook, Geo. W. Reed, and E. Nusbaumer, for appellant. Wm. R. Davis and Jas. A. Johnson, for respondents.

GAROUTTE, J. This is an application for a writ of mandate to compel the respondents herein to approve and allow the demand of appellant, Eunice D. Marion, as a teacher of the school department of the city of Oakland, for salary from July 31, 1889, to and including the 28th day of February, 1890, for the sum of \$700, and to compel the defendants to draw a warrant for the payment of said claim. Petitioner was nonsuited in the trial court upon the grounds, among others, that she was employed or elected by respondents as a teacher for a certain definite time, and that period had expired prior to the time for which she now claims salary, and upon which claim she attempts to support this proceeding. The motion for a nonsuit was properly granted upon the ground stated. Petitioner was an applicant before the board of education for a position as teacher in the public schools of Oakland, and the records of the board of May 29, 1886, disclose the following: "The board then went into executive session for the election of teachers for the ensuing year," and thereupon certain teachers were declared elected, among others the petitioner. Under this order of the board she began teaching, and continued in the same position during the years 1887 and 1888. In 1889 the board elected another teacher to fill the position she had previously occupied, and this proceeding resulted. At the trial she introduced no evidence indicating her employment or election by the board as a teacher for the years 1887 and 1888 other than the action of the board already stated, but insisted that her election in the year 1886 was an

election for life, subject to removal for cause, as specified in section 1793 of the Political Code.¹ The case of *Kennedy v. Board, etc.*, 82 Cal. 483, 22 Pac. Rep. 1042, is the leading authority in this state bearing upon this question, and it is there decided that the election of a teacher for no specified period of time, under section 1793, is an election for life, subject to dismissal for any of the causes mentioned in said section. That case goes quite far enough, and the principle here insisted upon carries the doctrine away beyond anything there declared. In the *Kennedy Case* the election of the teacher was for no stated, definite time, and it was not held in that case that the board had no power to elect for a certain definite period. Under its general powers the board of education is authorized to enter into contracts with teachers, and fix their compensation and term of employment. If the board should employ a teacher for one year, it would be absurd to say that it could not dispense with the services of such teacher at the end of the year. In the present case, whatever doubt may surround other elements of the transaction between these parties, the time for which petitioner's services were secured was fixed and definite. The board so understood it, for its record so discloses the fact. She taught under that authorization of the board. She entered the schoolroom, performed her duties, and drew her salary under that resolution, for there was no other. And, even conceding that she labored under a resolution, not knowing some of its terms, and honestly supposing she held a life position, her mistake in this regard could avail her nothing in the present proceeding.

While the statute, as construed in the *Kennedy Case*, gives the teacher a life tenure when elected without specifying the term of service, we see no reason why a board of education has not the power to elect a teacher for a month or for a year. Conceding an election to presuppose an office, and that a teacher's position after an election is an office, the statute does not fix the term of such office; and while there might possibly be valid objections to fixing the tenure for a long period of time, there would seem to be no want of power in the board to fix the term for a period of time of as short duration as it might see fit. Under the *Kennedy Case* the board of education of Oakland had the power to elect petitioner for life, but its power was not exercised to that extent, and her election by explicit terms was confined to a period of one year. We find nothing in the law denying the right of the board to exercise such a power. Again, we see no necessity of indulging in fine distinctions between the hiring of a teacher by special contract and the election of a teacher under this provision of the Code. There appears to be no reason in saying that, if a board of education desires to secure the services of a teacher for a month or a year,

¹Pol. Code, § 1793, provides that school teachers, "when elected, shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct."

such teacher must be hired by a special contract, and cannot be elected, for, if elected, a life tenure is created, even against the intentions and wishes of all parties concerned. We think the law was not enacted with such ends in view. If we concede petitioner's position to be true, that the board had no power to elect for a year, then her cause still remains without merit, for the action of the board in electing her was void, and no election whatever was had. Consequently she was teaching at the mere pleasure of the board, subject to be discharged, as any other employee, without a fixed term of employment. For the foregoing reasons let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

MARION v. BOARD OF EDUCATION OF CITY OF OAKLAND et al. (No. 15,055.)
(Supreme Court of California. March 24, 1893.)

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Application by Eunice D. Marion for a writ of mandamus to compel the board of education of the city of Oakland and others to reinstate plaintiff as principal of a certain school. From a judgment for defendants, plaintiff appeals. Affirmed.

Chas. E. Snook, Geo. W. Reed, and E. Nusbaumer, for appellant. Wm. R. Davis and Jas. A. Johnson, for respondents.

PER CURIAM. This is an application for a mandamus to compel the board of education of the city of Oakland to reinstate the plaintiff, Eunice D. Marion, in the position claimed by her as principal of the Swett grammar school in Oakland. The judgment of the trial court went against her, and she is now before this court upon appeal from that judgment. For the reasons given in case No. 15,056, between the same parties, and filed on the same date herewith, (32 Pac. Rep. 643,) the judgment and order are affirmed.

97 Cal. 594

SAN DIEGO COUNTY v. SIEFERT. (No. 19,039.)

(Supreme Court of California. March 23, 1893.)

PLEADINGS—WAIVER OF DEFECTS.

1. Under Code Civil Proc. § 475, providing that defects in pleadings, not affecting the substantial rights of the parties, shall be disregarded, it is too late, after answering to the merits, decision, and judgment, to raise an objection that the complaint is insufficient.

2. Deer. Supp. p. 192, § 19, provides that the records and minutes of the board of county supervisors must be signed by the chairman and clerk. *Held*, that where it was contended that a regular meeting, held January 6th, was not regularly continued from day to day until January 22d, because the minutes of two of the intervening meetings were not attested by the clerk, and those of another meeting were not signed by the chairman nor attested by the clerk, it was competent to show by the handwriting of the entries, their contemporaneous character, and the official custody from which the book was produced, that the board met and adjourned at the times therein stated, and that

the meeting of January 22d was a regular one. 3. Deer. Supp. p. 192, § 21, provides that the county board of supervisors must cause to be kept an ordinance book, in which must be entered all ordinances duly passed by the board. *Held*, that the record of an ordinance, with proof of proper publication, was sufficient to entitle it to be admitted in evidence, and is prima facie proof that the ordinance was passed, signed, and attested in the form in which it appears in the record, and the burden of showing its invalidity was on defendant.

4. Where it appears that there was a difference between the ordinance as recorded and as published, but the error did not affect the provisions of the ordinance touching defendant's liability, such error should be held immaterial.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the county of San Diego against John R. Siefert to recover a license tax. From a judgment for plaintiff, defendant appeals. Affirmed.

Welborn, Stevens & Welborn, for appellant. Johnstone Jones and John R. Aitken, for respondent.

PER CURIAM. This action is to recover from the defendant, Siefert, the sum of \$120, the amount of a license tax imposed upon his business as a saloon keeper for a period of 12 months, under an ordinance of the board of supervisors. The cause was tried by the court, and findings and judgment passed in favor of plaintiff, and the defendant appeals from the judgment and an order denying his motion for a new trial.

Appellant contends that the complaint does not state facts sufficient to constitute a cause of action in that (1) facts are not alleged showing the existence of the ordinance; and (2) that the complaint fails to show a violation of the ordinance upon which the action is founded. Upon this ground defendant objected in proper time to the introduction of any evidence. Neither of these points is well taken. The complaint alleges "that under and by virtue of the provisions of an ordinance of the board of supervisors of said county, duly passed and approved at a regular meeting of the board held on the 22d day of January, A. D. 1890, and thereafter duly published as required by law, said ordinance being known as 'Ordinance No. 48 of the Ordinances of the County of San Diego,' and entitled," etc., "the defendant was required to procure a license from the tax collector, * * * and to pay for such license the sum of ten dollars per month." This allegation might not have stood as against a demurrer for uncertainty, but no demurrer was filed. Furthermore, the defendant, in his answer, alleged that he had no information or belief as to the truth of the allegation above quoted, and therefore denied that the board of supervisors had duly or at all passed or approved ordinance No. 48, as in said allegation referred to. The complaint alleged that the defendant "failed, refused, and neglected, and still does fail, refuse, and neglect, to pay such license tax, contrary to and in violation of the provisions of said ordinance." There is no allegation

in the complaint that he failed to take out a license, but in his answer the defendant, "further answering, denies that he, during the times mentioned in said complaint, or at any other time or times, has or had neglected, failed or refused, or still neglects, fails, or refuses, to take out any license, as required by said ordinance." It is too late now, after answering to the merits, decision, and judgment, to raise the objections referred to. Section 475, Code Civil Proc.;¹ *Harkness v. McClain*, (Utah,) 29 Pac. Rep. 964. The findings support the judgment. There is a general finding that all the allegations of the complaint are true, and the denials and allegations of the answer are untrue. Several questions were made upon the trial and discussed in the briefs, which will necessarily arise upon a new trial.

1. It is contended that ordinance 48 was not adopted at a regular meeting of the board. For the purpose of proving that the meeting of the board at which this ordinance was passed was a regular meeting, plaintiff introduced in evidence ordinance No. 42, adopted January 11, 1889, declaring that the regular meetings of the board should be held monthly on the first Monday of each month. It is contended that plaintiff is required to show that ordinance 42 was adopted at a regular meeting also; that, without such evidence, it cannot be shown that the meeting at which ordinance 48 was adopted was a regular one. In *People v. Dunn*, 89 Cal. 228, 26 Pac. Rep. 761, it was held that an ordinance fixing rates of county licenses must be passed at a regular meeting, or at a special meeting called for that purpose. That the board must be regularly convened to perform any official act is true; but the legality of ordinance 42 was not put in issue by the pleadings, and the presumption arising from its existence upon the record of ordinances was quite sufficient to entitle it to be received in evidence without further proof. Code Civil Proc. § 1963, subd. 15; *Id.* § 1918, subd. 5; *Id.* § 1920. The presumption is, of course, a disputable one, but the burden of showing its invalidity was upon the defendant. But upon this point appellant further contends that the meeting at which ordinance No. 48 was passed was not a regular meeting, even if ordinance No. 42 was valid, for the reason that the regular meeting held January 6, 1890, was not regularly continued from day to day until January 22d, upon which last-named day it is claimed the ordinance was passed. This objection is based upon the fact that the minutes of two of the intervening meetings were not attested by the clerk, and that the minutes of another meeting were not signed by the chairman nor attested by the clerk. Section 19 of the county government act (*Deer. Supp.* p. 192) provides: "The records and minutes of the board must be signed by the chairman and clerk."

Substantially the same provision existed in the sixth section of the "Act to create a board of supervisors," (*Hitt. Gen. Laws*, § 6975,) and that provision was considered by this court in *People v. Eureka, L. & Y. C. Co.*, 48 Cal. 145. In that case the court said: "The action recorded is not the action of the chairman or clerk. They sign the minutes, not as certifying to their own official action, but as witnesses that the record is the record made by the clerk under the direction of the board. * * * The statute does not declare that the record shall not be proof of the action of the board if not signed by the officers named, but the effect is only to make their signatures evidence, identifying the minutes. The failure of the chairman and the clerk to discharge their particular duty simply imposed on the party desiring to prove the official action of the board some additional trouble in establishing the handwriting of the entries, their contemporaneous character, and the official custody from which the book was produced." Upon this authority, the minutes of the meetings, if proved as there indicated, were competent to show that the board met and adjourned at the times therein stated, for the purpose of showing the continuity of the session, and that the meeting of the board on the 22d of January was a regular one. The custom of the chairman, as to the time and circumstances under which he signed the minutes, could be material only so far as it tended to explain the omission to sign them.

2. The question whether the ordinance was signed by the chairman and attested by the clerk, as required by the county government act, was seriously controverted. That the signing and attesting are necessary to the passage and validity of the ordinance is clear. The statute conferring upon the board the power of enacting ordinances specifies the manner in which it shall be exercised. *Deer. Supp.* p. 197, § 26. "When the mode of enacting ordinances is prescribed, it must be pursued." *Dill. Mun. Corp.* § 309. This signing by the chairman and attesting by the clerk is intended by the statute to be upon the original ordinance. Section 20, subd. 9, of the same act, makes it the duty of the clerk to "authenticate with his signature and the seal of the board all ordinances or laws passed by the board, and to record the same at length in the ordinance book." Section 21 provides: "The board must cause to be kept: * * * (6) An ordinance book, in which must be entered all ordinances or laws duly passed by the board." The question whether the ordinance was passed, signed, and attested is one of fact, which need not be considered upon this appeal. The record of the ordinance, accompanied with proof of proper publication, is sufficient to entitle it to be admitted in evidence, and is *prima facie* proof that the ordinance was passed, signed, and attested in the form in which it appears in the record, and casts the burden on the defendant of producing evidence sufficient to rebut the presumption arising from the record, at least as to some particular essential to its validity. The principal question, therefore, is one of fact

¹Code Civil Proc. § 475, provides that "the court must, in every stage of an action, disregard any error or defect in the pleadings * * * which does not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect."

to be found by the court or jury upon legal evidence, as in other cases.

3. It was developed upon the trial that there was a difference between the ordinance as recorded and as published; but what the defect was, further than that "section 16 is different," was not disclosed. The object of publication is to impart notice to those who are or may be affected by its provisions. If an error occurs in the publication, which does not affect the provisions of the ordinance affecting the defendant's liability or his defense against such liability, it should be held immaterial. More cannot be said in the absence of definite knowledge of the defect in the published ordinance. The judgment and order appealed from are affirmed.

98 Cal. 13

DAVIS v. SOUTHERN PAC. CO. (No. 14,844.)

(Supreme Court of California. March 27, 1893.)

NEW TRIAL—CONDITIONS.

It is within the discretion of the trial court, after a verdict awarding excessive damages, to make an order denying a motion for a new trial on the condition that plaintiff will remit a certain part of the amount found by the jury.

Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by William Davis against the Southern Pacific Company to recover damages for personal injuries. Judgment was entered in favor of plaintiff, and defendant appeals. Affirmed.

W. H. L. Barnes and Frank Shay, for appellant. George A. Rankin, for respondent.

McFARLAND, J. This is an action to recover damages for personal injuries alleged to have been received by plaintiff on a passenger train of defendant. The jury returned a verdict for plaintiff of \$15,300. Defendant moved for a new trial upon various statutory grounds, including excessive damages. The trial court made an order that, if the plaintiff should consent that the judgment be reduced to \$9,000, the new trial would be denied, and that otherwise it would be granted. Plaintiff filed a written consent to such reduction, and the motion was thereupon denied. Defendant appeals from the judgment and from the order denying a new trial.

The main proposition argued by counsel for appellant is that the denial of the motion for a new trial, upon condition that respondent remit part of the amount found by the jury, was unauthorized by law; and that, if the court thought the verdict excessive, its duty was to have granted a new trial. This position is undoubtedly, upon principle, a very strong one, and counsel have defended it very ably. They have also cited authorities from other states, which support the proposition, although we are disposed to think that the weight of authority in other states is the other way. But, whatever might be considered the weight of reason and foreign

authority on the question above stated, if it were *res integra* here, the right of a court to do what is complained of in the case at bar is too firmly established in this state by a long line of decisions to be now questioned. The following are some of the cases in which the practice of denying a new trial when the plaintiff remits a part of the verdict has been established and recognized: *George v. Law*, 1 Cal. 363; *Benedict v. Cozzens*, 4 Cal. 381; *Chapin v. Bourne*, 8 Cal. 294; *Clark v. Huber*, 20 Cal. 196; *Carpentier v. Gardiner*, 29 Cal. 160; *Tarbell v. Railroad Co.*, 34 Cal. 616; *Harrison v. Peabody*, Id. 178; *Kinsey v. Wallace*, 36 Cal. 462; *Russell v. Dennison*, 50 Cal. 243; *Atherton v. Fowler*, 46 Cal. 323; *Dreyfous v. Adams*, 48 Cal. 131; *Gregg v. Railroad Co.*, 59 Cal. 312; *Clanton v. Coward*, 67 Cal. 373, 7 Pac. Rep. 787; *Phelps v. Cogswell*, 70 Cal. 201, 11 Pac. Rep. 628; *Durfee v. Garvey*, 78 Cal. 546, 21 Pac. Rep. 302; Id., 84 Cal. 590, 24 Pac. Rep. 929; *Loveland v. Gardner*, 79 Cal. 317, 21 Pac. Rep. 766; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. Rep. 880. It is argued that these authorities constitute a recognition of the practice without inquiry, rather than the determination of a contested point; but it will be found that in a number of the cases the point was expressly raised and argued by counsel, and definitely determined by the court. Such was the fact in the above-cited cases of *Benedict v. Cozzens*, *Chapin v. Bourne*, *Dreyfous v. Adams*, *Clanton v. Coward*. In *Gregg v. Railroad Co.*, while the briefs of counsel do not appear in the report, the opinion of the court shows that the only point in the case was as to the power of the court to make an order similar to the one in the case at bar, and the court approves the practice as settled. Since then the practice has been frequently approved as beyond question. Moreover, this court has gone further, and has itself, on appeal, ordered a new trial, unless respondent should file a remittitur of damages. *Tarbell v. Railroad Co.*, *Kinsey v. Wallace*, *Atherton v. Fowler*, *Phelps v. Cogswell*, *Durfee v. Garvey*, *Loveland v. Gardner*, all *supra*. It is contended that the rule should not apply to unliquidated damages,—damages for personal injuries,—but the rule was applied to just such damages in the following cases, above cited: *George v. Law*, *Benedict v. Cozzens*, *Tarbell v. Railroad Co.*, *Kinsey v. Wallace*, *Gregg v. Railroad Co.*, *Phelps v. Cogswell*. Considering the foregoing authorities, and others not cited, it would be almost as great a stretch of judicial authority for us to undertake to overthrow this long-established practice as it would be to undertake to dispense with a statute. We hold, therefore, that the action of the court now under review was in accordance with settled practice. Some of the cases speak of such action as within the discretion of the court, and perhaps there might be a state of facts upon which such action would be an abuse of discretion. But there was no such abuse of discretion in the case at bar. There are no other points in the case which call for special notice. As to the general liability of the appellant, the evidence, although to some extent conflicting, sustains the ver-

dict, and, upon the evidence, we cannot pronounce the amount of the damages after the remittitur as excessive, at least in the sense that would warrant us in disturbing it. Judgment and order affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(98 Cal. 42)

PIEPER v. PEERS et al. (No. 14,523.)

(Supreme Court of California. March 29, 1893.)

STAY OF EXECUTION — ACTION ON BOND—PLEADING.

In an action on a bond given to stay, pending appeal, execution on a justice's judgment for the return of personal property or its value, where the appeal has been dismissed by the superior court, the complaint need not allege that execution was issued and returned unsatisfied, or that notice of the dismissal of the appeal was given, or that demand was made before the action was brought, or that a delivery of the property could not be had, or that appellant has refused to obey an order of the superior court, unless a recovery is sought on such order.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Charles H. Pieper against Alexander Peers and others on a bond given to stay execution pending appeal. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. H. Campbell, for appellants. W. P. Veuve, for respondent.

FITZGERALD, J. This was an action against the defendants, as sureties upon an undertaking given to stay execution of judgment pending appeal. The defendants demurred to the complaint on the ground of insufficiency, and the demurrer was properly overruled. They then answered, and plaintiff had judgment, from which the defendants appeal upon the judgment roll alone.

It is substantially alleged, and the court finds, that one Marie Albert obtained a judgment in a justice's court against one Lucas for the delivery of a certain lot of hay, or the value thereof in case delivery cannot be had; that Lucas thereafter filed and served notice of appeal therefrom to the superior court, and that thereupon the defendants executed and filed in the justice's court their written undertaking and justification on appeal, conditioned in pursuance of the provisions of section 973, Code Civil Proc.; that the appeal was thereafter dismissed by the superior court; that no part of the hay has ever been delivered, nor any part of its value or the costs ever been paid pursuant to the judgment, and that the judgment was duly assigned to plaintiff. It was not necessary to the sufficiency of the complaint to allege the issuance and return of the execution unsatisfied, (*Nickerson v. Chatterton*, 7 Cal. 573; *Tissot v. Darling*, 9 Cal. 285;) or that notice of the dismissal of the appeal by the superior court was given, (*Murdock v. Brooks*, 38 Cal. 604;) or that demand was made prior to the commencement of the action, (*Coburn v. Brooks*, 78 Cal. 443, 21 Pac. Rep. 2; *Murdock v. Brooks*, supra;) or that a delivery of the property could not be had; or that any order was made by the superior court, which the appellant in that case failed or refused to obey, unless a recovery is sought upon such order, when made, which is not the case here, for the obvious reason that the undertaking on appeal, which is the basis of this action, is an independent and absolute contract on the part of the defendants, by the terms of which they expressly promised and agreed, in consideration of a stay of the execution of the judgment appealed from, "that the appellant will pay the amount of the judgment so appealed from and all costs, and will obey the order of the court made therein if the appeal be withdrawn or dismissed." In *Moffat v. Greenwalt*, 90 Cal. 368, 27 Pac. Rep. 296, which was an action upon an undertaking on appeal to a superior court, it was said by Justice Harrison: "By their undertaking the defendants promised and agreed that, 'if the appeal be withdrawn or dismissed,' the appellant would pay the amount of the judgment so appealed from. This was an original and independent agreement on their part, (*Tissot v. Darling*, 9 Cal. 278,) and in legal effect was entered into by them with the plaintiff. By virtue of the provisions of section 979 of the Code of Civil Procedure, upon the filing of the undertaking staying proceedings all proceedings under the execution are to be stayed. * * * The consideration recited in the undertaking was the 'staying of the execution of the judgment appealed from,' and, as this undertaking was filed, it became an executed obligation on their part, and, whenever the contingency upon which the obligation was to depend arose, their liability became fixed. This liability could not thereafter be defeated by an act or omission on their part or on the part of their principal. Their agreement to be bound in case the appeal should be dismissed extended as well to a dismissal resulting from their failure to justify as

to a dismissal resulting from a failure on the part of their principal to prosecute the appeal. * * * We do not think that it was competent for the defendants, after they had executed the undertaking, to avoid their liability thereon by any act of their own, or any failure to comply with a provision which is intended solely for the protection of the respondent." Upon the dismissal of the appeal the defendants became liable for the amount of the judgment appealed from, and all costs. To discharge themselves from this liability, they must show as a matter of defense that the judgment has been satisfied by the return of the property, or that the amount of the judgment and costs have been paid. As this does not appear to have been done, it follows that the judgment should be affirmed, and it is so ordered.

We concur: BEATTY, C. J.; DEHAVEN, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

(98 Cal. 10)

BROWN v. JENKS. (No. 14,914.)

(Supreme Court of California. March 27, 1893.)

STREET-PAVING CONTRACT—PROVISION FOR REPAIRS BY CONTRACTOR.

1. A requirement in a street-paving contract that a contractor shall keep the street in repair for five years imposes an additional burden on the property owners, and therefore vitiates the assessment made under it, unless such requirement is authorized by the statute providing for the letting of contracts for street improvements.

2. The objection as to the additional burden is not removed by testimony of the contractor that the requirement did not enhance the amount of his bid, as others might have bid a less sum if the contract had not contained such requirement.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Gratz K. Brown against C. L. Jenks on an assessment for street paving. There was a judgment for plaintiff, and defendant appeals. Reversed.

C. L. Jenks, for appellant. Shaw & Holland and C. T. H. Palmer, for appellee.

TEMPLE, C. This appeal is from the judgment, and presents two questions: (1) Whether the court properly overruled defendant's demurrer to plaintiff's complaint; (2) whether the court properly struck out a defense from the answer. Respondent confesses error in striking out the defense, and consents that the case be reversed on that ground. He says the point made by defendant on the demurrer is radical and important, and will be argued when the case is again here in such form as to require its determination. The question as to the correctness of this ruling is properly presented on this appeal from the judgment, and the consent of respondent to a reversal on some other ground, which does not dispose of the demurrer, cannot deprive appellant of his right to have it determined. The ques-

tion there raised is whether defendant can be put to the labor and expense of a trial on the merits, or not. Naturally, it is the first point to be determined, and, as the city of San Diego may have an interest in the question beyond this case, it is to be regretted that we have not the advantage of the views of its counsel upon the subject.

The action is brought upon an assessment for street work. It appears that the city council passed a resolution to the effect that it was its intention to order the following street work done: "That D street, from the east line of California street to the east line of Front street, * * * be paved with hard porphyry rock macadamizing, and cross-walked with granite and guttered with granite, all in accordance with the general specifications and the special specifications No. 1 for business streets," etc. The notices required were duly given, a resolution in due form passed, the proper time requiring the work to be done; and the work was contracted to be done, in accordance with the resolution of intention, to a contractor, who has done the work as required, which has been duly accepted by the proper officers of the city. The specifications referred to required the contractor to give a bond, with sureties, conditioned "for keeping the streets so improved in thorough repair for the term of five years from the completion of the contract. Payment in full of the contract price shall not release the contractor or sureties on said bond until five (5) years shall have expired. The necessity of such repairs shall be determined by the street commissioner and ex officio superintendent of streets and the street committee of the city of San Diego." The specifications are attached to the complaint, and make a part of it, and it is averred that the bond was given by the contractor as required. It is contended that this requirement in the contract vitiated the assessment. The work was done under the provisions of an act of the legislature passed March 18, 1885, (St. 1885, p. 147.) This act contains no grant of authority to the city council to contract for keeping a street in repair. Section 2 authorizes the council to contract for different kinds of street work. In all cases the work authorized is such as is necessary to make and complete a street, or to repair existing defects. The bond is not only unauthorized by the words of the statute, but the requirement changes, and may increase, the burdens of the property owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense undertaken is indefinite; and the property owner must pay for them in advance, whereas the statute provides for repairs after the necessity for them appears. Then, it being contingent, he will be paying for repairs which may never be required. And then they are assessed upon a different basis from that provided by the statute. Section 13 provides that needed repairs

shall be made by the owners of the frontage where the repairs are required. Under the contract all the owners of frontage along the entire line are assessed in proportion to frontage. As to some of them, no repairs may ever be required, or such as would be much less costly than repairs at other places along the line covered by the contract. From the argument of appellant, I gather that it was suggested in the lower court that this requirement in the specifications was intended as a guaranty that the work would be well done, and would not require repairs for that period of time. If so, the provision is equally unauthorized. The lot owner cannot be made to pay for such a guaranty, which may become worthless before the time has elapsed. Officers are provided and vested with the power, and charged with the duty, of seeing that such work is properly done. A bond cannot be substituted for the performance of this duty. Besides, it is for all repairs, and not such as may result from defects in the work. It covers repairs for defects from unforeseen causes, or from wanton abuse of the street by individuals.

If the contractor is willing to testify that the anticipated cost of repairing did not enhance the price, such testimony would not help the matter. Others might have bid for the work a less sum, if this requirement had not been made. I think the case should be reversed, with directions to the court below to sustain the demurrer.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to sustain the demurrer.

BURNETT v. LLEWELYN. (No. 19,038.) (Supreme Court of California. March 28, 1893.)

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Burnett against Llewelyn on an assessment for street paving. There was a judgment for plaintiff, and defendant appeals. Reversed.

Hunsaker, Britt & Goodrich, for appellant. Wellborn, Stevens & Wellborn, for respondent.

PER CURIAM. The court erred in striking out the second defense in the answer of the defendant. (*Brown v. Jenks*, 32 Pac. Rep. 701, No. 14,914, this day decided,) and upon the authority of that case the judgment is reversed, and the cause remanded.

97 Cal. 647

PARSONS v. SMILIE. (No. 19,135.)

(Supreme Court of California. March 25, 1893.)

BREACH OF CONDITION SUBSEQUENT IN DEED — EQUITABLE RELIEF FROM FORFEITURE.

1. In an action to compel a reconveyance of land on which plaintiff had entered for breach of a condition subsequent, that defendant (plaintiff's grantee) should maintain a lumber yard on the premises conveyed, for five years, the trial court found that the conveyance was made at a time of great excitement in the real-estate

market, and both plaintiff and defendant believed that large quantities of lumber would be required for building, as represented by plaintiff, but that there was little, if any, demand for lumber when defendant discontinued the lumber yard, and has not been any since. *Held*, that equity would not relieve defendant from the forfeiture, as the damage to plaintiff by the breach of the condition could not be ascertained, and it was immaterial whether or not the price paid by defendant for the land was its full value at the time of the conveyance.

2. Under Civil Code, § 1109, providing that, on breach of a condition subsequent in a grant, "the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors," a grantor, on entry for breach of condition in a recorded deed, may sue to compel a reconveyance, as the record of the deed shows the legal title to be in the grantee notwithstanding the entry.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Ephraim Parsons against Robert Smilie to compel a reconveyance of land for breach of condition subsequent. There was a judgment for defendant, and plaintiff appeals. Reversed.

Graves, O'Melveny & Shankland, for appellant. Metcalf & Metcalf and Chas. L. Batcheller, for respondent.

HAYNES, C. Appeal from judgment and order denying plaintiff's motion for a new trial. On the 21st day of November, 1887, plaintiff was the owner of four certain lots in North Pomona, Los Angeles county, and on that day executed and delivered to the defendant a deed of conveyance of the same for the consideration, therein expressed, of \$1,073.60, then paid by defendant. The granting part of the deed was in the usual form, following which was this clause: "This deed is given and accepted on the following conditions, which are to be binding on the party of the second part, his heirs and assigns, forever, to wit: The party of the second part shall put and maintain thereon a good lumber yard for a period of not less than five years, said yard to be opened for business within 120 days from this date. It is further stipulated that no intoxicating drinks shall ever be made or sold or given away on the above premises; and the party of the second part binds himself, his heirs, and assigns, to the above covenants, and, in case the above-described premises are transferred to other party or parties, they are to be bound by the above-named conditions, and a failure to comply with same will render this conveyance null and void, and said premises shall revert to said first party." This deed was duly recorded. Plaintiff entered for a breach of the condition to maintain a lumber yard on said premises, and notified defendant thereof, and demanded a reconveyance, and brought this action to compel such reconveyance, and remove the cloud caused by the record of defendant's deed. A general demurrer was interposed to the complaint, which was properly overruled. The defense to the action will sufficiently appear from the findings of the court. The findings were 27 in number, and can only be outlined in this opinion. The court found the condition as above

recited; that defendant erected an office upon one of the lots for the sale of lumber, and maintained a lumber yard for less than a year; that plaintiff entered for condition broken, and notified defendant thereof, and demanded a reconveyance; that, at the date of said conveyance, plaintiff owned a large tract of land in the immediate vicinity of the lots conveyed to defendant; that defendant was a contractor and dealer in lumber, and was desirous of establishing a lumber yard in that locality, which plaintiff also desired, for the purpose of affording facilities to the purchasers of land, and to himself, for procuring lumber; that said lots were not at the time of the sale of the value in the market of \$2,500, as alleged in the complaint, but were of the value of \$1,073.60, and no more, and are now worth not exceeding \$1,000. It was also alleged in the answer, and found by the court, that this transaction occurred during a period of great excitement in the real estate market regarding values and prospects of improvement, and the laying out of new towns on unoccupied land, and particularly in that vicinity; that plaintiff represented that large quantities of lumber and other materials would be required by plaintiff and others for building houses, and other purposes; that defendant relied on these representations, but that they were not false or fraudulent, as alleged in the answer, and were not intended to deceive the defendant, but they were believed to be true both by plaintiff and defendant, and both plaintiff and defendant were deceived thereby; that large quantities of lumber were not required, either by plaintiff or other persons, and that very little lumber or other materials were sold by defendant from said lumber yard; and that, at the time the lumber yard was discontinued, there was very little, if any, demand for a lumber yard on the said premises, and has not been since that time. The court further found "that defendant offered to make full compensation to plaintiff for whatever detriment had been occasioned to plaintiff by reason of the failure, if any, of defendant to comply with the provisions of said deed," but that no detriment had been occasioned to plaintiff by reason of such failure, and "that the defendant has not committed any grossly negligent or negligent or willful or fraudulent, breach of duty, nor any breach of duty," and "that he had fulfilled and performed all of the conditions in said deed, except as in these findings stated;" that on the 23d day of March, 1891, the defendant offered to reconvey to the plaintiff the said premises upon the repayment by the plaintiff of the sum of \$1,073.60, together with legal interest thereon from the date of the deed; that defendant also offered to compensate plaintiff for any detriment he had sustained, but that plaintiff had not been injured by the breach of the condition. Many of these findings are immaterial, unless, as respondent contends, the defendant, under the facts so found, is entitled, in equity, to be relieved from the consequence of his breach of the condition upon which the property was conveyed to him.

Near the close of his brief, respondent states the case as follows: "In the present case, defendant has not asked to be excused from performing on account of difficulty or expense or hardship, or because he was deceived by the plaintiff, but practically admits the breach at least of the condition that he shall maintain a lumber yard for five years, and, in case the court thinks that the complaint and conditions are sufficient, asks the court to relieve him by allowing him to make compensation for any injury he has caused." The complaint is clearly sufficient, nor can there be any doubt or room for construction as to the condition in question. Counsel say the expression, "a good lumber yard," is ambiguous and indefinite; but that question is not involved. If defendant had maintained a lumber yard of some kind for the whole period, that question might have arisen; but, if he did not keep any, he did not keep a good one.

I do not in the least controvert the general doctrine that equity will not render its aid to enforce a forfeiture for breach of condition subsequent in a deed, but the question presented is how far equity shall interfere to defeat a forfeiture for the violation of such condition. At common law, two things were required to revest the estate in the grantor, viz. a breach of the condition, and an entry for condition broken. Here both of these things occurred. It is conceded by defendant that he failed to perform the condition, and it is found by the court that plaintiff entered upon the premises, notified the defendant of the breach, and that he claimed the premises, and demanded a reconveyance. If it be true, therefore, that a re-entry after condition broken revests the estate in the grantor, it would be necessary to show, in order to sustain respondent's contention, that equity has the power to defeat the operation of the law and the acts of the parties, and take away from the plaintiff the estate which has become revested in him, and again vest it in the defendant. The conveyance upon condition was voluntarily accepted by the defendant; it was not unlawful, nor impossible of performance; and, in case of a contract thus entered into, equity would not relieve him from his obligation to perform it. There are cases in which equity has relieved against a forfeiture of the estate, but none, I think, under the circumstances, nor of the character, here involved. In the case of *Bethlehem v. Annis*, 40 N. H. 39, the principle is stated that wherever a conveyance of land upon a condition which is in equity regarded as a mortgage, or as a security for a loan of money, equity may relieve, and that this doctrine applies to cases generally where conditional deeds are made as security for the performance of a contract. After stating these general principles the court in that case said: "But, upon consideration, it will be seen that this principle, though generally true, can have no application to any other contracts than such as by their nonperformance create a debt, or a demand in the nature of a debt, against the delinquent party. Wherever the condition, when broken, gives rise to no claim

for damages whatever, or to a claim for liquidated damages, the deed is not to be regarded as a mortgage in equity, but as a conditional deed at common law." In *Henry v. Tupper*, 29 Vt. 358, it was said, (syllabus): "A court of equity may grant relief from forfeiture of an estate conditioned for the maintenance and support of the grantee, where the forfeiture was accidental and unintentional, and not attended with irreparable injury. But it rests in the sound discretion of the court when relief shall be granted in this class of cases." So there are numerous cases arising under leases, and in contracts where time is not of the essence of the contract, in which courts of equity will relieve against a forfeiture. The general doctrine is that equity will relieve where the thing may be done afterwards, or compensation can be made for it, but that unless a full compensation can be given, so as to put the party in precisely the same situation, a court of equity will not interfere, for such jurisdiction would be arbitrary. Washburn (2 Real Prop. p. 23) says: "And the only cases where equity interposes as to such conditions are where the failure of performance has been the effect of accident, and the injury is capable of compensation in damages which the court has the means of measuring, and where the grantor can be made perfectly secure and indemnified, and can be placed in the same situation as if the occurrence had not happened. This applies to cases where the condition is for the payment of money at a particular time, and compensation for the delay can be measured by the interest during that time. But where the condition is for the performance of a collateral act the rule is different, as the court has no standard by which to measure damages." *Livingston v. Tompkins*, 4 Johns. Ch. 415, 431; *Bacon v. Huntington*, 14 Conn. 92; *Hill v. Barclay*, 18 Ves. 56; *Henry v. Tupper*, 29 Vt. 358, 372. The same author again says, (page 23): "But if the act be willfully done, or one for which the court has no certain rule by which to measure the damages, beyond their own arbitrary judgment in the matter, equity will not relieve." See, also, *Descarlett v. Dennett*, 9 Mod. 22; *Wafer v. Mocato*, Id. 112; *Northcote v. Duke*, 2 Eden, 322. In *Elliott v. Turner*, 13 Sim. 485, it is held that "willful," in such a case, is the same as a voluntary act of the party.

Counsel for respondent relies strongly upon section 3275 of the Civil Code, which is as follows: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." This section has never, so far as I have been able to find, been construed by this court. Appellant contends that it has no application to conditions either precedent or subsequent, but applies to covenants or other obligations capable of direct enforcement by action. I do not think it necessary to determine that question. Assuming that it applies to cases of

forfeiture for breach of conditions subsequent, it closely follows the principles stated in the cases above cited. Compensation will only be made where there is some measure or standard by which it can be estimated; nor can I see anything in this section requiring the word "willful" to be given a different meaning from that expressed in the cases upon the subject of relief from forfeiture, which is the ordinary meaning of the word. In *Elliott v. Turner*, supra, the chancellor said it meant the same as "spontaneous" or "voluntary." Lord Eldon, in *Hill v. Barclay*, supra, does not define the word, but uses it in connection with the words "neglect" and "omission," as well as in connection with acts performed. Redfield, C. J., in *Henry v. Tupper*, 29 Vt., at page 373, said: "In cases where the condition is for the payment of money, or for the performing of a certain value of services expressed in currency, as one hundred dollars of necessary repairs upon buildings leased, it has been, I think, the more general practice of the court to grant relief as matter of right, without reference to the inquiry whether the default was accidental or willful; but in all cases where the thing to be done was something collateral, where the issue, quantum damnificatus, must be sent either to a jury or masters before the court could grant relief, they have pretty generally, I think, required to be satisfied that the omission to perform was not willful, but accidental and by surprise, and it has been held, always, in such cases, to depend very much upon the circumstances of the particular case." *Black's Law Dictionary* defines the word "willful" as follows: "Proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious." The court, however, made a finding that the breach of the condition by defendant was not "grossly negligent or willful or fraudulent." Unless the word "willful" was understood by the court, in that connection, to mean "malicious," or with intent to injure the plaintiff, the finding cannot be sustained from the evidence. For a period of about two months defendant kept a man in charge of the lumber yard, afterwards left it in care of the railroad station agent for some time, and, within a year from the time it was started, removed the lumber remaining unsold to his lumber yard at the town of Pomona, two miles or more from the premises in question. It is impossible to conclude that his removal of the lumber yard was not intentional or voluntary, or that it was not the act of his will to do so; nor can I conceive of any possible measure of damages, or mode of estimating or determining the extent of the injury to plaintiff, by defendant's breach of this condition, even if it were material to do so. The authorities clearly show that the cases where compensation has been allowed were of an entirely different class from the case at bar, and where, as was said by Chief Justice Redfield, it would not be necessary to send the issue of the amount of damages either to a jury or masters before the court could grant relief. In *Wafer v. Mocato*, 9 Mod. 112, it was said: "For this

court never relieves but in such cases where it can give some compensation in damages, and where there is some rule to be the measure of such damages, to avoid being arbitrary." And in a note to *Descarlett v. Dennett*, Id. 22, it was said "that the court of chancery will not relieve against a covenant where on the performance or nonperformance of the act to be done, if omitted, the party is to pay a sum by way of liquidated damages." The court found that plaintiff had not sustained any injury from defendant's breach of the condition, and that the price paid by the defendant for the lots was the then market value. I do not think it material whether it was or not. The plaintiff may have been unwilling to sell, even at the fair market value, except for the purpose of having a lumber yard conducted upon these lots. There must have been a purpose on the part of the grantor in inserting that condition in the deed, and this purpose must have been understood and considered by defendant in accepting the condition. That the establishment and maintenance of such business was beneficial to the plaintiff is beyond question, but the quantum of such benefit in dollars and cents is absolutely incapable of computation or estimation, and for that reason the injury sustained by the breach in question cannot be ascertained by any rule or measure of damages known to the law.

While not undertaking to decide what exceptions there may be to the general rules stated by the authorities upon the subject of relief against forfeiture, I think it clear that this case is not an exception to those rules, and that the circumstances insisted upon by respondent will not justify this court in affirming the judgment. A court of equity cannot undertake to set aside the deliberate contracts or obligations of parties, fairly and freely assumed, because time may show that the obligation was onerous or unprofitable. Equity was not intended to subvert the law, nor has it any authority to set aside or disregard the positive, legal obligations voluntarily assumed by parties, except under those special circumstances recognized, though not always clearly defined, by the authorities. If it be said that the plaintiff has come into a court of equity, and that the judgment is right because equity will not enforce a forfeiture, the reply is that the Civil Code permits it. The deed from plaintiff to defendant is shown to have been recorded by the record, and under our recording acts the legal title to the premises, notwithstanding the entry for condition broken, appears to be in the defendant. Section 1109 of the Civil Code provides as follows: "Where a grant is made upon conditions subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors by grant duly acknowledged for record." In *Liebrand v. Otto*, 56 Cal. 248, the action was to remove a cloud from plaintiff's title. The defendant had never been in possession. The action there, as here, was based upon a forfeiture. The court there said that the case thus far had

been treated as a proceeding in equity to remove a cloud from plaintiff's title, but that it might also be considered as a suit brought under section 1109 of the Civil Code; that, if the grantee had failed to perform the conditions upon which the grant was made, it was its duty, under that section of the Code, to reconvey the property to the grantor. This being a duty required and enjoined by the statute, and one essential to show plaintiff's title upon the record, the case is taken out of the ordinary proceedings in equity, and the action is one based upon a statutory right. The plaintiff, if he were not in possession, might have brought ejectment, and recovered, but that would not have cured the defect apparent upon the record in his title; and our Code procedure will not require, even if the plaintiff be not in possession, that he should bring two actions,—one to establish his title at law, and the other to compel a conveyance. The form of action is, I think, proper, showing the facts which establish the plaintiff's legal title, and at the same time compelling the conveyance under the Code provision. In the view I take of the case, the finding that the plaintiff is not now the owner in fee, or at all, of said premises, is not sustained by the evidence, nor do the findings support the judgment, and the judgment and order appealed from should be reversed, and I so advise.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

98 Cal. 1

WILMINGTON TRANSP. CO. v. O'NIEL.
(No. 14,872.)

(Supreme Court of California. March 27, 1893.)
CONTRACT—CONSTRUCTION—LIQUIDATED DAMAGES
—VALIDITY OF STIPULATION.

1. In an action on a contract the complaint alleged that defendant hired plaintiff's lighter, and agreed to return the same in good condition, and, if lost or damaged to the extent that it could not be put in the same good condition as when received, to pay \$3,500 for the lighter; and that while in his use it was lost, whereby defendant became indebted to plaintiff for \$3,500. Defendant answered that the lighter was destroyed by the act of God and the elements; that the actual worth of the lighter was only \$1,800, and that he has been and is now willing to pay plaintiff \$2,500. *Held*, that the answer failed to set up any defense, the cause of the loss being immaterial.

2. The \$3,500 mentioned in the contract should be regarded as liquidated damages, and not as a penalty.

3. Under Civil Code, §§ 1670, 1671, providing that every contract which determines in advance the amount of damages to be paid in case of a breach shall to that extent be void, except where it would be extremely difficult from the nature of the case to fix the actual damages, the contract set out in the complaint is void so far as it attempts to fix such amount.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Wilmington Transporta-

tion Company against Patrick O'Niel on a contract. There was judgment for plaintiff, and defendant appeals. Reversed.

John Roberts, A. M. Carpenter, and Roberts & Robinson, for appellant. D. P. Hatch and John D. Bicknell, for respondent.

VAN CLIEF, C. On November 3, 1890, the respondent, (plaintiff,) a corporation, as party of the first part, and the appellant (defendant,) as party of the second part, executed the following agreement: "That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by said party of the second part, does covenant and agree unto the chartering and letting to hire of its coal lighter Wilmington, her anchor and chain, unto the said party of the second part for the term of one month from the date hereof; said lighter to be exclusively employed during the term of this charter party in transporting rocks from Santa Catalina island to Wilmington bay, for use on the government breakwater. The said party of the second part, in consideration of the foregoing and the use of said lighter Wilmington, does hereby covenant and agree to and with the said party of the first part to pay for the chartering and use of said lighter Wilmington, under the aforesaid conditions, at the rate of fifty dollars (\$50) per month, payable in advance, and to return the said lighter Wilmington to said party of the first part in the same good condition as when received, ordinary wear and tear not excepted, upon twenty hours' notice being given by the said party of the first part, and to deliver said lighter alongside the Southern Pacific Co.'s wharf at San Pedro; and should said lighter Wilmington be lost or damaged to the extent that it cannot be put in the same good condition as when received, the party of the second part to pay the party of the first part the sum of thirty-five hundred dollars (\$3,500) for said lighter Wilmington. Wilmington Transportation Co. By its secretary, W. G. Halstead. Patrick O'Niel." The action is based upon the agreement to pay \$3,500 in case the lighter should be lost, and it is averred in the complaint that the lighter Wilmington was delivered to defendant according to the agreement; "that on or about the 12th day of November, 1890, said coal lighter Wilmington, while in the use and occupation of the defendant, was lost and damaged to the extent that it cannot be put in the same good condition as when received from plaintiff by defendant, said coal lighter Wilmington being totally lost and destroyed; that under and by virtue of the terms and conditions of said agreement the defendant became indebted to the plaintiff in the sum of \$3,500, as provided in said agreement, no part of which sum has been paid; that the plaintiff demanded payment of the said defendant of the sum of thirty-five hundred dollars, but said defendant at all times, and still does, refuse and neglect to pay said sum, or any part or portion

thereof." The prayer is for judgment against defendant for the sum of \$3,500, "with interest thereon from November 12, 1890, (date of the loss,) until paid, with costs of this action." The complaint contains no averment as to the value of the lighter, nor as to the "twenty-hours notice" mentioned in the agreement. Defendant demurred to the complaint on the general ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court, and defendant answered. The answer admits the execution of the agreement, and alleges "that the lighter was not injured, lost, or destroyed by any act, negligence, or default of the defendant, but by act of God and the elements," and proceeds to state particularly the manner and causes of the loss during a storm; further alleges that the value of the lighter at the time it was delivered to defendant, or at any time thereafter, did not exceed \$1,800; and further alleges that the defendant at all times has been, and now is, willing "to pay to the plaintiff the sum of \$2,500, which, he avers, is more than the value of said lighter and the damages sustained by plaintiff." In this state of the pleadings the plaintiff moved for judgment on the pleadings according to the prayer of the complaint, which motion was granted, the judgment being for \$3,717.81, with interest thereon until paid. This includes interest on \$3,500 from the date of the loss of the lighter. The defendant appeals from the judgment and contends—First, that the answer raised a material issue as to whether the lighter was lost by inevitable accident; second, that the sum to be paid (\$3,500) in case the lighter should be lost or damaged, etc., was not intended to be fixed as liquidated damages, and that such intention does not appear from the agreement, properly construed; and, third, that if the sum of \$3,500 was intended as liquidated damages, the agreement to that extent is made void by sections 1670 and 1671 of the Civil Code.

1. I think the first point cannot be sustained by the authorities. The defendant expressly promised to pay in case the lighter should be lost, without any provision or qualification in the contract as to the manner or cause of such loss. Where a party has expressly undertaken without any qualification to do anything not naturally or necessarily impossible under all circumstances, and does not do it, he must make compensation in damages, though the performance was rendered impracticable, or even impossible, by some unforeseen cause over which he had no control, but against which he might have provided in his contract. Whart. Cont. §§ 311, 314, and authorities there cited, particularly, *School Dist. v. Dauchy*, 25 Conn. 530; *Harmony v. Bingham*, 12 N. Y. 99; *Tomkins v. Dudley*, 25 N. Y. 272. It is to be observed, however, that the contract here is not merely to return or to redeliver the lighter to plaintiff, but also to pay \$3,500 in case the lighter should be lost; and that there is no pretense that such payment has been rendered impossible or impracticable by any cause, so that the alleged

casus can apply only to the promise to redeliver the lighter; while the action is based solely upon the alleged breach of the promise to pay in case the lighter should be lost. If I am not mistaken in this view of the nature of the case, the issue as to the cause of the loss is wholly immaterial. The possibility of a loss was foreseen, and provided for in the agreement, whereby the defendant unqualifiedly obligated himself to pay in the event of a loss from any cause; and the only qualification or limitation of this obligation by the law is that it would not bind the defendant in case the loss had been caused by the culpable negligence or other wrongful act of the plaintiff, of which there is no pretense.

2. Is the agreement susceptible of the construction that the parties intended the \$3,500 as a penalty within which the actual damages for the loss or injury might be assessed, and not as fixed liquidated damages? If such is a proper construction of the agreement, the plaintiff should have alleged and proved the actual damage; and the answer of the defendant that the value of the lighter did not exceed \$1,800 would have been material as a partial defense to the action. "The weight of authority," says Mr. Field in his work on Damages, (section 136.) "seems to support the position that the sum fixed upon will be regarded as a penalty, or as liquidated damages, according to the intention of the parties, and that this intention may be gathered from the whole instrument, the subject-matter of the contract, and extraneous facts and circumstances." See, also, Sedg. Dam. § 396. The only circumstance that can be said to indicate that the parties intended the sum of \$3,500 as penalty, and not as liquidated damages, is that the same sum is required to be paid in case the lighter should "be damaged to the extent that it cannot be put in the same good condition as when received," as in case the lighter should "be lost," though the damage in the former case might be less than in the latter. The rule in cases of this kind, deduced from the cases cited by Mr. Sedgwick, is stated by him at section 413 as follows: "A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." But upon examination of the cases referred to, it will be seen that this rule has often been applied where it was admitted that the parties intended stipulated damages, and not a penalty; so that the application of the rule does not always depend upon the intention of the parties. Yet where it is otherwise doubtful whether penalty or stipulated damages was intended, the circumstances that the sum agreed upon greatly exceeds the actual damage for a breach of any one of the several stipulations tends, in a greater or less degree, according to the disparity between the stipulated sum and the actual damage, to prove that such sum was intended as a penalty, and not as stipulated damages. In this case it is

not clear what extent of damage to the lighter was meant by the language used, viz. "damaged to the extent that it cannot be put in the same good condition as when received," and therefore the difference between the actual damage meant, and the stipulated compensation therefor, cannot be determined. It seems to me that the damaged condition of the lighter, intended to be expressed or described by the language employed, was nearly equivalent to a total loss. I therefore think the sum of \$3,500 was not intended as a penalty, but was intended as stipulated damages, unless the agreement may be construed to be a sale of the lighter on the condition that it should be lost, which seems absurd. The agreement is certainly a contract of bailment, giving the bailee only a special property in the lighter during the agreed term of the bailment, the general property remaining in the bailor. In the case of *Westcott v. Thompson*, 18 N. Y. 363, the facts were that a brewer sold 67 barrels of ale to a retailer, upon an agreement that the barrels should be returned after the ale should be drawn from them, but, if any were not returned, the retailer should pay \$2 apiece for them. Held, that the property in the barrels remained in the brewer, and that the agreement to pay \$2 apiece for them if not returned was intended to fix the damages for the loss of such as the retailer should be unable to return. If the property in the lighter remained in the plaintiff until it "was lost and destroyed," how could it pass to the defendant after the lighter was totally lost,—sunk to the bottom of the ocean, or totally consumed by fire? If it could pass under such circumstances, I think the agreement fails to express an intention to that effect. Reading the whole instrument together, it appears to be a contract of bailment, with a stipulation on the part of the bailee to indemnify the bailor against loss of the property from any cause; and, though the stipulation to indemnify in case of loss partakes of the nature of insurance, it is not a contract of insurance in the legal or commercial sense of the word, even conceding that the defendant was authorized by the insurance commissioner to transact insurance business, as required by section 596 of the Political Code. It does not specify the rate of premium, nor the risk or peril insured against, nor the period during which the insurance is to continue, as required by section 2587 of the Civil Code. But, conceding it to be a policy of insurance, it cannot be deemed a "valued policy," since it does not state the value of the property insured, (Civil Code, § 2596,) and therefore the damages to be recovered can only be estimated by proof of the value of the property. It is not claimed, however, by counsel for respondent that the agreement contains either a contract of sale or a contract of insurance.

3. Having determined that the stipulation for the payment of \$3,500 is a "contract by which the amount of damage to be paid" or "compensation to be made" for the loss of or injury to the property bailed was determined in anticipation of such damage, in the sense of section 1670

of the Civil Code, it only remains to be considered whether or not, "from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage," in the sense of section 1671 of the same Code. These sections are as follows: 1670: "Every contract by which the amount of damage to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in the next section." 1671: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Section 1671 has been construed by this court in several cases. In *Eva v. McMahon*, 77 Cal. 467, 19 Pac. Rep. 872, it was held that it is not impracticable nor extremely difficult to fix the actual damage sustained by the breach of a contract to deliver the possession of land; and if no actual damage is sustained none can be recovered, though a stated amount was stipulated for in the contract. In *Brick Co. v. McCre*, 75 Cal. 205, 16 Pac. Rep. 890, it was held that a stipulation in a building contract, by which the contractor agreed to pay the owner a certain sum as liquidated damages for each day's delay in finishing the building after the time appointed in the contract, was within the rule of section 1670, and not within the exception stated in section 1671, and therefore void. In *Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. Rep. 36, there was a contract between plaintiff and defendant, whereby the defendant agreed to deliver to plaintiff on demand between certain dates, 187,500 grain bags, to be sold by plaintiff on commission of 1 per cent., and not to sell said bags to any other person than plaintiff; and further agreed to pay plaintiff 3 cents for each of said number of bags which he should refuse or neglect to deliver to plaintiff, as liquidated damages. The action was to recover such liquidated damages. A breach of the contract by nondelivery of the bags being admitted by the answer, the plaintiff rested its case without other evidence of damage than the agreement to pay three cents per bag as stipulated damages. Held, that a nonsuit was properly granted on the ground that the agreement for stipulated damages was void under sections 1670 and 1671 of the Civil Code. Held, further, that an averment in the complaint that "it was understood and agreed between the plaintiff and defendant at the time of making the contract that, owing to the nature of the case, it would be impracticable and extremely difficult to fix the actual damage," was immaterial, and required no answer. I think "the nature of the case" at bar cannot be distinguished from that of the cases above cited, and that the plaintiff is entitled to recover only his actual damages proximately resulting from the loss of its lighter, which should have been alleged, and, if denied, proved, since the contract fixing the damages at \$3,500 is void. I therefore conclude that the judgment should be reversed, and the cause remand-

ed for a new trial, with leave to the parties to amend their pleadings, if so advised.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings, if so advised.

98 Cal. 19

DAVES et al. v. SOUTHERN PAC. CO. et al. (No. 14,653.)

(Supreme Court of California. March 27, 1893.)

INJURY TO EMPLOYEE—NEGLIGENCE OF FELLOW SERVANT—LIABILITY OF LATTER.

1. Where the section crew of a railroad company side track a hand car with which they are working to clear the main track for an approaching train, and the section foreman, who has unlocked the switch, negligently fails to close it, and the train enters on the side track, and kills a section hand, the section foreman is personally liable in damages for his death.

2. The railroad company is not liable, though the section foreman had power to employ and discharge the men working under him, since the negligence of the foreman in leaving the switch open was, notwithstanding his superior rank, the negligence of a fellow servant, within the meaning of Civil Code, § 1970, providing that an employer is not liable to his employee for losses suffered in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Mrs. Daves and her daughter against the Southern Pacific Company and one Bresnahan for causing the death of James Daves, husband and father of plaintiffs. There was judgment against both defendants, and they appeal. Reversed as to the railway company, and affirmed as to Bresnahan.

John D. Bicknell, for appellants. P. C. Tonner and Hutton & Swanwick, for respondents.

FITZGERALD, J. This action is brought by the widow and minor daughter of James Daves, deceased, to recover damages for loss suffered by his death through the alleged negligence of the defendants. The case was tried by a jury, and a general verdict rendered against the defendants, the Southern Pacific Company and Bresnahan, for \$9,000. It was also specially found by the jury that the defendant Bresnahan did not close the switch after he opened it to let the hand car upon the side track. This appeal is taken by both defendants from the judgment and the order denying their motion for a new trial.

It appears that the corporate defendant owns and operates a line of railroad between the cities of Los Angeles and Colton, in this state. That the defendant Bresnahan was its section foreman, and, as such, had charge of a portion of its track, with power to employ and dis-

charge the men employed to work under him. That James Daves, the deceased, was a section hand employed by Bresnahan to work under him, and was engaged in the performance of his duty as such at the time of the accident which caused his death. That on the morning of the accident, and shortly before it occurred, Bresnahan, with eight of the section men, one of whom was Daves, placed a hand car on the main track for the purpose of going to a point on the section to make repairs. The hand car was then run by them some 300 feet to a switch, which was unlocked and thrown open by Bresnahan, and the hand car passed on to the side track to clear the main track for the west-bound passenger train, then nearly due, and in sight. That immediately thereafter Daves was engaged in doing something about the hand car, and was under the west end of it, when the train came up, and the switch being open, the train ran onto the side track, colliding with the hand car and killing Daves. Whether the switch was closed after it was opened by Bresnahan was a controverted point at the trial, and was submitted specially to the jury. The jury found that he did not close the switch, and, as there is evidence to support the verdict, it follows that the accident was caused by the negligence of Bresnahan, and the verdict against him cannot be disturbed.

As to whether the verdict will be permitted to stand as to the defendant corporation depends upon whether Bresnahan and Daves were fellow servants within the meaning of section 1970 of the Civil Code, which reads as follows: "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." This section was construed by this court in *Collier v. Steinhart*, 51 Cal. 116, and in *McLean v. Mining Co.*, *Id.* 255. In the latter case it appears that the defendant was engaged in blasting rock in its mine. Plaintiff was in its employ as a workman, and one Kegan was its "foreman of all work," with authority to employ and discharge the men working under him. Plaintiff was injured while at work by being struck with a rock thrown from a blast, through Kegan's negligence in failing to notify him that the blast was to be fired. The court, in the application of this section to these facts, say: "The injury to the plaintiff was caused by the negligence of Kegan, the foreman of defendant, who was a fellow servant with the plaintiff,—'another person employed by the same employer in the same general business,'—that is, the business of working the mine of the defendant, Kegan being in the blasting, and the plaintiff in the hydraulic, department of the 'general business.' The section of the Civil Code already cited declares that to such a case the rule of respondeat superior shall not apply, unless there has been want of ordinary care upon the part

of the defendant in the selection of the culpable employee. But the fact was, as found by the court below, that there had been no such want of ordinary care on the part of the defendant; Kegan, the 'foreman' being found to be 'skillful, competent,' and a proper person to perform the duties with which he was charged. 'The law of this state respecting this subject,' as set forth in the Code referred to, recognizes no distinction growing out of the grades of employment of the respective employees; nor does it give any effect to the circumstance that the fellow servant through whose negligence the injury came was the superior of the plaintiff in the general service in which they were in common engaged; and the alleged distinction in this respect insisted upon by the appellant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands. *Collier v. Steinhart*, supra.

In *Congrave v. Railroad Co.*, 88 Cal. 360, 26 Pac. Rep. 175, it was said by Justice McFarland that section 1970 "not only restates the rule first established by judicial decision as to injury received through the negligence of a fellow servant, but it clears away to a great extent the difficulties which may have existed as to the meaning of 'fellow servants.' It declares them to be those employed 'in the same general business.'" And in citing with approval *McLean v. Mining Co.*, supra, he uses the following language: "It is clear that in deciding this case the court determined that the Code swept away the distinctions which appear in some of the 'adjudged cases' on the subject of fellow servants. *Collier v. Steinhart*, 51 Cal. 116, referred to in the opinion, is still stronger to the point decided. Both of these cases were approved in *McDonald v. Hazeltine*, 53 Cal. 35, which was also a case where an employee was injured through the carelessness of a foreman. These cases were again followed and approved in *Stephens v. Doe*, 73 Cal. 26, 14 Pac. Rep. 378, where it was held that 'the foreman of a mine and a miner employed to work under his directions are fellow servants; and the owner of the mine is not liable for injuries caused to the latter through the negligence of the foreman, unless he failed to use ordinary care in the selection of the foreman.' The same doctrine was announced in *Brown v. Railroad Co.*, 72 Cal. 523, 14 Pac. Rep. 138, and *Fagundes v. Railroad Co.*, 79 Cal. 97, 21 Pac. Rep. 437."

In the *Fagundes Case*, just cited, plaintiff's intestate was a laborer employed by the defendant to work on its track. The offending servants were, respectively, the conductor of a train and a track walker, whose duty it was "to see that the track was clear of obstructions, and to signal when they existed." The deceased lost his life through the track walker's negligent interference with a switch and the conductor's negligence "in not being sufficiently on the alert to prevent" such interference. In that case the court held that, as "there is nothing in the evidence tending to show any negligence on the part of the defendant in the selection of the employes whose carelessness caused

the casualty," it could not be held responsible.

The principle declared in the section of the Code referred to, and upon which the decisions in the foregoing cases rested, was settled by the highest judicial authority in this country long before the adoption of the Code, but the remarkable contrariety of judicial decisions upon the subject in other states has arisen out of the great difficulty met with in the application of it to the facts of the particular case to be decided. But in the consideration and application of this principle to the case before us we do not propose to enter into a discussion of the relation which the section foreman of a railroad corporation sustains towards his employer with respect to the duties pertaining to his employment, except in so far as the subject of such relation is necessary to be considered in connection with the character of the particular act itself by which the accident was caused, for the purpose of determining whether such act was a personal duty which the defendant corporation owed to the deceased as its employe, or whether the loss caused by the act complained of was "in consequence of the negligence of another person employed by the same employer in the same general business." This must be determined, not from the grade or rank of the section foreman, but from the character of the act performed by him. If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant, in the performance of such duty, acted as the representative or agent of his employer, for which the employer is responsible; if it was not, then they were fellow servants, and the offending servant is alone responsible.

The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of employes as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant, so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employe by his contract of employment. Was, then, the act or omission which caused the injury a personal duty which the defendant corporation owed to the deceased while he was engaged in the performance of his duties as its employe? If it was, and the deceased was not at fault, then the corporate defendant is liable; otherwise not. It appears that Bresnahan, through whose negligence it is clear that Daves was killed, was the section foreman of the defendant corpora-

tion, and, as such, had charge of about eight miles of its track, including that portion of it where the accident occurred. It was his duty to keep the track and switches in repair and order, and free from obstructions, so as to practically insure the safety of trains passing over it. He had undisputed control of the section men employed to work under him, and was vested with authority to employ and discharge them. As to whether he was the representative of the employer, with respect to the performance of these duties, we are not called upon, in view of the facts, to decide, for the reason that the act which caused the injury out of which this action arises, is clearly not embraced within them. It is not claimed that the corporation did not exercise ordinary care in the selection of Bresnahan as foreman, or that the switch which he negligently left open, and by which the loss was suffered, was unsuitable or defective. But it is insisted that the corporate defendant violated a duty which it owed to Daves by not providing him with a reasonably safe place to perform his work; that the place was not safe because "a train was coming when the switch was open," in consequence of which he lost his life. The place, as we have seen, where the accident occurred, was the side track on which the hand car had been run from the main track to avoid the passenger train, then almost due, and in sight. The place was, of itself, in the first instance, a reasonably safe one, and was resorted to, under the circumstances, for that very reason. The track and switches on Bresnahan's section, in so far as anything appears to the contrary, were in good condition, and so was the hand car, with the exception of some disarrangement in the brake, which, however, had nothing to do with the injury. The servants were sufficient in number, and competent for the purposes of the employment. It is plain, therefore, that the death of Daves was not caused by the violation of any duty which the master owed to him, but by the negligent act of Bresnahan, who, with respect to the performance of that particular act, was the fellow servant of Daves. If a brakeman or trainman, who it appears were intrusted with keys to the switch, or one of the section men, had been guilty of the negligent act complained of, we do not think that it would be seriously contended here that such act was the act of the master; and such would undoubtedly be the case if a switchman had been regularly employed to attend that switch, and he negligently performed the act referred to, instead of Bresnahan, for a switchman in using and operating a switch is no more the agent of the master than is an engineer who is engaged in running a locomotive. It is the duty of the master to provide a suitable switch and competent servants for its operation. When he has done this his duty is at an end, and his liability ceases. The keeping of it in position and its use and operation is a duty belonging to the servant, the negligent performance of which, to the injury of another servant employed in the same general business, is a risk which the injured servant assumed

when he took the employment, and for which the master is not liable. It is not denied that Bresnahan was a competent and experienced foreman, so that there was no neglect of duty by the master with respect to his selection. But the negligent act complained of was performed by him in the course of the work upon which they were all engaged, and by one who, so far as the particular act was concerned, was clearly not the agent of the master, but the fellow servant of Daves. The place was therefore made dangerous by the culpable negligence of a fellow servant, and this, notwithstanding the fact that his grade or rank at the time happened to be superior to that of Daves. It therefore follows that the consequences flowing from a place made unsafe under such circumstances are not chargeable to the master. The duty violated did not relate to the place of work, but to the negligent use of an appliance or instrumentality which was proper and suitable for the purpose for which it was furnished by the master, and such use of it was simply a detail of the work or management of the business; therefore a duty of the servant, which he, and not the master, was bound to perform. From these views it is clear that the negligence of Bresnahan in leaving the switch open in the manner and with the unfortunate result indicated was, notwithstanding his superior rank, the negligence of a fellow servant, within the meaning of section 1970 of the Civil Code; therefore a risk impliedly assumed by Daves when he took the employment, for which the corporate defendant cannot be held responsible. As this disposes of the controlling question in the case, the others discussed in relation to the instructions are not necessary to be considered. Let the judgment and order be affirmed as to the defendant Bresnahan, and reversed as to the corporate defendant, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DEHAVEN, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

(97 Cal. 637)

McSHERRY v. PENNSYLVANIA CONSOLIDATED GOLD-MIN. CO. et al. (No. 15-113.)

(Supreme Court of California. March 25, 1893.)

CHANGE OF VENUE—APPLICATION—AFFIDAVIT OF MERITS—JUSTIFICATION OF SURETIES IN INJUNCTION BOND.

1. A motion for a change of venue, on the ground that it was not brought in the proper county, will not be denied on the ground that an impartial trial could not be had in the proper county, or that the convenience of witnesses and the ends of justice would be promoted by the retention of the action in the county where it was brought, as it would require a premature decision on such questions. *Cook v. Pendergast*, 61 Cal. 72, followed.

2. All the defendants need not join in an application for a change of venue. *Rathgeb v. Tiscornia*, 4 Pac. Rep. 987, 66 Cal. 96, followed.

3. On an application for a change of venue, the affidavit of merits made by one of the defendants recited that he made it for himself

and for all the defendants, at their request, and that he and the other defendants fully stated the facts of the case to their attorneys, who advised them that they had a good defense on the merits, which all of them believed to be true. The affidavit was used on the hearing on behalf of all of the defendants. *Held*, that it was not subject to the objection that it was made by one of the defendants only.

4. The complaint in an action against a corporation alleged that the principal office was in S. county, where the action was brought. The affidavit of merits made by defendant's president, on an application for a change of venue on the ground that the action was brought in the wrong county, stated that defendant's principal office was in N. county. Plaintiff, who had been general manager, a director, and owner of a majority of the stock of defendant, in his opposing affidavit, did not notice such statement in the moving affidavit. *Held*, that the averment of the complaint that the principal office was in S. county would be treated as sham.

5. Code Civil Proc. § 529, provides that, when the sufficiency of sureties in an injunction bond are excepted to, the sureties, "upon notice to the defendant of not less than two nor more than five days, must justify." *Held*, that notice of justification must be given not less than two, nor more than five, days after filing and service of the notice of exception to the sufficiency of the sureties.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by William B. McSherry against the Pennsylvania Consolidated Gold-Mining Company and others. There was an order denying defendants' motion for a change of the place of trial, and an order denying their motion to dissolve an injunction, and defendants appeal. Reversed.

Kitts & Bowman, for appellants. Joseph P. Kelly, (H. I. Kowalsky, of counsel,) for respondent.

FITZGERALD, J. The record in this case contains two appeals: One from an order denying defendants' motion for a change of place of trial, the other from an order denying defendants' motion to dissolve an injunction. The action was for an accounting, and for the recovery of certain shares of the capital stock of the defendant corporation, alleged to have been illegally sold for delinquent assessments to the said corporation, who thereafter declared a stock dividend, and distributed 30 per cent. of plaintiff's stock to its stockholders, the individual defendants herein, who, it is alleged, fraudulently conspired together, and in pursuance of such conspiracy did fraudulently deprive plaintiff of his stock so sold and distributed as aforesaid. Plaintiff also obtained an order restraining and enjoining all of the defendants from disposing of any of said stock, and from levying any further assessments upon the outstanding capital stock of the defendant corporation, until the termination of this action. The application for a change of place of trial was made by each and all of the defendants at the time of filing their demurrer, and before answering, on the ground "that the county designated in the complaint, viz. the city and county of San Francisco, is not the proper county." The affidavit upon which the application was based shows

that at the time of the commencement of the action, and afterwards, the principal and only place of business of the defendant corporation, and the place of residence of each of the other defendants, was in Nevada county, except the defendant Rhodes, whose place of residence was in Sacramento county. The application was resisted by opposing affidavits on the grounds (1) that an impartial trial of the case could not be had in Nevada county; (2) that the convenience of witnesses and the ends of justice would be promoted by the retention of the case; (3) that the defendant Rhodes did not join in the application for the reason that he was never served with process, and never appeared or authorized any one to appear for or represent him, in this action; (4) insufficiency of the affidavit of merits; and (5) that the complaint, which is verified, shows that the principal place of business of the corporate defendant is in the city and county of San Francisco.

The first and second grounds of objection are disposed of by the case of *Cook v. Pendergast*, 61 Cal. 72, in which it was held that, "independent of an express provision of the statute, the superior court ought not to be called on, before issues of fact have been joined, to decide that the convenience of witnesses will be promoted by a change of the place of trial, or that a case cannot be fairly and impartially tried in the county in which it is pending. The Code of Civil Procedure does not require a decision which, in the nature of things, must ordinarily be premature. * * *

If the motion to change the place of trial is brought to a hearing before he has answered, the plaintiff cannot by cross motion demand the retention of the action in the county where it is pending, on the ground of convenience," etc. See, also, *Heald v. Hendy*, 65 Cal. 321, 4 Pac. Rep. 27. With reference to the objection that Rhodes was never served with process, and that he never appeared or authorized any one to appear for him, it is sufficient to say that the record shows that the demand for a change of place of trial was signed by him, and that the attorneys herein, whether authorized to do so or not, did appear for and represent him. But, let us concede that he was never served, and that he never appeared, and that the attorneys who appeared for him did so without authority, and that these facts were shown in the proper way, which, of course, is not the case. Still the claim that, when a demand for a change of venue is made, all the defendants must join in the demand, cannot be sustained. This point was expressly decided adversely to plaintiff's contention in *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. Rep. 987. Nor is the contention that the affidavit of merits is insufficient because it was made by one of the defendants, only, well founded. The affidavit, it is true, was made by Wilhelm, the president of the defendant corporation, and one of the individual defendants in the action. But it is expressly stated in the affidavit that he makes it for himself, and for all and each of the defendants, and at their request, and, further, that he and the other defend-

ants have fully and fairly stated the facts of the case to their attorneys herein, who, upon such statement, advised each and all of them that they had a good and substantial defense upon the merits of the action, which each and all of them verily believed to be true. The affidavit was used at the hearing of the motion in behalf of each and all of the defendants, and was in all respects sufficient. *Rowland v. Coyne*, 55 Cal. 1; *Palmer v. Barclay*, 92 Cal. 199, 28 Pac. Rep. 226; *People v. Larue*, 66 Cal. 238, 5 Pac. Rep. 157.

The allegation in the complaint that "plaintiff is informed and believes that the defendant corporation has its principal office in San Francisco," is not only immaterial, but when viewed in connection with plaintiff's previous relations with the corporation, having been general manager, director, and owner of a majority of its capital stock, and the positive and direct statement to the contrary made by the president of the corporation in the affidavit of merits, of which no notice was taken by plaintiff in his opposing affidavit, entitles it to be treated as, we think it really is, a sham allegation. The claim, therefore, that there is a conflict on the question as to the place of residence is without any foundation whatever. The place of residence of a corporation is in the county where its principal place of business is situated, (*Jenkins v. Stage Co.*, 22 Cal. 538; *Cohn v. Railroad Co.*, 71 Cal. 488, 12 Pac. Rep. 498; *Buck v. Eureka City*, [Cal.] 31 Pac. Rep. 845;) and that is the proper county, within the meaning of section 395, Code Civil Proc., where actions against it of this character must be tried, subject, however, to the other grounds of this and the following section, and of the provisions of section 16, art. 12 of the constitution; also to the power of the court to change the place of trial as provided in the Code. Upon the showing thus made the defendants were entitled, as a matter of right, to have the place of trial changed to Nevada county, and the court erred in denying their motion to change the place of trial to that county. The order appealed from is therefore reversed, and the court below directed to make an order granting defendants' motion for a change of the place of trial of this action to Nevada county.

The motion to dissolve the injunction was made on the ground that plaintiff's sureties failed to justify within a reasonable time, or at all, after notice of exception to the sufficiency of sureties was given. It appears that the injunction was served on February 29, 1892, and the notice of exception on the 5th day of March following. But no notice of justification was served or filed up to the 20th day of the last-named month, or at all. The notice of motion to dissolve was thereafter served and filed, and on the 1st day of April the motion was heard and denied by the court. Section 529 of the Code of Civil Procedure provides, among other things, that, when the sufficiency of sureties is "excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same man-

ner as upon bail on arrest, and, upon failure to justify at the time and place appointed, the order granting an injunction shall be dissolved." This section, in view of the damages that may result from the improper issuance of an injunction, must be construed to mean that notice of justification must be given to the defendant of not less than two nor more than five days after the filing and serving of the notice of exception to the sufficiency of the sureties; and the plaintiff's sureties must justify within five days after said notice of exception is given, or the injunction will upon motion be dissolved. But, as it is possible that the respondent may have been misled by correspondence had between his attorney and the attorneys for appellants as to the time agreed upon between them when the sureties should justify, the order will be reversed, with directions to the court below to make an order granting the motion to dissolve the injunction unless plaintiff's sureties shall justify, upon proper notice to the defendants, within five days after the filing of the remittitur.

So ordered

We concur: MCFARLAND, J.; DE HAVEN, J.

(97 Cal. 659)

VEJAR et al. v. MOUND CITY LAND & WATER ASS'N et al. (No. 19,100.)

(Supreme Court of California. March 24, 1893.)

DESCRIPTION IN DEED — PAROL EVIDENCE—LAND CONVEYED.

1. In 1837 the Mexican government granted P. and V. a tract called the "San Jose Rancho," and in 1840 regranted the same land and an additional league to P., V., and A. In 1846 partition was made, and, in proceedings thereafter for confirmation of the grants, separate patents were issued for each tract. In 1864 V. conveyed his interest in the Rancho San Jose, the description being the "rancho known as 'San Jose,'" and referring for further description to the Mexican government grant, the confirmation thereof by the United States land commission and district court, and the government survey. In such grant the parties were declared owners of one league "in augmentation of the place called 'San Jose.'" In proceedings before the land commissioners the entire tract was called "San Jose;" and the deed of confirmation to V. declared that the land confirmed is a portion of the place called "San Jose." The record in the confirmation proceedings contained a map compiled from exhibits on file in the office of the United States surveyor general, purporting to give the boundaries of the Rancho San Jose, Rancho Azusa, and addition to Rancho San Jose as fixed by the United States surveyor. *Held*, that there was such ambiguity in the description of the land conveyed as to warrant the admission of extrinsic evidence to show what was intended to be conveyed by the words "Rancho San Jose."

2. On an issue as to whether V. intended to convey his interest in the additional league, it appeared that some years prior to such conveyance he had made a lease to the grantees in such conveyance, wherein the property was described as the "Rancho San Jose," being the same land conveyed to V., P., and A. by the Mexican government. In a mortgage by V. and wife the property was described as the "Rancho San Jose," being the same originally

granted to V. and P., and afterwards regranted to V., P., and A., with an addition of one league. There was only one grant of land to V., P., and A. by the Mexican government. A nephew of P. testified that he had known the Rancho San Jose since the grant was made by the Mexican government, and that the two tracts were considered one rancho. Other witnesses also testified that the two tracts were known as the "Rancho San Jose." *Held*, that V. intended to include his interest in the additional league in such conveyance.

3. P. devised to his wife "the land of the rancho," and in the probate proceedings a decree was entered giving the widow 3,335 acres in the Rancho San Jose. *Held* to show that P. understood that he had an interest in only one rancho,—the "San Jose,"—and that included whatever interest he had in the additional league.

4. In 1875 separate patents were issued to the Rancho San Jose, and to the additional league, under the name of the "San Jose addition;" and in 1877 V.'s widow executed a conveyance of her interest in the "Rancho San Jose." A nephew of P. testified that, after the grant of the original league, it was always considered one rancho. Other witnesses testified that they had never heard the additional league spoken of other than San Jose addition until 1881. *Held*, that at the time the widow made such conveyance the two tracts were not well known by different names, and that the widow must be deemed to have included in the tract conveyed the additional league.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Partition by Ramon Vejar and others against the Mound City Land & Water Association and others. There was judgment for defendants, and plaintiffs appeal. Affirmed.

A. J. King, R. Dunnigan, Shirley C. Ward, and Anderson, Fitzgerald & Anderson, for appellants. Chapman & Hendrick and Walter J. Hughes, for respondents.

PATERSON, J. The plaintiffs brought this action to partition a tract of land now known as the "Rancho San Jose Addition," a Mexican grant, containing one league of land. The defendant San Jose Ranch Company has succeeded to all the rights of the Mound City Land & Water Association, and the only contest herein is between it and those claiming under Ricardo Vejar and Ygnacio Palomares. On April 15, 1837, Alvarado, governor ad interim of California, granted to Palomares and Vejar a tract of land known by the name of "San Jose," and juridical possession thereof was given to them August 3, 1837. The same tract was on March 14, 1840, regranted to them and one Luis Arenas, together with a square league of land in addition to the former grant. This second grant was made in accordance with an arrangement entered into by the three grantees, upon suggestion of the governor, who had promised Palomares and Vejar that, if they would admit Arenas into partnership with them, he would give the three an additional league adjoining the San Jose. In his petition to the prefect, setting forth the understanding above stated, and praying for the additional league promised by the governor, Arenas spoke of the land as "the part called 'Azusa,' in the direction of the Mission San

Gabriel." The prefect consulted Palomares and Vejar, and they replied that they had agreed to admit Arenas as a partner in the Rancho of San Jose, in consequence of the recommendation of the governor, by a letter sent to them, "offering for their so doing to grant a league or more of land in addition out of the place, towards the direction called 'Azusa,' in the direction of the Mission of San Gabriel, that being the part most proper for said extension." Juridical possession of the land was given to the three grantees on May 7, 1840. In 1846 a temporary partition of the lands covered by the two grants was had between the three parties above named. After due proceedings had before the board of land commissioners and the United States district court, for the confirmation of the grants, separate patents were issued for each tract of land. By deed dated April 30, 1864, Ricardo Vejar conveyed all his interest in the Rancho San Jose to H. Tischler and I. Schlesinger. The descriptive language of this deed is as follows: "All that certain rancho, tract, and parcel of land situate, lying, and being in the county of Los Angeles, state aforesaid, known, called, and described as the 'Rancho of San Jose,' for a more particular and accurate description reference being had to the grant of the same by the Mexican government, the confirmation thereof by the United States land commission, and the district court of the United States for the southern district of California, and the survey of the same by the government of the United States, containing two leagues, be the same more or less." It is claimed by the respondent herein,—the San Jose Ranch Company,—that this deed conveyed all of Ricardo Vejar's interest both in the San Jose ranch and in the one league additional thereto now known as the "San Jose addition." Plaintiffs and other appellants claim, however, that the deed passed only Vejar's interest in the original grant of the Rancho San Jose, and that the description named in the deed as the "Rancho of San Jose," when read in the light of the language of the documents referred to in the deed for "a more particular and accurate description," viz. the grant, the confirmation, and the survey, is certain and unambiguous, and that the court below erred in not limiting the introduction of evidence in explanation of the description to the documents referred to in the deed; that the court should not have allowed extraneous evidence to be introduced to show what was intended to be conveyed by the use of the words "Rancho San Jose." It must be conceded that, if the ambiguity of the description found in the deed is removed by the language of the documents referred to therein, the contention of the appellants is sound, for the grant, the confirmation, and the survey are as much a part of the deed as if they had been fully set forth therein. It becomes necessary, therefore, for us to look at these documents.

In their original petition to the governor, Palomares and Vejar asked him to grant the place known by the name of 'San Jose,' distant some six leagues from

the Ex-Mission of San Gabriel. The committee on vacant land reported favorably, and on April 15, 1837, they were declared to be the owners "of the place called 'San Jose,'" and juridical possession of the "place or rancho called 'San Jose'" was given August 14, 1837. The three grantees were declared to be "the owners in property of the said place called 'San Jose,' with the addition of one league." Again, the governor, in directing the issuance of title to the property, stated: "Ygnacio Palomares, Ricardo Vejar, and Louis Arenas are declared owners in property of one league (de ganado mayor) as an augmentation to the place called 'San Jose,' which was adjudicated to the two first named. Let the title in property of the said place with the augmentation referred to be again issued in favor of the three individuals mentioned." The decree of confirmation to Vejar states that "the land of which confirmation is hereby made is a portion of the place called 'San Jose,' * * * and is bounded and described as follows, according to the map or diagram of the same annexed to the testimonial, showing a partition of the place called 'San Jose' between Ygnacio Palomares, Henry Dalton, and Ricardo Vejar;" and in his certificate the secretary of the board certified that the transcript of the record contained a copy of the evidence on file in case No. 338, wherein Vejar is a claimant against the United States for "the place known as 'San Jose.'" In their opinion in Dalton vs. The United States the board of land commissioners state that the claimant has presented two grants: First, one in which the property granted is designated by the name of "San Jose;" second, a grant made to Palomares, Vejar, and Arenas, dated March 14, 1840, which grant covers the land conceded by the first grant, "together with one square league more of land in addition to the former grant." In some of the proceedings the additional league granted to the three grantees named is called "Azusa." There is in the record a map compiled by Thompson in 1877, from maps and exhibits on file in the office of the United States surveyor-general, which purports to give the boundaries of the Rancho San Jose, Rancho Azusa, and addition to Rancho San Jose, as fixed by United States deputy surveyors. In the proceedings for the confirmation before the board of land commissioners the entire tract is uniformly referred to as the "Rancho San Jose." The only evidence we have of the district court decree is in the recitals of the patent, a copy of which is set forth in the transcript. These recitals refer to the petitions for confirmation, the basis thereof, the action of the land commissioners, with a description of the land, the appeal to the district court, and the decree of the latter that the decision of the board be affirmed, the further adjudication by said court that the petitioner was entitled to an equal, undivided third part of the lands granted by the governor on April 15, 1837, and regranted in March, 1840; and the patent closes with a grant to the three owners and their heirs of the tract of land known by the name of "addition to San Jose;" but this patent was

issued on the 4th day of December, 1875, and we have been unable to find such a designation of the place anywhere in the proceedings from the inception of the title down to the issuance of the patent.

Now, what is meant by the terms "addition to Rancho San Jose," and "augmentation to the place called 'San Jose?'" The term "augmentation" is defined to mean "the act of increasing or making larger by addition, expansion, or dilation; the act of adding to or enlarging; the state or condition of being made larger." Cent. Dict. A thing increased is the same thing made larger, and, in speaking of the territory which augmented the San Jose rancho, no simpler language could have been used than "addition to the Rancho San Jose," and thus it is designated by the United States surveyors in their maps. Appellants contend it is shown that the "league in augmentation" did not become a portion of the Rancho San Jose as understood by the Mexican government, because after the "league in augmentation" of the grant of the Rancho San Jose had been made to the three grantees, and juridical possession given to them of it under the name of "Azusa," a grant was made to Arenas personally of another league, which used the language in "augmentation of the place called 'Azusa,'" which latter place was owned by the three; that no one would for a moment suppose the personal grant to Arenas was the same grant that was made to the three, or a portion of the same, simply because spoken of as being "in augmentation" of it. But here appellants' counsel goes beyond the bounds of legitimate argument upon the question under consideration, which is confined to a discussion of the effect of the three documents above referred to in construing the meaning of the term "Rancho of San Jose," as used in the deed. If the subsequent grant to Arenas can be used in determining the question as to what Vejar intended to convey, it must be conceded that the ruling of the court in receiving other evidence dehors the deed was correct. It was proper for the court to consider this point now made by appellants in determining upon all the evidence—the deed, the three documents referred to, and the evidence received dehors the record—what Vejar intended to convey by his deed of the Rancho San Jose, and we presume it was considered in that connection.

Appellants also claim that a conclusive reason why the two tracts "were not and cannot be treated as all a part of one grant is that the original grant of 1837 of the place called 'San Jose' was a complete and perfect grant under the Mexican law, and thereby the entire title of the government in such land had become extinguished, and therefore as to such tract of land no title whatever passed by the regrant of 1840, in connection with the grant of the additional league." It is doubtless true, as a matter of law, that the original grant to Palomares and Vejar, the confirmation by the departmental assembly, and the juridical possession which was given prior to the making of the grant of 1840, made the grant a perfect

one, and no additional title was acquired by Palomares and Vejar to the land therein included; but the question is not to the legal effect of the original grant, but as to what lands Vejar intended to include within the language used in his deed of April 30, 1864, viz.: "Known, called, and described as the 'Rancho San Jose.'" A rancho made up of several grants may acquire a name, and pass by a deed under the same.

We do not think that a reference to the documents referred to in the deed removes the ambiguity of the description of the contract. The court did not err, therefore, in admitting extrinsic evidence, and we pass to a consideration of the question whether such evidence supports the finding of the court.

The names "place called 'San Jose,'" "Rancho San Jose," "place called 'Azusa,'" and "Rancho Azusa," are used very indefinitely in the proceedings. The board of land commissioners, in *Dalton vs. The United States*, referring to the two grants, say that neither of them designates "the land granted by the name of 'Azusa,' and that name seems to have been applied to the place occupied first by Arenas, and then by Dalton, his grantee, and to have comprised both the portion of San Jose and the additional league of land which was covered by the grant made to said Arenas alone." The defendants read in evidence a lease made by Vejar to Tischler and Schlesinger, dated April 19, 1861, (three years prior to the execution of the conveyance to them,) in which he described the property as the "Rancho San Jose, being the same that was granted to the party of the first part, Ygnacio Palomares, and to Luis Arenas, by Governor Alvarado, March 14, 1840, and confirmed by decree of the United States district court for the southern district of California, February 25, 1856." As there never was more than one grant by Gov. Alvarado to the three grantees named, it is certain that Vejar in this description included the property in controversy here,—the addition to the Rancho San Jose. On August 19, 1861, Vejar and wife executed and delivered to Tischler and Schlesinger a mortgage upon "that certain tract of land known as the 'Rancho of San Jose,' being the same that was originally granted by Juan B. Alvarado, governor of California, to Ricardo Vejar, one of the parties of the first part, and Ygnacio Palomares, on the 15th day of April, A. D. 1837, * * * and which was regrant by the said Governor Alvarado to said Vejar, Palomares, and one Luis Arenas on the 14th day of March, A. D. 1840, together with an addition of one league of land on the west, * * * and being the same land which was confirmed to Ricardo Vejar by decree of the United States district court for the southern district of California, on February 25, 1856." These two instruments we think show very clearly that Vejar understood that all the land in controversy was included within the Rancho San Jose. In their petition to the judge and first alcalde, Vejar and Dalton represented themselves as owners of the Rancho San Jose, and said "that, the property in said rancho be-

ing in three individual shares, one of which belongs to Don Ygnacio Palomares, and it being for the interest of those which we represent to make a partition of the lands of said rancho," they hope an order will be made to partition the same. The partition prayed for, however, was for the whole place, including the additional league. Palomares was notified that such an application had been made, and, "when informed of its contents, said that he was not opposed to the partition of the Rancho of San Jose, as a joint owner, he receiving the part which might belong to him," but was opposed to paying his share of the expenses, "on account of having already made greater payments in patenting the said rancho." The judge referred to the land to be partitioned as the "Rancho San Jose," and, speaking of his proceedings, said that Vejar and Dalton "were satisfied with their portions as the third part of the Rancho of San Jose, and remained in possession thereof," but Palomares "rudely and disrespectfully went away saying that he would not agree to it." One Francisco Alvarado testified on behalf of the defendants that he had known the Rancho San Jose ever since and before it was granted by the Mexican government; that Palomares was his uncle; that the two tracts of land were always considered as one ranch; that, after the grant of the additional league, they considered the ranch so much larger, and he never heard his uncle speak of the addition as being a separate ranch, but only that the ranch was larger. Ygnacio Alvarado testified that he was acquainted with the lands prior to 1837; that he lived on the Rancho San Jose in 1865, and for many years prior thereto; that he never knew of any other ranch than the Rancho San Jose. W. R. Rowland testified that he had a conversation with Vejar subsequent to his conveyance to Tischler and Schlesinger and while he lived on the Puente ranch, and that in said conversation Vejar stated that he had no other lands, and wanted to remain there during his lifetime, and the witness gave him permission to do so. J. M. Fears testified that he had known the San Jose ranch for about 25 years, and had just recently heard of the San Jose addition,—in the last year or two. Louis Phillips testified that Vejar died in 1880 or 1881; that no administration on the estate of Vejar was ever had; that Vejar left the San Jose rancho in 1864, after his conveyance to T. and S.; that he never heard Vejar speak of the San Jose addition; that neither Dalton nor Palomares, both of whom showed him the boundaries of the lands which they claimed under the whole partition, ever said anything to him about the San Jose addition. M. F. Coronel testified that he knew Vejar and Palomares in their lifetime, and the San Jose ranch on which they resided; "that the San Jose ranch included where Vejar and Palomares lived and the additional league; that it was all called 'Rancho San Jose,' but it had different names,—'San Jose de Palomares,' and 'San Jose de Penascoso,' and 'San Jose de Vejar,'" that the first he knew of the San Jose addition was when Dalton informed him about it.

It is impossible to believe that Vejar, in his straitened circumstances from 1864 down to the time of his death, would have remained away from the lands in controversy under the circumstances if he had believed that he still retained an interest therein. He had several children, but none of them ever attempted to take possession of the land, or, so far as the record shows, to claim any interest therein. Vejar was claiming land in the Nogales and Puente ranches, and, when the decision in the controversy went against him, he begged permission of Rowland to remain on the premises he had so long occupied, and stated that he wanted to remain there during his lifetime because he had no other lands. The conduct of the parties subsequent to the making of a deed is competent and often very material evidence in determining in case of an ambiguity what was intended to be conveyed. *Mulford v. Le Franc*, 26 Cal. 88. Upon all the evidence in the case, we fail to see how the court could have found in accordance with the contention of the appellants.

It remains to be considered whether the claimants under Palomares—some of whom are plaintiffs and some defendants, and all are appellants—have been divested of their interest in the San Jose addition, as heirs of Ygnacio Palomares, one of the three original grantees. The court below, in its opinion, (a copy of which is printed in the briefs,) did not consider this question. Whether it was deemed conceded by appellants, or whether it appeared too clear for argument that there was no merit in their claim, does not appear. But the fact is that the court found against their contention. The evidence, however, on this branch of the case is not so clear and convincing as it is with respect to the claim of other appellants. Ygnacio Palomares died in 1864, and left a will in which he devised to his wife "the land of the rancho," excepting therefrom certain portions. The will was duly admitted to probate. The inventory, properly authenticated, described the real estate as 3,335 acres "of the Rancho de San Jose." No other reference is made to the Rancho San Jose, nor does the name "Rancho San Jose addition" appear anywhere in the proceedings. The final decree was entered in the matter of the estate, distributing the property under the same description, viz. 3,335 acres in the Rancho San Jose, and also any other property, to the widow, whether then known or not known. It is claimed by appellants herein that no part of the addition to the Rancho San Jose passed by said will and the proceedings had thereon. This contention cannot be sustained. The will refers to the "Rancho,"—a general term for the land held and occupied by him,—and which he desired his wife to take; and the evidence quoted above shows that he understood that he had an interest in but one rancho, viz. the San Jose; that the latter included whatever interest he had in the San Jose addition. Appellants insist that the construction which we have placed above upon the term "San Jose addition" cannot be applied to instruments which were executed and delivered after the issuance

of the patent to the San Jose addition in December, 1875. It is claimed, therefore, that the deed of the widow Concepcion Palomares, of October, 1877, by which she conveyed to Francisco Palomares all her right, title, and interest in and to the "Rancho de San Jose," cannot be held to have included in the tract conveyed the San Jose addition. The determination of this contention again depends upon the solution of the question as to what the grantor (the widow) meant and intended to convey by the use of the description employed in the deed. It is true her conveyance was executed two years after the patents had issued for separate tracts, one under the name of "San Jose," and the other under the name of "San Jose addition;" but we cannot agree with counsel for appellants in saying that both tracts "were then well known by said respective names." The evidence, we think, fails to show this, and sufficiently establishes the conclusion of the court that the grantor intended to convey, not only her interest in the San Jose rancho, but in the addition thereto. Francisco Alvarado, a nephew of Ygnacio Palomares, testified that, after the grant of the additional league, it was always considered as one ranch; that his uncle never spoke of it as a separate ranch; and that he never heard that the league was a separate ranch until he came into this case. Ygnacio Palomares never heard about what is called the "addition" or "augmentation" until two or three years before the trial. Mr. Rowland, who has lived on an adjoining ranch since 1846, never heard of the San Jose addition until after Mr. Slausson had commenced suit for partition in 1881 or 1882. The witness Fears stated that he had heard of the San Jose addition—just heard it spoken of; that there was such a thing—within a year or two before the trial. The only evidence offered in rebuttal of this testimony were certain deeds and agreements between Dalton and others, and to which neither Mrs. Palomares nor her son Francisco were parties, and the testimony of the witness King, tending merely to show that Dalton always treated the San Jose as one tract, and the San Jose addition as another.

Judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

98 Cal. 117

KRUMDICK v. CRUMP, Judge. (No. 15,275.)
(Supreme Court of California. April 8, 1893.)**CHANGE OF VENUE—DISQUALIFICATION OF JUDGE.**

Code Civil Proc. § 398, providing that if an action is pending, and the judge is disqualified, it must be transferred for trial to a court the parties may agree upon, or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, leaves the disqualified judge, in such cases, no discretion, but makes it his duty to transfer the action at once, on motion. *Upton v. Upton*, 29 Pac. Rep. 411, 94 Cal. 26, and *Paige v. Carroll*, 61 Cal. 216, distinguished.

Department 2.

Application by Jennette Krumdick, executrix, for a writ of mandamus to compel R. W. Crump, judge of the superior court of Lake county, to issue an order transferring a certain cause for trial to another court. Writ granted.

J. H. Seawell, Thos. B. Bond, and A. Yell, for petitioner. Clay W. Taylor and J. Chadbourne, for respondent.

BEATTY, C. J. This is an original proceeding by mandamus. The petitioner is plaintiff in an action (*Krumdick vs. White*) commenced in the superior court of Lake county in the year 1887. The respondent, who was the attorney for the defendant in that action, has been since January, 1891, judge of the superior court of Lake county. In December, 1891, the judgment of the superior court of Lake county in the action referred to was reversed by this court, and the cause remanded for a new trial. *Krumdick v. White*, 92 Cal. 143, 28 Pac. Rep. 219. On the 14th of January, 1892, the remittitur was filed in the superior court, and on the 16th of the same month Mrs. Krumdick's attorney duly notified the defendant White that she would on the 1st of February, 1892, move the superior court of Lake county for an order transferring said cause for trial to the nearest superior court where the like objection or cause for removal did not exist, upon the ground that the judge of the superior court of Lake county, the respondent herein, was disqualified. This notice of motion was accompanied and supported by a formal demand for a change of the place of trial of said action, and by affidavits showing the disqualification of the judge. On the 1st of February, 1892, said motion came on regularly to be heard before the respondent, but the hearing was continued by him to February 8th because the defendant in said action was not present. On February 8th, on motion of the defendant's attorney, opposed by plaintiff's attorney, the hearing of said motion was again continued to February 15th. On February 15th the hearing was continued by consent to March 14th. On that day the motion was by consent submitted on briefs to be filed by plaintiff in 10 days, defendant in 15, and plaintiff, 5. On March 19th the defendant in that action filed and served on the plaintiff an affidavit tending to show that the convenience of witnesses required that said action be not removed to another county, but be retained in Lake county to be tried before some superior judge from some other coun-

ty, to be called for that purpose. On March 21st the order of March 14th for the submission of the motion on briefs to be filed was vacated by respondent, and a new order to the same effect, extending for one week the time of the respective parties for filing briefs, was entered. Briefs were thereafter filed in pursuance of the last order. At the time of filing her reply brief, — April 20, 1892, — plaintiff delivered to the respondent all the papers in the case, and her motion was regularly submitted, but it has never been decided. This proceeding to compel the respondent to act upon said motion, and to grant it, was commenced January 7, 1893, nearly nine months after the motion was submitted. The respondent's excuse for not acting on the motion is that the affidavit filed by the defendant on March 19th, tending to show that the convenience of witnesses required the retention of the cause in Lake county for trial, presented an issue which he was disqualified to try or determine, and made it necessary that he should call another superior judge, from some other county, to decide the motion; and he says he did invite the Honorable S. K. Dougherty, of Sonoma county, to hold a session of the superior court in Lake county, to hear and determine causes in which he was disqualified; that Judge Dougherty, in pursuance of such invitation, did hold such session of court, commencing June 8, 1892; that said cause of *Krumdick v. White* was on the calendar for June 8, 1892, and regularly called by Judge Dougherty, but was on motion of the plaintiff stricken from the calendar, and never restored.

There is nothing in any of the facts here recited to justify or excuse the respondent from refusing or neglecting to perform the plain statutory duty imposed upon him by section 398 of the Code of Civil Procedure.¹ The case provided for by that section was clearly made out by the uncontradicted affidavits filed in the support of the motion; and, aside from the affidavits, the essential fact upon which the right to transfer the cause depended was necessarily within the knowledge of the respondent, whose duty it was to make the order without delay. *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. Rep. 848. There should have been no postponement on account of the absence of the defendant, no continuances, no time given for the filing of briefs, no holding under advisement, no entertaining of any counter motion based upon grounds calling for the exercise of judicial discretion. The plain injunction of the statute leaves the disqualified judge, in such cases, no discretion. He has but one thing to do, and it is his duty to do that thing at once. This case does not come within the rule of *Upton v. Upton*, 94 Cal. 26, 29 Pac. Rep. 411, in which we felt constrained to follow the decision

¹Code Civil Proc. § 398, provides that if an action is pending in a court, and the judge thereof is disqualified, it must be transferred for trial to a court the parties may agree on, or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist.

in *Paige v. Carroll*, 61 Cal. 216. We did so, however, because the point of practice had been so settled, and not without serious doubts as to the correctness of the decision, which ignores what seems to be a substantial provision of the statute, designed to prevent the selection by either party to the controversy of the court and judge before whom the trial is to be had. It is not necessary here to determine whether the practice tolerated in *Upton v. Upton* and *Paige v. Carroll*, supra, can be longer recognized. It is enough to say that in those cases the court went to the extreme verge of toleration, and that the exceptions to the statutory rule will certainly not be extended. It is ordered that a peremptory writ of mandate issue, as prayed.

We concur: DE HAVEN, J.; McFARLAND, J.

(97 Cal. 644)

MORRIS et al. v. WILSON. (No. 18,057.)
(Supreme Court of California. March 25, 1893.)

MECHANIC'S LIEN—FAILURE TO RECORD CONTRACT.

1. Const. art. 20, § 15, provides that mechanics, material men, etc., shall have a lien on the property on which they have labored or furnished material. Code Civil Proc. § 1183, provides that all contracts between the owner and contractor for work, where the amount exceeds \$1,000, shall be in writing, and recorded before the work is begun, otherwise the contract to be void, and no recovery to be had thereon by either party thereto; that the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the instance of the owner, and that they shall have a lien for the value thereof. *Held*, that a contractor who has failed to record his contract for work, where the amount to be paid therefor is over \$1,000, is not entitled to a lien.

2. The lien notice averred that the employment was under an attempted contract in writing, and the contract price to be paid thereunder exceeded \$1,000, but said contract was never filed, and was void, etc. *Held*, that such notice showed that the contractor claimed under an implied contract to recover that which, had the contract been properly recorded, he could have recovered under, and that such notice negated the contention that his demand was for extra labor, and not included in the void contract.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by W. A. Morris and Thomas Grabb against W. W. Wilson to foreclose a mechanic's lien. Judgment for plaintiffs. Defendant appeals. Reversed.

Thompson & Paulsell, for appellant. James H. and J. E. Budd, for respondents.

SEARLS, C. Appeal from a decree in favor of plaintiffs for \$356.35 and costs, and for the foreclosure of a mechanic's lien as security therefor. The cause comes up on the judgment roll. The lien of the plaintiffs is for labor and services as carpenters and builders, rendered to the defendant in the construction of a building upon a lot of land owned by the latter in the city of Stockton, county of San Joaquin.

They were not entitled to a lien. They had entered into a written contract with defendant to furnish all the materials and construct the building for the sum of \$2,000, which contract was never recorded, as required by section 1183¹ of the Code of Civil Procedure. Under such circumstances, the contract was void. In such case the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof. Section 1183, supra, and section 1184. The evident intent of the statute was to make it an object for both the contractor and owner to put in writing and record their building contracts where the amount agreed to be paid is in excess of \$1,000. The penalty which attaches to the owner for failure to do so is that he may be held liable for the value of all labor done and materials furnished by persons other than the contractor, without reference to the contract price. The contractor suffers the penalty of a like failure, by being excepted from the class of persons who may take liens under the law. If a contractor, under a contract void for the reasons indicated, can perform the labor and furnish materials, and file a valid lien upon the implied promise to pay, as was attempted in this case, he can avoid the force and intended effect of the statute. It is true that our constitution (section 15, art. 20) provides that "mechanics, material men, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material," etc. But the constitution is not, and does not profess to be, self-acting. It commands legislation on the subject. It is equally true that the first part of section 1183 of the Code of Civil Procedure provides for a lien in favor of a class of persons, among which contractors are included; but this must be read in connection with the context, and he who would avail himself of the benefits of the law must bring himself within its purview as to time and manner of filing. In short, he must comply with the statute to avail himself of its benefits. Plaintiffs claim that their demand is for extra labor, and therefore not included in the void contract. Their claim of lien, made a part of the complaint, negatives this position. In the notice of lien it is averred "that said employment was under an attempted contract in writing, and the contract price and amount agreed to be paid under said contract exceeded

¹Code Civil Proc. provides that contractors shall have liens on the property on which they have bestowed labor and materials for the value of such labor and materials; that all contracts between the owner and contractor for work, where the amount agreed to be paid exceeds \$1,000, shall be in writing, and recorded before the work is begun, otherwise the contract to be void, and no recovery to be had thereon by either party thereto; that labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the instance of the owner, and they shall have a lien for the value thereof.

\$1,000, but said contract was never filed, * * * and was and is wholly void," etc.; showing that, the contract being void, they claim under an implied contract to recover that which, had the written contract been properly recorded, they could have recovered under it. The law gives them a right in such cases to recover the money on an implied contract. A mechanic's lien only exists by virtue of compliance with the statute which creates it. Plaintiffs did not comply with the terms of that statute. They must therefore rest content with a personal judgment. The judgment should be reversed, and the court below directed to enter a personal judgment only in favor of plaintiffs, without counsel fees or expenses of preparing and recording the mechanic's lien.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to enter a personal judgment only in favor of plaintiffs, without counsel fees or expenses of preparing and recording the mechanic's lien.

97 Cal. 676

LINDSAY IRRIGATION CO. v. MEHRTENS et al. (No. 18,003.)

(Supreme Court of California. March 27, 1893.)

REVIEW ON APPEAL—QUESTIONS OF FACT.

Whether a particular region is a "farming neighborhood," and whether the supplying of water to that neighborhood is a "public use," within Code Civil Proc. § 1238, providing that eminent domain may be exercised in the following "public uses:" Canals, ditches, and pipes for supplying "farming neighborhoods with water,"—are questions of fact for the trial court, and its findings thereon are conclusive, where the evidence upon which they were based was not insufficient to support them.

Department 1. Appeal from superior court, Tulare county; M. K. Harris, Judge.

Action by the Lindsay Irrigation Company against William Mehrtens and others to condemn land for the purpose of digging ditches and laying pipes for irrigation. There was judgment for plaintiff, and defendants appeal. Affirmed.

W. B. Wallace and Wm. W. Cross, for appellants. Geo. H. Smith, for respondent.

HARRISON, J. The plaintiff is incorporated under the laws of this state for the purpose of supplying water for irrigation and domestic use, and other purposes to which water may be put, to the farming neighborhood surrounding and lying contiguous to the town of Lindsay, in the county of Tulare, and seeks in this proceeding to condemn certain lands for the purpose of constructing a ditch or canal through which to conduct water from Kaweah river to said farming neighborhood. Judgment was rendered in favor of the plaintiff for a condemnation of the land sought to be appropriated by it, and fixing the amount of damage which should

be paid by it to each defendant for the land taken from him. In their appeal from this judgment the argument of the appellants is directed chiefly to an attempt to show that the land to which the plaintiff seeks to conduct the water is not a farming neighborhood, and that the supplying of water to that land is not a public use, and therefore the plaintiff cannot exercise the right of eminent domain for the purpose of taking their lands.

The right of the state to take private property for public use is an inherent element of its sovereignty, and its exercise is restrained only by the limitations contained in the constitution. The right to take the property is not conferred by the constitution, but is to be exercised in conformity with the will of the sovereign, as expressed by the legislature, and such right can be exercised only in behalf of those public uses which the legislature has authorized, and in the mode and with the limitations prescribed in the statute which confers the authority. Whoever, under the claim of an agency of the state, would deprive the owner of any of his property by virtue of the exercise of eminent domain, must show, not only that the use for which he seeks to appropriate it is a public use, but also that the legislature has authorized the taking of property for that particular use, and in the mode in which he is seeking to appropriate it. The legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public, and will be recognized by courts; but whether, in any individual case, the use is a public use, must be determined by the judiciary from the facts and circumstances of that case. Section 1238, Code Civil Proc., provides that "the right of eminent domain may be exercised in behalf of the following public uses: * * * (4) * * * Canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water. * * * This is a legislative declaration that the supplying of water to a farming neighborhood is a public use, and such declaration must be regarded as falling within the scope of legislative duty in providing for the public welfare. In re Madera Irr. Dist., 92 Cal. 309, 311, 28 Pac. Rep. 272, 675. "If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court." Id. In a state like California, where so great a portion of the land is susceptible of agriculture, it may well be said, in view of the climatic peculiarities, and topographical distribution of the land, that the legislature is acting for public welfare in making provision for supplying its many farming neighborhoods with water. "We are not prepared to say that the supply of water to farming neighborhoods for irrigation (and the Code evidently means for irrigation) may not be for a public use. Indeed, in view of the climate and arid soil in parts of the

state, (for this object, climate and soil may properly be considered,) it is safe to say that the supply for such use may be that which the legislature has decided it to be,—a public use. The judgment of the legislature that it is such ought not, therefore, to be disturbed by the courts." *Lux v. Haggin*, 69 Cal. 304, 10 Pac. Rep. 674.

The term "farming neighborhood" is an indefinite expression, and whether it can be applied to any particular tract of land must be determined by evidence. The word "neighborhood" is not synonymous with "territory" or "district," but is a collective noun, with the suggestion of proximity, and refers to the units which make up its whole, as well as to the region which comprehends those units. One of the definitions given in the *Century Dictionary* is "a district or locality, especially when considered with relation to its inhabitants, or their interests." A farming neighborhood may be defined as a region in which there are several tracts of farming land, with a proximity of location, and which can be regarded as a whole with reference to some common interests, although they are distinct in boundaries, and held in individual proprietorship. Its extent need not be characterized by fixed boundaries, nor is its existence determined by any definite number of proprietors; and while a tract of land, though large in extent, might, if held in different proprietorships, constitute a neighborhood, yet it would not if it were held in single ownership. The term "public use" is also an expression of indefinite signification, and its application to the facts of any particular case is also to be determined from evidence. The supplying of water to a tract of agricultural land, though of many thousand acres in extent, if occupied by an individual proprietor, would be for his private benefit, and not a public use, yet the same tract of land might be so subdivided, and held in individual proprietorship, as to render the supply of water to it a public, instead of a private, use. The same tract of land may constitute a farming neighborhood, and yet be so limited in the elements which make it a neighborhood that the supplying of water to it would not constitute a public use. *Water Co. v. Baker*, 95 Cal. 270, 30 Pac. Rep. 537. It is not necessary that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use. Whether the particular region is a farming neighborhood, and whether the supplying of water to that neighborhood constitutes a public use, are questions of fact, which must be determined by the court before whom the proceeding is had; and its decision thereon must be held conclusive upon this court, to the same extent as in other cases where it is called upon to determine matters of fact. It is only when it appears that such decision is manifestly erroneous, either by an abuse of its discretion, or by making its decision without any evidence to support it, that this court will call it in question. In

the present case the court below has found that the region to which the plaintiff proposes to supply water is a farming neighborhood, and that the supplying of water to that neighborhood is a public use. There is evidence in the record tending to support both of these findings, and we cannot say that the evidence upon which these findings were made is insufficient to support them. For the purpose of determining the existence of a farming neighborhood, it is not essential that the proprietor of a tract of land therein should actually reside upon the land, or cultivate it by his own industry. It is the land to which the water is to be supplied, and the subdivision of the region into individual proprietorships is essential only for the purpose of constituting it a neighborhood, and determining whether such supply is a public, instead of a private, use. The distinctive characteristic of the neighborhood is that it be a "farming" one, and this implies the proximity of the several tracts of land, rather than of their proprietors. The same public use would exist, whether the lands were cultivated by individual tenants to whom the proprietors had leased it, or by the employes of the proprietors, who were themselves absent, as if by the proprietors residing upon the lands. Nor does the fact that the stockholders of the plaintiff are owners of land within the neighborhood change the supplying of water to that neighborhood from a public to a private use. If the farming neighborhood exists, it is no objection to these proceedings that every member of that neighborhood is a stockholder in the plaintiff. The public use would still remain, and the incidental benefit to the stockholders from supplying the water to the land would be no greater objection than in the case of a corporation formed to supply water to a town whose stockholders are inhabitants of the town. Whether a majority of the stock of the plaintiff is owned by a few persons, who are also the owners of the greater portion of the land to be supplied with water, is equally immaterial. These are questions worthy of consideration by the court in determining whether the region constitutes a farming neighborhood, and whether the supplying of water is a public use, but they are not, of themselves, determinative of the question. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

98 Cal. 35

BIGGI v. BIGGI. (No. 14,936.)

(Supreme Court of California. March 29, 1893.)

CONSTRUCTION OF CONTRACT—PARTITION.

1. The title to land was conveyed to both husband and wife, who were subsequently divorced by a decree which made no disposition of the community property. While the action was pending, the parties made a written contract that the land should be sold for not less than \$3,100, as one V. should determine, and the proceeds divided between them, and that the husband should occupy it till sold, and pay a certain sum per month to the wife. The contract also recited that the wife released all

claims to all other property other than "the one-half interest in said life estate and the one half of the proceeds of the sale thereof." Held, that the contract was a release of the wife's interest in all other property but the land which they had agreed to sell, and was a recognition that the land was community property, one half of which belonged to the wife, but did not convey the interest of the wife to the husband.

2. In an action on the contract by the wife, alleging that the husband refused to comply with its terms, and that the land could not be partitioned without great prejudice to the owners, the wife was entitled to a judgment for its sale and a division of the proceeds between the parties.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Theresa Biggi against Narcisso Biggi to enforce a contract providing for the sale of a lot of land and a division of the proceeds between the parties. There was judgment for defendant, and, a motion for a new trial being denied, plaintiff appeals. Reversed.

Geo. W. Reed and Geo. M. Shaw, for appellant. Hall & Earl and Dodge & Fry, for respondent.

HARRISON, J. The plaintiff was at one time the wife of the defendant, Narcisso, and in October, 1888, pending an action between them for divorce, they entered into an agreement for the division of their property, in which it was provided that a lot of land situated on San Pablo avenue, in Oakland, should be sold, and the proceeds of the sale equally divided between them, but that such sale should not be for less than \$3,100, and that, whenever an offer should be made therefor, one Vandercook should be the exclusive judge as to the value of said premises, and as to accepting or rejecting said offer, and that they would abide by his judgment, and sell the premises for such sum as Vandercook might determine. This lot of land had been purchased during the marriage of the parties, and the title thereto taken in the names of them both, but the judgment of divorce which was afterwards rendered between them was silent upon the disposition of the community property. In June, 1889, Vandercook received an offer of \$3,200 for the property, which he deemed sufficient therefor, and which the plaintiff agreed to accept, but the defendant, when requested thereto, refused to accept the offer or sign a contract of sale unless he should receive the entire proceeds thereof. The plaintiff thereupon brought this action, alleging in her complaint that the land was owned in common between her and the defendant, Narcisso, setting forth the foregoing agreement, and the refusal of the defendant to comply with its terms, and asking for a sale of the land and the division of the proceeds between them. The defendant in his answer denied that the plaintiff had any interest in the land, and also denied that he had refused to accept the offer which the plaintiff alleged had been made for the land. Upon the trial the court found that the defendant was the owner in fee of the entire tract of land, and that the plaintiff had no interest therein, and rendered judgment

against the plaintiff, and also a judgment in favor of the defendant, Narcisso, upon his cross complaint therefor, quieting his title to the land as against the plaintiff. The court did not make any finding upon the issue of the defendant's refusal to accept the \$3,200 offer.

The finding of the court that the defendant was the owner in fee of the entire tract, and that the plaintiff had no interest therein, is contrary to the evidence. The conveyance of the land to the husband and wife made it presumptively community property, and their subsequent divorce without any disposition of that property in the decree left them tenants in common thereof, (*De Godey v. Godey*, 39 Cal. 157;) and the fact that the title had been conveyed to them both caused each of them to be thereafter the holder of the legal title to one half of the land. The agreement between them prior to the decree of divorce was a recognition by the husband that it was community property, and that the plaintiff was entitled to one half thereof. The contention by the respondent that by the aforesaid agreement between the parties the plaintiff conveyed to the defendant whatever interest she had in the land in question, and that her rights against him are only an obligation on his part to pay her one half of the proceeds of any sale that he may make, is contrary to a proper construction of the instrument. The provision therein that until the property should be sold the husband should be entitled to its possession and occupancy, and should pay to the plaintiff six dollars per month therefor, and the further provision that "the parties hereto agree to abide by the judgment of said Vandercook, and to sell said premises for such sum, offered or not, as said Vandercook may determine," are inconsistent with the proposition that the plaintiff's title to the land passed to the defendant by the instrument, and show that, whenever a sale should be made in accordance with its terms, it was to be made by both parties, and that the consent of the plaintiff, as well as of the defendant, was necessary to effect the sale. The clause relied upon by the respondent, wherein the plaintiff "releases and acquits said party of the first part from all and every claim of every character and kind whatsoever to other property, other than said one half interest in said life estate, and the one half of said net proceeds of said sale, as aforesaid," when read in connection with the other portions of the instrument, and the purposes for which the parties recite that they have executed the agreement, must be construed as relating to "other" property than that enumerated in the instrument, and not as a release of her interest in the property out of whose sale she was to receive one half of the proceeds. For the purpose of ascertaining the intention of the parties, and the interpretation to be given to the instrument, all of its parts must be considered, and, when so considered, it is to be construed as a mutual, executory agreement on the part of both parties that they will consent to a sale of the land for such sum, not less than \$3,100, as may be

approved by Vandercook, and that upon such sale each will accept one half of the proceeds thereof. As in the case of any other executory agreement, its breach by one party gave to the other the right to treat it as rescinded or to seek for its enforcement. It may be conceded that, until a breach by either party, the right to a partition of the land between them was superseded or suspended, but the refusal of the defendant to perform the agreement, and his denial of the right of the plaintiff to its performance, gave her the right to disregard the agreement, and either bring an action for the partition of the land, or treat the agreement as existing, and seek its enforcement against the defendant. For this purpose the plaintiff alleged in her complaint the facts constituting the breach by the defendant, and the court should have made a finding upon this issue, as the evidence in the record is ample to sustain her allegations. Upon such finding, inasmuch as her allegation in the complaint that the land could not be partitioned without great prejudice to the owners thereof was not denied, her right to a judgment for its sale and the division of the proceeds between them would have been established. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; PATERSON, J.

98 Cal. 86

McDANIEL et al. v. PATTISON et al. (No. 14,280.)

(Supreme Court of California. April 1, 1893.)

EQUITY JURISDICTION—PROBATE OF WILL—SETTING ASIDE DEED.

A complaint by certain devisees of a will alleged that another devisee fraudulently suppressed the will, and altered a deed, whereby testator had conveyed to him a small portion of land, so as to include the entire property of the testator, and demanded that the deed be set aside and the property distributed in accordance with the will, which, it was alleged, could not be probated under Code Civil Proc. § 1339, providing that no will shall be proved as lost or destroyed unless its provisions are clearly and distinctly proved by at least two credible witnesses. *Held*, that a court of equity has no jurisdiction to probate a will, though such relief is sought only incidentally to the main equitable relief; and the fact that the devisees are also alleged in the complaint to be heirs at law will not enable them to obtain the relief demanded, since, having alleged a will, their rights arise only from it. Beatty, C. J., and De Haven, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Sarah E. McDaniel and others against J. H. Pattison and another to set aside certain deeds, etc. Judgment for plaintiffs. Defendants appeal. Reversed.

For former opinion, see 27 Pac. Rep. 651.

J. L. Murphey and Anderson, Fitzgerald & Anderson, for appellants. Chapman & Hendrick, for respondents.

PER CURIAM. We are satisfied with opinions filed and the conclusion reached

by department 1 when this case was before it for decision, and the judgment is therefore reversed.

In their petition for a rehearing respondents claim that they are entitled to assert their rights as heirs, but it is evident from the pleadings, findings, and decree that the parties and the court below proceeded upon the theory that plaintiffs were claiming as devisees, and not as heirs. The decree, therefore, cannot be modified, but we think there is enough in the complaint to justify an order allowing the plaintiffs to amend their complaint, if they desire so to do, so as to assert any claim they may have by reason of their heirship. The judgment and order are reversed, and the cause is remanded, with directions to allow the parties to amend their pleadings, if they be so advised.

BEATTY, C. J. I dissent. The opinion of the department originally filed in this case, which has now been adopted by the court, decides two propositions, which, in my opinion, are untenable, and which, if incorrectly decided, not only operate unjustly in this case, but establish a most unfortunate precedent for others.

1. It is decided that the complaint fails to state any cause of action,—is so fatally defective, in other words, that, in the absence of even a general demurrer, it will not support a decree limited in its operation to the annulment of the fraudulent deeds therein mentioned. The sole ground upon which this conclusion is reached is that the complaint, although it shows clearly that the plaintiffs are heirs to the decedent, with an undoubted right, in the absence of a will, to maintain the action in that capacity, also shows that they are named as devisees of the same estate in a will which has been suppressed or destroyed by the defendant, and which has not been admitted to or denied probate. Reduced to its simplest terms, the proposition is that, under such circumstances, the heir has no title to the property whatever upon which he can maintain an action to recover its possession or prevent its fraudulent alienation. He has no title as heir, because he may be proved to be a devisee; and he has no title as devisee, because the will has not been admitted to probate. The title, in short, pending a decree of the probate court establishing the will or the intestacy of the decedent is nowhere. There must, it seems to me, be some fatal flaw in the reasoning which leads to such a conclusion. The fallacy evidently consists in the assumption that on a given state of facts a man may be, in legal contemplation, a devisee, and at the same time not a devisee; for it is only upon this assumption that the plaintiffs can be denied all relief. One door is closed against them on the ground that they are devisees, another on the ground that they are not devisees.

To me it seems a sounder argument to say that upon the facts alleged in the complaint the plaintiffs either are or are not devisees. They must be either the one or the other, for there is no room for a third category in which to place them. If they are devisees, they may maintain the action

in that capacity; if they are not devisees, their title as heirs is undoubted. To hold that they are just sufficiently devisees to destroy their title as heirs, but not sufficiently so to enable them to make title under the will, is to draw too fine a distinction for the ends of justice,—a fact made strikingly apparent by the results of the doctrine in this case, and its inevitable consequences in other cases that may be easily supposed. The probate of an existing will, even when regularly and formally executed and uncontested, requires some time. At least 10 days' notice of the time and place fixed for hearing the proofs must be given, and in the matter of protecting estates from spoliation even so short a delay as 10 days might be of most serious consequence. But when a will is contested, or when it has been fraudulently suppressed or destroyed, so that, if proved at all, it must be proved in the face of all the difficulties that attend the establishment of a spoliated or contested will, months, and even years, may elapse before a final decree establishing the will or the fact of intestacy. In such a case the heirs of the estate, whether named as devisees or not, could maintain no action for its preservation or protection until the decree of the probate court became final; for clearly, if they have no title as heirs when named as devisees in an unproved will, they would, a fortiori, have no title as heirs if the estate was devised to others. But I need not concern myself about the latter case, the question here being as to the right of an heir who is at the same time named as devisee in an unproved will to protect the estate which in any event belongs to him from spoliation or destruction, pending a final decree of the probate court admitting the will to probate or establishing the intestacy of his ancestor.

The decision of the court is that, under such circumstances, he cannot maintain an action to set aside and declare void a forged deed purporting to convey his ancestor's estate to the forger. In other words, although years may elapse before a final decree in probate, the heir must stand by, while the forger, vested with an apparently fair record title of the property, makes use of his opportunity to victimize an innocent purchaser. Or, if the case were different, if the deed, instead of being a forgery, conveys no title, has merely been obtained by some fraud or deception which will authorize a court of equity to set it aside at the suit of the heir or devisee, but in the mean time will enable the fraudulent grantee to pass a good title to an innocent purchaser for value, there will be the same inability on the part of the heir to sue. He cannot commence an action and file notice of his pends, but must wait until his status is determined,—until it is settled whether he owns the estate as heir or devisee. When that is done, he finds that the estate is vested in an innocent purchaser by a transfer which he has been denied all opportunity of preventing; and, if he could not maintain such an action, neither could he maintain an action to oust an intruder, or to enjoin the most destructive waste or spoliation. He is, in other words, utterly impotent to protect

property which is certainly his by one title if not by the other, merely because it has not been determined which is the good one. I cannot forbear to express my dissent from a doctrine which, to my mind, is so unfounded and so destructive of the most valuable rights of heirs. It is scarcely necessary to point out the broad distinction between this case and *Castro v. Richardson*, 18 Cal. 480, and other similar cases cited in the opinion of the court. In that case the only claim of title was based upon a devise in an unproved will. I venture to say if the complaint had alleged that the plaintiff was also an heir it would not have been held that it showed no title. My conclusion upon this branch of the case is that the complaint did disclose facts sufficient at all events to warrant a decree annulling the several deeds of conveyance therein mentioned. It most assuredly stated a cause of action, and the most that can be said of the allegations with respect to the will is that they rendered it ambiguous or uncertain as to the measure of relief to which the plaintiffs were entitled; but, conceding that they had that effect, all objections on the ground of ambiguity or uncertainty were waived by the failure to demur.

The opinion of the court just filed, while adopting the original opinion of the department, adds a clause allowing the plaintiffs to amend their complaint so as to assert their right as heirs. This permission appears to be entirely inconsistent with the decision. The record shows that the existence of an unproved will was as clearly established by the testimony at the trial as it was alleged in the complaint. The only amendment which the plaintiffs can possibly make is to omit from their complaint allegations of fact which are established by plenary proof. By doing so they may make a prima facie case, but all that the defendants will have to do to defeat their action will be to allege and prove the same facts,—as they can easily and will most certainly do; for, if the allegation of these facts by plaintiffs shows that they have no right of action, the facts are necessarily material, and when they are alleged and proved by the defendants, the action must inevitably be dismissed.

2. It is also held in the opinion of the court that the devisee in a spoliated will can have no relief in equity against the spoliator unless he first establishes the will in probate. This part of the decision ignores the well-established distinction between the proceeding in rem, by which the probate court establishes a will so as to bind the heirs generally and the whole world, and a suit in equity by the party injured against the spoliator to charge him as a trustee with respect to the property gained by his fraud. I admit the correctness of the doctrine that a court of equity, as such, has no power to establish a will, even in a case of spoliation, so as to bind the heirs generally, although there are cases of spoliated wills where such power has been asserted and exercised. *Bailey v. Stiles*, 2 N. J. Eq. 220. The current of authority, however, is the other way, and I think the sounder and more reasonable view is that for the establishment of

a will in the strict sense the jurisdiction of the probate court is exclusive. But the same law writers who uphold this doctrine admit an exception or distinction in case of a spoliated will. Prof. Pomeroy, for instance, who is cited in support of the prevailing opinion, when discussing this specific point, uses the following language: "When instruments have been fraudulently suppressed or destroyed for the purpose of hindering or defeating the rights of others, equity has jurisdiction to give appropriate relief by establishing the estate or rights of the defrauded party;" and he gives the following illustration: "If an heir should suppress a deed or will, equity would confirm the title of the grantee or devisee." Pom. Eq. Jur. §§ 919, and note. Other law writers state the doctrine in substantially the same terms. 6 Waite, Act. & Def., 377; 3 Redf. Wills, c. 1, § 7; and see authorities cited at page 239, 2 N. J. Eq. The only case which I have found which holds that a court of equity can afford the defrauded devisee no relief against the spoliator is the case of *Morningstar v. Selby*, 15 Ohio, 345, cited in the opinion of the court. None of the other decisions there cited was made in a case of spoliation, and the general expressions therein contained to the effect that a court of equity, as such, has no power to establish a will, have no application to an action by the defrauded legatee against the spoliator. Not only the weight of authority, but every consideration of justice and expediency, would seem to support the view that a court of equity is not without the power to afford a remedy for so gross a wrong, where, by the very act of the spoliator, the injured party has been deprived of all other remedy.

It is contended that, since the probate court is invested with power to take the proof of lost or destroyed wills, there is no necessity for resorting to equity in such a case, and no ground for its interposition. It is true that a lost or destroyed will may be proved and established in the probate court if there is sufficient evidence of its execution and its terms, and this is a wise and necessary provision for the enforcement of the rights of devisees and legatees against heirs generally. But for the protection of innocent heirs, and the prevention of frauds, the law has at the same time wisely provided that a lost or destroyed will shall not be admitted to probate unless its provisions are clearly and distinctly proved by two credible witnesses. Code Civil Proc., § 1339. Now, it might often happen, as it has happened in this case, that there would be but one living witness by whom a bequest or devise in a spoliated will could be proved. In such a case the will could not possibly be admitted to probate so as to bind innocent heirs, no matter how clear the evidence of its existence and its destruction by another heir, because, as to the innocent heirs for whose protection the law was enacted, there would not be sufficient evidence of its provisions. But as to the spoliator, the case would be different, because the rule of evidence would be different. Everything is presumed against the spoliator, and, the spoliation being clearly

proved, comparatively slight evidence of a bequest thereby defeated would be satisfactory as against him, and therefore sufficient. To hold otherwise would be to convert a provision intended as a shield for the innocent into an instrument of fraud. A will could be destroyed by an heir, and he could admit or even boast of the act, but, unless the provisions of the will could be clearly established by two credible witnesses, the legatee or devisee could have no relief against the actual perpetrator of the fraud. I am unwilling to admit that a court of equity is powerless to grant relief in such a case. It seems, on the contrary, to be precisely the case in which equity is bound to interpose, upon the ground that there is no remedy elsewhere. The result of its interposition is not to usurp the functions of the probate court by establishing the will in a strict sense, so as to bind all the world, but merely to fasten a trust upon the property coming to the hands of the spoliator in favor of the person defrauded. Civil Code, § 2224. The case is strictly analogous to the numberless cases in equity arising under the statute of frauds in which rights in lands have been effectuated upon the ground of implied or resulting trusts in the absence of the written evidence of the right required by the statute. Section 1339 of the Code of Civil Procedure, requiring the evidence of two credible witnesses to establish a lost will, is nothing more nor less than a statute of frauds, and can no more be used as a protection for fraud in a court of equity than other statutes designed to effect the same purpose.

DE HAVEN, J. I concur in the foregoing opinion of the chief justice.

98 Cal. 30

CLAIBORNE v. CASTLE et al. (No. 18,071.)
(Supreme Court of California. March 29, 1893.)

VERIFICATION OF PLEADING—WAIVER OF VENDOR'S LIEN.

1. A verification of a pleading by one co-defendant is a compliance with Code Civil Proc. § 446, providing that the verification must be by affidavit of a party, or, under certain conditions, his attorney.

2. Civil Code, § 3046, provides that one who sells real property has a vendor's lien thereon, independent of possession, for the unpaid price, unsecured otherwise than by the personal obligation of the buyer. Section 5 provides that the provisions of the Civil Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof. *Held*, that the act and conduct of a vendor, which indicate a waiver of the lien, may be shown by parol, since the common-law character of the lien is not changed by the Code provisions.

3. A vendor's lien is a simple equity, and a consideration is unnecessary to support a waiver of it.

4. Where the owner of land executes a deed to N., taking his note for the price, and, before recording the deed, N. sells the land to C., when, by agreement of all concerned, and in consideration of the payment by C. of the interest due on the note, the deed to N. is destroyed, and the owner executes a deed of the land to C., and agrees to look to N. personally for payment, neither the owner nor his repre-

sentative can be heard to say, in a court of equity, that there was no consideration for the waiver of the vendor's lien.

Department 1. Appeal from superior court, Tulare county; Ansel Smith, Judge.

Action by Gilbert B. Claiborne, executor of George Crossmore, deceased, against George H. Castle, Jr., and others, executors of George H. Castle, deceased, and Hayes Nicewonger, to foreclose a vendor's lien for the purchase price of real estate. There was judgment in favor of defendants, and, a motion for a new trial being denied, plaintiff appeals. Affirmed.

Aug. Muenther and John B. Hall, for appellant. Baldwin & Campbell, (Reddy, Campbell & Metson, of counsel,) for respondents.

GAROUTTE, J. On April 5, 1884, George Crossmore, now deceased, was the owner of the real estate in the complaint described, and on that day he sold the said real estate to defendant Nicewonger for the sum of \$8,000, taking his promissory note therefor, payable four years from that date, with interest. Crossmore executed a grant, bargain, and sale deed for said premises to Nicewonger, but said deed was never recorded. It appears that Nicewonger was indebted to one Castle in a sum of money exceeding \$10,000, and about the 28th day of February, 1885, Castle, Crossmore, and Nicewonger met, and it was agreed between them that Nicewonger would surrender up his deed, and that the same should be destroyed, and that Crossmore should execute a deed of said land to Castle, direct; that Castle should pay \$3,500 for the land, by paying to Crossmore \$480 interest on the note, and to Nicewonger \$20, and by crediting Nicewonger with the sum of \$8,000 on his indebtedness to him, (Castle,) and that Crossmore should keep the note of Nicewonger, and hold it for payment of the land, and look to Nicewonger personally for payment; and under that agreement the deed was executed by Crossmore, and accepted by Castle. After this date, Crossmore did not intend to claim, and did not claim, any lien whatever upon the land and premises in the complaint mentioned, for the purchase price thereof, but looked entirely to the note of defendant Nicewonger for payment thereof. The foregoing facts were substantially found by the court, and are fairly supported by the evidence. This action is brought by the executor of the last will of Crossmore, against Nicewonger and the executors of the last will of Castle, to enforce a vendor's lien upon the realty, based upon the original transfer to Nicewonger. Plaintiff appeals from the judgment and order denying his motion for a new trial.

1. It is insisted that the default of the defendant Castle should have been entered, for the reason that the answer was verified by Nicewonger alone, he stating that he also made the affidavit on behalf of his codefendant. The necessity for the verification of the pleading arises from the statute alone, and the solution of this question is dependent entirely upon the construction of section 446 of the Code of Civil Pro-

cedure. Without entering into a detailed analysis of that section, it is quite apparent, taking it as a whole, it was contemplated by the legislature that a verification of a pleading by one plaintiff or codefendant would be sufficient to meet the demands for such legislation. Such has been the practice in this state. To our knowledge it has never been questioned, and we are not disposed to disturb it. Conceding that cases may arise where the real party in interest would thus be able to shift the responsibility of the verification of the pleading upon his nominal plaintiff or codefendant, the evil should be remedied by legislative enactment, rather than by judicial construction.

2. It is insisted that a vendor's lien cannot be waived or released as long as the obligation exists, by parol declarations of the lienholder. Appellant concedes that prior to the Codes the text-books and authorities were against his contention, but claims that a vendor's lien is now a statutory lien by virtue of section 3046 of the Civil Code, and consequently stands upon a higher plane, and is endowed with greater capabilities, than the ordinary vendor's lien, recognized by equity courts. Section 3046 declares: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." But this section is but a repetition of the common law, as are hundreds of other sections found in the Codes. When it uses the term "vendor's lien," it refers to the same old vendor's lien proper that is treated of in the text-books, both modern and ancient. If other provisions of the Code limit or enlarge rights under it to that extent, it is not the vendor's lien of the past, but to that extent only. Section 5 of the Civil Code provides that its provisions, "so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments." See *Churchill v. Improvement Co.*, 96 Cal. 490, 31 Pac. Rep. 560. The recent cases of *Avery v. Clark*, 87 Cal. 619, 25 Pac. Rep. 919, and *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. Rep. 608, and 26 Pac. Rep. 789, fully discuss this subject, and, in effect, hold that the Code provisions do not change the character of the lien. While in those cases the title still remained in the lien holder, yet the matters discussed were fairly involved, and we again assent to the law as there declared. It is settled beyond dispute that the acts and conduct of a vendor, which indicate a waiver of the lien, may be shown by parol. The California cases all point directly to this conclusion, and the doctrine is clearly announced in *Moshier v. Meek*, 80 Ill. 79; *Jurman v. Farley*, 7 Lea, 141; *Jones, Liens*, § 1073.

3. It is insisted that Crossmore's agreement with Castle and Nicewonger to waive the lien was made without consideration. The evidence indicates to the contrary, but as said in *Avery v. Clark*, supra: "A vendor's lien is not the result of any agreement or any intention of the vendor and vendee, but is a simple equity raised by

courts for the benefit of the vendor of real estate. It is a privilege purely personal, and cannot exist in favor of any but the vendor." If it is a simple equity or privilege, purely personal,—something dependent for life upon no agreement of the parties,—a consideration is unnecessary to support a waiver of it. Under any view of the case, Crossmore cannot be allowed to come into a court of equity, asking to have a vendor's lien foreclosed upon Castle's land, and claim that his release of the lien thereon was made without consideration. His promise to release the lien was the moving consideration to Castle to purchase. Without it he never would have bought the land. Crossmore's conduct placed Castle in his present position, and it would be most unfair if he should be allowed to make such a showing, and thereby visit loss upon an innocent party. Equity will not listen to a plea of "no consideration" upon any such state of facts. For the foregoing reasons, let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

98 Cal. 45
BENSON v. CENTRAL PAC. R. CO. (No. 13,290.)

(Supreme Court of California. March 30, 1893.)
INJURY TO PERSON ON RAILROAD TRACK—NEGLIGENCE—PROXIMATE CAUSE.

1. When the engineer first discovered plaintiff, a child six years old, on the track, her father had her by the hand and was leading her towards the other parallel track. After reaching that she became frightened, and, breaking away, went in front of the moving train. The train was going only 15 miles an hour, and immediately after she put herself in peril every effort was made to stop the train. *Held*, that there was no negligence on the engineer's part, as plaintiff's action could not have been anticipated.

2. Carrying plaintiff beyond her destination and leaving her at the next station was not the proximate cause of her injury, she being struck by a train while walking back to her station along the track, the only direct way.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Action by Elvine M. Benson, by I. B. L. Brandt, her guardian ad litem, against the Central Pacific Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Henry E. Highton and I. B. L. Brandt, for appellant. W. H. L. Barnes, for respondent.

PER CURIAM. This action is brought by the plaintiff, an infant, to recover damages for personal injuries alleged to have been sustained by her while walking upon the roadway of defendant, by being run into by a locomotive operated by defendant. The case was tried by a jury, which returned a verdict for defendant, and the appeal is from the judgment and from an order refusing a new trial.

Plaintiff's evidence tended to prove the following facts: Plaintiff, a child

of but six years of age, with her father and the other members of her family, took passage on a train of defendant for Watt's station, in Alameda county. As the train approached Watt's station the whole family arose and took positions at the door of the car so as to be able to step off the train without delay, and immediately on the stoppage of the train at the station proceeded to leave it; but the stop was so short that but part of the family were able to get off, and the train moved away with the father and the plaintiff and her brother still on it. While the family was thus endeavoring to get off, the conductor of the train was on the platform of the car, and, when the train began to move, the father asked him, "Why didn't you let me off?" and the conductor thereupon told the father: "You cannot get off here. You have got to go to the next station, only a short distance, and you can walk back when you get to the next station." When the next station (Emery) was reached, the father, with plaintiff and her brother, left the train. The father had never before been on the part of the railroad between Watt's and Emery Stations, and on stepping off looked up and down the railroad. He saw no cars. He could observe no other route than the railroad to get back to Watt's station, and in fact there was no other way; one side of the railroad right of way being the waters of the bay, and the other a slough, running through marsh and swamp. There were two tracks, and supposing that if a train should come along behind him it would be on the east track, as the train which he had just left was occupying the west track, the father started to walk southerly along the east track to Watt's station, carrying the baby on one arm and holding plaintiff by the hand; and he had thus proceeded for a distance of 500 or 600 feet south of Emery when he heard a noise back of him. Looking in the direction of the noise he saw a train, but owing to the existence of a curve in the road it was impossible for him to determine on which track the train was running. A moment later he looked again at the train, and saw that it was on the east track,—the same on which he was walking. He then left that track, crossing to the west track, and had entirely cleared the east track, continuing all the time to hold plaintiff by the hand, when the plaintiff, frightened by the approach of the train, while it was yet 150 or 200 feet from her, broke away from her father and ran back to and on the east track, where she was struck by the flying train, and received the injuries complained of. The accident happened in broad daylight; the view of the railroad between the two stations, a distance of 2,062 feet, was unobstructed; and a person standing at either station could see to, and some distance beyond, the other; and a person on the spot where plaintiff and her father were when the latter first heard the train, namely, 600 feet south of Emery station, could easily be seen from the latter place. Plaintiff and her father were in fact noticed by the fireman of the train, according to the latter's

evidence, while they were still on the track on which the train was approaching them, and were seen by him to cross over to the other track, and they were observed by the engineer when about 100 yards from the train; notwithstanding which the train, which had pulled out of Emery station at a speed of 15 miles an hour, continued such speed. No bell was rung, or whistle blown, or other signal given plaintiff, and no attention paid to her presence on the track, until the train was within 150 feet of her, when an endeavor was made to stop it, but too late to be of use. To which must be added the uncontradicted testimony introduced by defendant that when the engineer first saw plaintiff's father he was in the act of stepping off the track upon which the train was traveling, towards the other track, and succeeded in getting entirely clear of the track and out of danger, and, further, that the engine was provided with the best equipment known for stopping the train; that the engineer kept his eye upon the plaintiff and her father, and, as soon as she unaccountably broke from her father and ran across the track in front of the engine, every possible effort was made to prevent the injury.

Appellant contends that various erroneous instructions were given by the court, to her injury, and that several instructions asked for by her were wrongfully refused; that because of these errors the question of negligence was not properly submitted to the jury. But we think there was no evidence of negligence on the part of the defendant, and that a verdict for the plaintiff, had one been rendered, could not have been sustained; and in considering this question we shall adopt the rule laid down in *Wilson v. Railroad Co.*, 62 Cal. 172, that where the evidence of negligence consists of circumstances from which inferences may be drawn for or against it, it is the province of the jury to determine whether there was negligence or not. There were no houses along this roadway at the point where the accident occurred, or for some considerable distance either way. The roadbed was about 25 feet wide, on one side of which was water and on the other marsh. Two tracks were laid over it. It is matter of common knowledge that 15 miles per hour is not more than one half the usual speed between stations, outside of cities and towns. No one would think such speed reckless or dangerous under ordinary circumstances over this road at that point. The defendant had a right to the use of its track, and may ordinarily presume that no one is upon it to be injured. It owes to persons wrongfully there no duty to look out for them that they may not be injured. Whatever duty it owes such persons arises after and because they have been discovered there by its servants. When the engineer first discovered plaintiff she was in the custody and control of her father, and was in the act of stepping from the track towards the other parallel track. The party did get off and reach a place of security. It is difficult to see why, under such circumstances, the defendant's engineer should have made any attempt to

check the speed of the train. Counsel suggest because of the fright to the child, which they assume should have been anticipated. But the child was apparently and in fact in the custody of a person of mature years, her father, who testified that he held her by the hand. Unfortunately she broke from him and ran in front of the engine. We do not think this could have been anticipated, or was caused by any negligence on the part of defendant's servants. As soon as she put herself in peril every possible effort was made to prevent the injury. So far, we think, negligence on the part of defendant could not be reasonably inferred from the circumstances.

But appellant's counsel contend that plaintiff was not wrongfully upon the roadway, but was there through the fault of defendant's servants, who carried her beyond her station, in violation of the contract of defendant, and put her off at another point on their road, telling her that she could walk back; that there was no other way to reach the station save by the roadway, and therefore the acts of defendant's servants in failing to permit her to alight at Watt's station, and leaving her at Emery station, directly and proximately caused the accident. The failure of defendant to permit plaintiff to alight at Watt's station, leaving her at Emery station instead, was a violation of defendant's contract for which plaintiff was entitled to an action for damages. She might have insisted upon her contract and perhaps have refused to alight anywhere else, or might have taken the next return train for Watt's station, and insisted upon her right to be left at Watt's station free of charge, but it is difficult to see how such wrong on the part of the defendant gave her a right to go back over the track to Watt's station.

The real contention here is that, defendant having carried her beyond her destination and left her, the defendant must be held to have intended that she should walk to the station, and, there being no other obvious way, the wrong of defendant was the proximate cause of the danger to which she was exposed; and, as a child of six years cannot be guilty of contributory negligence, the defendant must be responsible. When it is said that there was no other way back, it must be understood that there was no direct way. We cannot suppose that Emery station was entirely isolated from the general road system of the country. The testimony of plaintiff's father also shows that he knew that a return train was then expected, upon which they could have taken passage. The cases cited by counsel for appellant in support of this contention are cases where the common carrier violated another obligation imposed by his contract, that is, to furnish a safe place for alighting. *Hutchinson on Carriers*, which is referred to, says, (section 617): "Such carriers must be equally careful not to pass beyond the alighting platform station, and thus to require or make it necessary for the passengers to alight without returning to it. When this has been done it is a breach of the carrier's contract, and

the passenger may demand a return to the platform or station before leaving the train, and if the servant of the company in charge, without sufficient cause, refuse to return with him, but leaves him to get back by other means, the passenger will be entitled to an action and to the recovery of damages. * * * If there should be no demand to be taken back or refusal to do so, and no attending circumstances of aggravation, and the passenger voluntarily leaves the car, all that the passenger could rightfully claim would be compensation for the inconvenience to which he has been put. * * * But nevertheless where the passenger is carried past the platform or usual alighting place, and is required, either expressly or impliedly, to leave the car without assistance and to find his way unaided to the station, during which time he receives injury, the carrier is liable." This is evidently because the passenger was left in an unsafe position. This is made evident by the cases cited in its support. *Railroad Co. v. Doane*, 115 Ind. 435, 17 N. E. Rep. 913. A lady passenger was carried some 40 rods beyond the station, and ordered to alight. The roadway was fenced by a wire fence. She discovered no way of getting out except to walk back to the station. In doing so she had to pass a cattle pit, into which she fell. It is said: "It is also the duty of a railroad company to provide suitable stations and platforms to enable persons to enter its cars, and passengers to safely alight when they have accomplished their journey." It is also said that, when passengers are required to alight at any other place than the platform, the company is liable for injuries received in leaving such place to the same extent as it would be for defects in its own premises. The facts in this case and the reasoning of the court clearly show that it can have no application to the case in hand. *Adams v. Railway Co.*, 100 Mo. 555, 12 S. W. Rep. 637, and 13 S. W. Rep. 509; *Winkler v. Railway Co.*, 21 Mo. App. 99; and *Franklin v. Motor Road Co.*, 85 Cal. 63, 24 Pac. Rep. 723,—are of the same character, and have only to be read to show their inapplicability to the case under consideration. Here the plaintiff was left at a different station from that to which the defendant had agreed to carry her, but she was not left in a position of danger. When she left the car without asking to be carried back and left where she ought to have been left, the contract relation between her and defendant ceased. She had a right of action against the company for the breach of their contract, but they owed her no special care because of it. It must follow that the failure to leave plaintiff at Watt's station and carrying her to Emery station was not the proximate cause of her injury.

The judgment and order are affirmed.

98 Cal. 63

BARROWS et al. v. FOX et al. (No. 14,643.)
(Supreme Court of California. April 1, 1893.)

WATER COURSES—APPROPRIATION—AMOUNT OF
DIVERSION.

A decree enjoining an appropriator of water against diverting from a stream any

greater quantity of water than will flow through an iron pipe, of a certain size, which is found to be the amount required by him, is erroneous where the water is conducted in an open ditch or flume; as in such case the amount which reaches the place of use is not the same as that diverted, and the appropriator is entitled to such an amount, allowing for waste, as will yield the amount required at the place of use, and he is not obliged to substitute iron pipes.

In bank. Appeal from superior court, Ventura county; B. F. Williams, Judge.

Action by Barrows and others against Fox and others. From a decree defining the rights of the parties, and from an order denying plaintiffs' motion for a new trial, plaintiffs appeal. Reversed.

Blackstock & Shepherd, (Chapman & Hendrick, of counsel,) for appellants. H. L. Poplin, for respondents.

BEATTY, C. J. The plaintiffs in this action are successors in interest to an appropriator of running water. The appropriation was made at a time when all the lands affected were public lands of the United States, and by means of a ditch and flume through which the water diverted from the stream was conducted to the lands now owned and occupied by the plaintiffs, where it was applied to irrigation, watering stock, and domestic purposes. The diversion and use of the water for these purposes and by these means had been continued for more than 13 years prior to the trial of the action in October, 1890. The defendants, long subsequent to the appropriation by plaintiffs' grantor, became the owners of riparian lands through which the stream flows in its natural course below the dam maintained by plaintiffs for the purpose of forcing the water into the head of their ditch. The lands of plaintiffs are not on or adjacent to the stream, and no surplus or waste water will flow from their lands back into the stream, above or within the limits of defendants' lands. In the summer of 1890 the defendants, for the purpose of diverting the water from the plaintiffs' ditch and flume, and bringing it upon their own lands, tore out plaintiffs' dam, whereupon this action was commenced for damages, injunction, etc. The defendants answered, contesting plaintiffs' claims, and asserting their own claims, not only as riparian owners, but as appropriators, and praying for affirmative relief. The cause was tried by the court, and a decree rendered, defining the rights of the respective parties, and enjoining each from interfering with the other. From this decree, and from an order denying their motion for a new trial, the plaintiffs appeal.

The appeal from the order may be disposed of in few words. There was no error—none certainly that could possibly have prejudiced the plaintiffs—in any of the rulings made by the superior court during the trial, and we find in the record evidence sufficient to sustain the findings which are attacked. The principal objection to the findings is that they limit too strictly the extent and character of plaintiffs' appropriation. In effect, it is found that the appropriation did not exceed 11

inches of water, and that this quantity cannot be beneficially applied for the purpose of irrigation on plaintiffs' lands more than 15 days in each month during the irrigating season, i. e. from June to November, inclusive, in each year. There is evidence to sustain this finding and to support the conclusion that the diversion by plaintiffs of the entire 11 inches during other months, or for more than 15 days in each irrigating month, would merely result in a waste of the waters of the stream upon nonriparian lands. It is also found that for domestic purposes and for watering stock the plaintiffs require no more water than will flow through a three quarter inch iron pipe laid from the point of diversion to plaintiffs' lands on the grade of their ditch and flume. There is evidence, not very satisfactory perhaps, but sufficient to sustain this finding in the terms in which it is made, the only difficulty being that it fixes no quantity of water, and is incapable of fixing it in the absence of a pipe such as that described; and the fact is that the plaintiffs have not, and have never had, a pipe of any description, but only an open flume and ditch. This difficulty, however, does not result from lack of evidence to support the finding, though it does, as we shall see, affect that portion of the decree which is based upon it.

We come next to consider the points urged in support of the appeal from the judgment.

1. The superior court did not err in enjoining the plaintiffs from diverting the whole amount of water appropriated by them for purposes of irrigation at times when it is found they could not use it beneficially for that purpose, and when, as a necessary consequence, it would run to waste on nonriparian lands. The extent of an appropriation is limited, not by the quantity of water diverted, but by the quantity which is, or which may be, applied by the appropriator to a beneficial use; and as to any surplus the riparian proprietor below the point of diversion has a right to demand that it should flow in the stream as it has been accustomed to flow. Civil Code § 1411; *Perego v. McKissick*, 79 Cal. 572, 21 Pac. Rep. 967.

2. But we think the decree of the superior court in attempting to enforce this principle goes in one respect too far, and is in another particular too uncertain and indefinite to be capable of enforcement. The findings nowhere determine the quantity of water diverted by plaintiffs. All that they establish is the quantity which plaintiffs have a right to use on their lands for irrigation and other purposes. But plaintiffs are enjoined against any diversion from the stream in excess of the quantity which they are found to be entitled to use on and at their lands. There is always and inevitably a difference between the quantity of water diverted from a stream and the quantity which reaches the place of use when conducted for any distance through an open ditch or flume, and, when the only fact found is the quantity of water used, this is not a sufficient basis for an injunction limiting the diversion. These remarks apply with especial

force to that part of the decree which limits plaintiffs' right of diversion for stock and domestic purposes to the quantity of water which will flow through a three quarter inch pipe. The plaintiffs, as we have seen, have no pipe of any dimensions, and they are not only not obliged to put in a pipe, but they have no right to do so, in the lands of other parties through which their ditch is shown to extend. *Allen v. Water Co.*, 92 Cal. 138, 28 Pac. Rep. 215. The quantity of water which they are allowed to divert at all times for stock and domestic purposes is therefore undetermined, and incapable of determination except by means legally impossible, and the decree is therefore erroneous. It is also erroneous for the further reason that the plaintiffs have the right to divert from the stream a quantity of water sufficient to yield at the place of use the quantity required after the loss by absorption and evaporation of so much thereof as is necessarily so lost in a ditch and flume well constructed and kept in good condition. Ditches and flumes are the usual and ordinary means of diverting water in this state, and parties who have made their appropriations by such means cannot be compelled to substitute iron pipes, though they may be compelled to keep their flumes and ditches in good repair so as to prevent any unnecessary waste. The judgment is reversed, and the cause remanded to the superior court, with directions to modify its decree to conform to the views herein expressed, and for that purpose to take such additional testimony and make such additional findings as may be necessary.

We concur: HARRISON, J.; GAROUTTE, J.; PATERSON, J.; FITZGERALD, J.

98 Cal. 110

CLARK et al. v. CHAPMAN. (No. 18,005.)
(Supreme Court of California. April 8, 1893.)

VARIANCE—FORECLOSURE SALE—GUARANTY.

1. In an action on a contract of guaranty which recites that it is made by defendant in consideration of the execution and filing in court of a certain agreement to arbitrate, to which defendant, one H., and others were parties, where it appears that H.'s name was erased, by mutual consent, before filing, no objection can be made to introducing the agreement, as filed, to identify the subject-matter on which defendant's liability is based, since the variance is not such as will mislead defendant.

2. Where land worth \$3,500 is incumbered of record with mortgages for \$3,200, a bid of \$25 at an execution sale is not disproportionate to the value of the property, after deducting the apparent liens.

3. Where a creditor has recovered a judgment against the principal debtor, which remains unsatisfied, a guarantor against whom judgment is recovered on his guaranty is, on payment thereof, entitled to an assignment of the judgment against the principal, but such assignment is not a condition precedent to a recovery from the guarantor.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by A. M. Clark and W. H. Mc-

Kenzie against E. W. Chapman on a contract of guaranty. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. M. Demont and Newman Jones, for appellant. Van Meter & Warlow, for respondents.

SEARLS, C. This is an appeal from a final judgment in favor of plaintiffs, and from an order overruling a motion for a new trial. On the 24th day of May, 1888, J. G. Wofford, the assignor of the respondents, S. G. Boyd, E. W. Chapman, the appellant, and E. H. Fleming entered into a written agreement of arbitration of certain differences existing between them, growing out of and relating to certain commissions claimed by Wofford from Chapman and Fleming for the sale of fruit and ornamental trees and cactus hedge plants; for salary claimed to be due him; also, for an amount claimed to be due him and Boyd from all the others on account of moneys, notes, etc., received by such others from the sale of cactus hedge plants in Merced county, where said Wofford and Boyd claimed an interest in the sales. The name of one J. H. Hamilton was originally written in the body of the agreement of arbitration, as a party thereto, but was erased therefrom, as appears by a note at the bottom of the instrument, which note is as follows: "Name J. H. Hamilton erased wherever occurring in this instrument. [Signed] H. S. Dixon. S. W. Geis. G. G. Goucher." Dixon was the attorney of Chapman, and Geis and Goucher were attorneys of Wofford. On the day of the execution of the agreement to arbitrate, viz. May 28, 1888, E. W. Chapman, the appellant, entered into a written agreement with J. G. Wofford, in the following language: "In consideration of the execution and filing in the superior court of the state of California, in and for the county of Fresno, by him, of a certain agreement of submission to arbitration, dated this day, to which J. H. Hamilton, E. W. Chapman, S. G. Boyd, and E. H. Fleming are parties, submitting to arbitration the divers matters specified therein, and of the faithful performance by him of all his obligations entered into under and by virtue of said agreement, I, E. W. Chapman, of the county of Fresno, state of California, do hereby covenant and agree with J. G. Wofford, of the same place, that I will and shall save him, said Wofford, harmless against all loss of any and all lawful claims he may establish before the arbitrators appointed in said agreement by reason of his surrender to them of any of the property or effects involved in said controversies so to be decided, and that I will and do hereby guaranty said Wofford that he shall have immediate payment of any and all sums found by said arbitrators due him upon the settlement of the affairs and accounts involved in the matters submitted to said arbitrators by said agreement, upon the final determination of the matters so submitted to said arbitrators. E. W. Chapman. Fresno, 24th May, 1888." On the same paper, below the foregoing agreement, the following ap-

pears: "I hereby obligate myself to said Wofford in manner and form above written. Ed. H. Fleming." The agreement of submission to arbitration was filed in the superior court of Fresno county on the day of its execution, viz. May 24, 1888. The arbitrators named in the agreement met, received from Wofford a surrender of certain horses, wagons, harness, promissory notes, and other assets, as provided in the agreement of arbitration, and on the 18th day of July, 1888, filed their findings and award in the proceedings with the clerk of the superior court of Fresno county, in which, among other things, the sum of \$1,454.11 was found to be due to J. G. Wofford from E. H. Fleming. The agreement to arbitrate provided therefor, and such proceedings were had thereupon that on the 27th of July, 1888, judgment in favor of Wofford, and against E. H. Fleming, for \$1,454.11, was entered in the superior court of Fresno county. At the date of the entry of judgment the defendant therein, E. H. Fleming, was the owner of lots 11, 12, and 13, in block 107, of Fresno City, valued at about \$3,500, upon which there was of record mortgages amounting to \$3,200, although in fact one of them, for \$1,500, had been paid. Fleming, on the 7th of August, 1888, conveyed these lots to one Burns. Execution issued on the Wofford judgment September 22, 1888, was levied upon the three lots above mentioned; and, at a sale thereunder on the 10th of November following, they were bid in for \$25 by Wofford, from whom they were redeemed by Fleming on the 8th of May, 1889. At the date of the sale, and ever since said date, Fleming has been insolvent, and had no property except the lots in question. On the 17th of October, 1888, Wofford assigned to Clark and McKenzie the guaranty from Chapman, receiving therefor the entire amount due him, viz. \$1,454.11 and interest. No payments having been made thereon, the assignees brought this action, and recovered judgment in the court below.

As will appear from the foregoing statement, the name of J. H. Hamilton is mentioned as a party to the contract of arbitration in the guaranty of defendant, Chapman, while in the agreement to arbitrate, filed in the superior court, the name of Hamilton does not appear. Defendant objected, when the contract of arbitration was offered in evidence, upon the ground that this variance was fatal, and his objection being overruled, and the agreement admitted in evidence, he afterwards made the same point on motion for a nonsuit, which was denied; and these rulings are the basis of the first error assigned. Appellant admits that an agreement to arbitrate was filed in the superior court, but claims that, inasmuch as the name of J. H. Hamilton did not appear as a party thereto, it was not the agreement specified in the guaranty. Section 469 of the Code of Civil Procedure provides that "no variance between the allegations in pleading and the proof is to be deemed material unless it has actually misled the adverse party." Was the defendant misled by the variance? The object of the reference to the contract to arbitrate in the contract

of indemnity was to identify the subject-matter upon which defendant's liability was based. It described the contract of submission to arbitration accurately as to date, as to questions to be submitted, property to be surrendered to the arbitrators, court in which the submission was to be filed,—in short, in all respects, identically, except that, as filed, the name of Hamilton was erased. When we consider that this seems to have been done by the mutual consent of all the parties; that the attorney of defendant witnessed the erasure of Hamilton's name from the contract of submission; that the matter was arbitrated without objection, so far as appears; that Wofford surrendered the property in his possession, as provided in such agreement,—it is hard to see that Chapman was misled; non constat but that the insertion of the name of Hamilton in the two instruments was a mere clerical error, which might be disregarded or corrected by the parties thereto, at their will. The question is not one in which the variance is as to the measure of defendant's liability, but rather as to the identity of the subject-matter upon which that liability is founded. The responsibility of defendant, as measured by his guaranty, was founded upon a certain arbitration, and the results flowing therefrom, and any indices identifying that arbitration with certainty are deemed sufficient. *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 264, was a case in which the defendants were sued as common carriers for the loss of a draft sent through them, and described as being signed by "John Q. Jackson." The proof showed that it was signed "John Q. Jackson, Agent," and the court held the variance between the allegation and proof immaterial. *Smith v. Morse*, 9 Wall. 76, was an action upon a breach of covenant to perform the award of arbitrators. The agreement to refer to arbitrators contained this clause: "as provided in articles this day executed." The declaration in the case counted on the submission omitting the sentence quoted; and on the submission being offered in evidence, containing the quoted clause, its admission was objected to on the ground of variance. In fact, no articles of submission had ever been executed, and it so appeared at the trial, whereupon the court held there was no variance. I regard the error assigned as not well taken.

2. It is urged that there was no sufficient consideration for the contract of guaranty entered into by defendant. The first specification of insufficiency is based upon the theory that defendant's guaranty was based upon the consideration of the execution and filing in the superior court of the contract of submission containing the name of J. H. Hamilton, whereas in fact no such agreement was ever executed and filed. This allegation of error is answered in the discussion of the question of variance, in which it is held the contract of submission was substantially the same as specified in the contract of guaranty, and varied therefrom only as by consent of all the parties, defendant included. A further consideration for the guaranty is to be found in the surrender to the arbitrators

by Wofford of the property in his possession, as provided for therein. The second specification, as to the sufficiency of evidence to justify the findings and decision, is based upon the supposed agreement between Wofford and Chapman that the former should purchase the town lots of the judgment debtor, Fleming, at the face of the judgment, on a sale under execution, and upon full payment by Chapman should assign the certificate of sale to the latter. The evidence as to this agreement involved a substantial conflict. The finding was against the defendant, and, upon well-established principles, will not be disturbed by this court. Wofford exhausted the lien of his judgment upon all the property of the defendant therein, and the sum bid, \$25, was not disproportionate to the value of the property after deducting the apparent liens thereon. The fact that one of the mortgages had in fact been paid, although not so appearing of record, does not seem to have been known at the date of the sale and purchase by Wofford. A guarantor, like a surety, is entitled to be reimbursed by enforcing any remedy which the creditor then has against the principal; and, if defendant satisfies the judgment herein, he will be entitled to an assignment of the judgment against Fleming; but such assignment is not a condition precedent to recovery. I am of opinion the conclusion reached by the court below was correct, and advise that the judgment and order overruling the motion for a new trial be affirmed.

We concur: BELCHER, C.; HAYNES C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

98 Cal. 134

FLAGG v. PUTERBAUGH, Judge. (No. 19,270.)

(Supreme Court of California. April 14, 1893.)

**BILL OF EXCEPTIONS—TIME OF PRESENTATION—
MANDAMUS TO COMPEL SETTLEMENT.**

1. Code Civil Proc. § 649, allowing a party to present a bill of exceptions for settlement at the time of the ruling in case of appealable orders made before final judgment, is merely permissive, and not exclusive; and such a bill should be settled and allowed if presented within a reasonable time, as in case of final orders, and the analogy furnished by sections 650 and 651 should determine what is a reasonable time.

2. Mandamus to compel settlement and allowance of a bill of exceptions which petitioner was entitled to have settled and allowed will be denied where the time for appealing has expired, and no appeal has been taken.

In bank.

Original application by O. S. Flagg for a writ of mandamus to compel George Puterbaugh, judge of the superior court, to settle and certify a bill of exceptions. Respondent demurred to the petition. Demurrer sustained.

O. J. Flagg and Thos. J. Capp, for petitioner. Welborn, Stephens & Welborn, for respondent.

BEATTY, C. J. This is a proceeding by mandamus to compel the respondent to settle and certify a bill of exceptions to an order dissolving a writ of attachment. Respondent demurs generally to the petition, for want of facts. From the petition it appears that the order dissolving the attachment was made October 4, 1892. Afterwards, on the same day, the cause in which the attachment had been issued was tried by the court, and taken under advisement. On October 7th, judgment was directed for the plaintiff, and, on October 13th, findings were filed, and judgment entered. On October 8th, petitioner (plaintiff in the attachment suit) served a draught of his proposed bill of exceptions on the defendants' attorneys, and on the 19th gave notice that he would on the 24th of October present the bill to the respondent for settlement. On the 24th the bill was accordingly presented, but the respondent took no action in the matter until November 4th, when he granted leave to the petitioner to amend said bill, giving him until November 9th to file and serve his amended bill, and allowing the defendants 10 days thereafter to interpose objections, or propose additional amendments. On November 7th the petitioner served on defendants, and presented to re-

spondent, his amended bill. The defendants objected to the settlement of the bill, and on January 13, 1893, the respondent indorsed thereon the following order: "The proposed bill of exceptions, not being presented in time, is disallowed, and the court hereby refuses to allow or settle the same." This action, or rather this refusal to act, on the part of the respondent is attempted to be justified on several grounds. In the first place, a distinction is claimed to exist between this case and *Tregambo v. Mill & Mining Co.*, 57 Cal. 504, because the order excepted to here is an appealable order, while in that case it was a ruling which could only be reviewed on appeal from the final judgment; and it is contended that although in the case cited the procedure prescribed by section 650, Code Civil Proc., may have been applicable, this case is wholly governed by section 649. We see no reason, arising out of the difference of the cases, for applying a different rule. The decision in *Tregambo v. Mill & Mining Co.* was a liberal ruling in favor of justice, and ought to be followed in all cases where it can be applied without violating the express terms of the statute. A court should lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits, and rules of procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits, rather than to convert them into a means of obstruction. Taking this view of the matter, and assuming that the case is governed by section 649, that section is, in terms, permissive, and the privilege granted the party, of presenting his bill of exceptions for settlement at the time of the ruling, is not necessarily exclusive. It would frequently be extremely inconvenient to make up a bill of exceptions instantanously, and there is no reason why a court should hold itself rigidly bound to such a practice in the case of appealable orders made before final judgment, any more than in the case of similar orders made after final judgment, which are provided for in section 651. In short, we think that in a case falling under section 649 a bill of exceptions ought to be settled and allowed if presented within a reasonable time after the order excepted to, and that the analogy furnished by sections 650 and 651 should determine what is a reasonable time. The petitioner here followed the practice prescribed by those sections, and was entitled to have his bill of exceptions allowed and certified. It is only in consequence of our twenty-ninth rule that a bill of exceptions to this order is necessary. The rule does not, as perhaps it ought, prescribe any practice for the settlement of the bills of exceptions which it requires. We take the occasion, therefore, to say that, in order to comply with that rule, parties appealing from orders may follow the same practice prescribed by sections 650, 651, Code Civil Proc.

Another objection to the right of petitioner to the relief sought is that his petition shows that his original proposed bill was not refused settlement, and that the bill which was refused was filed too late.

We think it sufficiently appears that the court refused to settle, not only the bill proposed November 7th, but any bill. The first one, at least, was in time, and entitled the petitioner to a bill truly setting forth the proceedings to be reviewed. But, considering the extension of time granted by the court, we think the second draft proposed was in time, and, so far as it was true, ought to have been allowed.

The last objection is that more than 6 months have elapsed since the order dissolving the attachment, that the time for appealing was only 60 days, and that it does not appear that any appeal has ever been taken. This objection to the sufficiency of the petition seems to be well founded. It would be a vain thing to settle a bill of exceptions, if there is no appeal, and the court would not order it. For this reason, only, the demurrer to the petition must be sustained. Demurrer sustained, with leave to petitioner to file an amended petition within 10 days, if he is so advised.

We concur: DE HAVEN, J.; FITZGERALD, J.; HARRISON, J.; McFARLAND, J.

(98 Cal. 138)

PEOPLE v. WALTERS. (No. 20,994.)

(Supreme Court of California. April 14, 1893.)

HOMICIDE—EVIDENCE—PROSECUTING ATTORNEY.

1. In a murder case, where the evidence shows that a feud existed between the families of defendant and deceased, evidence that, immediately after defendant shot deceased, he fired the other barrel of his gun, and wounded deceased's mother, who was present, is admissible to show motive.

2. It is also proper to admit the testimony of surgeons as to the number and position of the wounds on her body, as it tends to show that defendant shot at her with deadly aim.

3. For the same reason it is proper to prove that shortly after the shooting she was covered with blood.

4. Pen. Code, § 1130, providing for supplying the place of the district attorney by appointment of the court when he cannot prosecute, is not exclusive, and in such case an attorney may be employed to prosecute by the board of supervisors; and there need be no formal order of court, as required by said section.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Elmer Walters was convicted of murder in the second degree. The court granted a new trial, and the people appeal. Reversed.

Atty. Gen. Hart and Harris & Gregg, for the People. R. E. Bledsoe, E. W. Freeman, and L. T. Farr, for respondent.

BEATTY, C. J. The defendant was charged with the murder of one Ira Wall, and was convicted of murder in the second degree. On the trial in the superior court, evidence was admitted, over the defendant's objection, to the effect that at the time of the homicide Ira Wall and his mother were together, and, immediately after shooting and killing Ira Wall with

one barrel of his shotgun, the defendant fired with the other barrel upon Mrs. Wall, and wounded her. Before judgment the defendant moved for a new trial upon the following grounds: "(1) That the court has misdirected the jury in matters of law, and has erred in the decisions of questions of law arising during the course of the trial; (2) that the verdict is contrary to the law; (3) that said verdict is contrary to the evidence." After argument the court made and entered the following order: "Defendant's motion for a new trial, heretofore submitted, is granted upon the ground that the court erred in admitting evidence regarding the shooting of Mrs. Wall, and on that ground only, and denied as to the other grounds of said motion, and the prosecution excepts." From this order the people appeal, contending that the several rulings of the court admitting evidence relating to the shooting of Mrs. Wall were free from error, and consequently that the order was wholly unwarranted. The defendant contends that the order granting a new trial is not only sustained by the ground upon which the action of the court was expressly based, but that it should have been granted upon other grounds.

In order to a proper consideration of the case, a brief statement of the leading facts is necessary: There was a controversy of some years standing between the Wall and the Walters families over the right to divert and use the waters of a small stream for the purpose of irrigating their respective lands. The Walls seem to have been the first appropriators, but the extent of their appropriation and use seems to have been disputed by the defendant and his two brothers, and there were mutual interferences in the way of turning the water in and out of the irrigating ditches of the parties. On one occasion, when several of the Walls—brothers and sisters—were present, a brother of the defendant took a gun from the hands of Ira Wall's sister, and in attempting to break it caused it to be accidentally discharged, inflicting upon himself a mortal wound. Subsequently a suit was commenced by the Walls against the defendant, in which a preliminary injunction was issued restraining him from interfering with the water; but this order was so modified as to permit the parties, pending the litigation, to use the water alternately four days at a time. Afterwards the action was tried, and decided in favor of the Walls. Pending his motion for a new trial the defendant claimed the right to use the water alternately with the Walls four days at a time, according to the modification of the preliminary injunction, and having turned the water from the Walls' ditch into his own, armed himself with a pistol and shotgun, and took his station at the point of diversion, apparently for the purpose of preventing any interference on the part of the Walls. During the night of August 10, 1892, he slept on the ground a few feet from the ditch, and was still in bed between 5 and 6 o'clock on the morning of the 11th, when Ira Wall, his mother, and a boy of sixteen, named Carver Peck, came down the canon along the

road from the Wall residence to the town of Elsinore. Mrs. Wall was in a buggy on her way to Elsinore. Ira Wall and Peck were on foot, and each had a shovel. None of them were armed. Mrs. Wall stopped her buggy about 30 feet short of the point at which the Walters ditch crossed the road. Ira Wall and Peck went to the ditch, and commenced placing some stones in it where it crossed the road, for the purpose, as they claim, of making it passable for the buggy. At this moment defendant sat up in his bed, and drawing a double-barreled gun from under the cover, with the remark, "You know what I am here for," fired at Ira Wall, and immediately swung his gun around in the direction of Mrs. Wall, where she sat in her buggy, and discharged the second barrel. About 50 shot entered the body of Ira Wall under his left shoulder blade, killing him instantly. Thirteen shot took effect in the breast of Mrs. Wall, but did not inflict a fatal wound. It is for the supposed error in the admission of evidence of this shooting of Mrs. Wall that the superior court has ordered a new trial.

The superior court did not err in admitting this evidence. It is true that in trying a person charged with one offense it is ordinarily inadmissible to offer proof of another and distinct offense, but this is only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged; but, whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. These remarks are applicable to any case in which two persons are murdered or assaulted at the same time, and as part of the same transaction, and the present case affords an excellent illustration of the necessity of the exception to the general rule. On the occasion of this homicide, Mrs. Wall and her son were the representatives of one side of a long-standing controversy, which had resulted in a bitter family feud, and the shooting of the mother immediately after the shooting of the son, by a representative of the other side, was convincing evidence of the motive of the act. It showed the malice which is an essential ingredient of the crime charged, and tended strongly to disprove the claim of self-defense, which the people could anticipate if they chose to do so. Nor can the defendant complain of the rulings of the court admitting the evidence of surgeons as to the number and position of the wounds on the body of Mrs. Wall. This evidence tended to prove that he shot at her with deadly aim; and the same may be said of the evidence of another witness, who stated that when he saw Mrs. Wall at the scene of the shooting, shortly after it occurred, she was covered with blood from head to foot. The authorities cited in appellant's brief abundantly sustain the foregoing views. We do not think it necessary to refer specially to any case except *People v. Cunningham*, 66 Cal. 671, 4 Pac. Rep. 1144, and 6 Pac. Rep. 700, 846. The ground upon which the new trial was granted, therefore, does not

sustain it, and it only remains to inquire whether either of the other grounds relied on by the defendant entitled him to a new trial.

Two points, only, are urged under this head: First, that it was error to allow attorneys to conduct the prosecution in place of the district attorney, who had not been regularly and formally authorized so to do by an order entered in the minutes of the court; second, that the court erred in refusing to allow one of the instructions requested by the defendant. The facts upon which the first point arises are as follows: The district attorney of the county had been attorney for the defendant in the litigation about the water right, and for that reason felt that he could not properly prosecute the charge of murder. At his suggestion the board of supervisors employed other counsel to conduct the prosecution, which they did without objection, but without any formal order of court, made in pursuance of section 1130 of the Penal Code. There was no error in this. Section 1130, Pen. Code, makes provision for supplying the place of the district attorney when for any reason he cannot conduct the prosecution, but is not exclusive. If his place is otherwise supplied by counsel who are guilty of no misconduct prejudicial to the defendant, he has no ground of complaint. As to the second point, it is sufficient to say that the instruction refused was so broad in its terms as to be misleading, if not positively erroneous, and so far as it was correct it was given, with the necessary qualifications, in another instruction allowed by the court. There was no ground for the order granting a new trial, and the order is therefore reversed, with directions to the trial court to enter the proper judgment upon the verdict.

We concur: HARRISON, J.; DE HAVEN, J.; McFARLAND, J.

98 Cal. 103

In re SANBORN'S ESTATE. (No. 18,112.)
(Supreme Court of California. April 3, 1893.)

WILL—WHO MAY CONTEST—PUBLIC ADMINISTRATOR.

Under Code Civil Proc. §§ 1307-1312, providing that a will can be contested on "written grounds of opposition" filed by a "person interested," a public administrator cannot contest the probate of a will, since the person contesting must be interested in the estate, and not merely in the fees of administration.

Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Petition by V. M. Peyton for the probate of the will of Israel Sanborn, deceased. J. R. Claves, public administrator, also filed a petition for letters of administration of the estate of Sanborn. From orders admitting the will to probate, and denying the petition of Claves, the latter appeals. Affirmed.

Nicol & Orr and E. I. Jones, for appellant. J. H. & J. E. Budd, for respondent.

McFARLAND, J. Israel Sanborn died in San Joaquin county on January 27, 1892, and on February 3, 1892, V. M. Peyton filed in the superior court of said county a petition in which it was averred that said Sanborn left a will dated April 17, 1872, by which petitioner and one Severy were named as executors. It was further stated that Severy was incompetent, and petitioner prayed that the will be admitted to probate, and letters testamentary be issued to said Peyton. Due notice was given to the heirs, and no one interested in the estate appeared to contest the probate of said will. But on February 8, 1892, J. R. Claves, who was public administrator of said county, filed in said court a petition for letters of administration of the estate of said Sanborn, in which he averred, among other things, that he "has no knowledge whether said will was ever signed or attested by said Sanborn, or any witnesses;" that it "does not show upon its face that the same is any will or testament of said deceased;" and that he "is advised and believes that the attestation, witnessing, or publication of said paper as a will cannot be shown;" and, further, that no other will has been found, and that "to the best knowledge, information, and belief of said petitioner, said deceased died intestate." The two petitions were heard together; and the court made an order admitting the will to probate, and granting letters to the administrator, Peyton, and also another order denying the petition of the public administrator, Claves. From these orders, Claves appeals.

At the trial, Claves offered evidence tending to show that Sanborn had made a later will, which could not be found. To this evidence, respondent objected, and it was admitted, "with the privilege to move to strike it out;" and afterwards the court granted a motion of respondent to strike it out, which ruling is assigned by appellant as error. This evidence was properly stricken out; and, if the court committed any error, it was in listening at all to the petition of the public administrator before it had passed upon the probate of the will. The probate of a will can be contested only upon "written grounds of opposition" filed by a "person interested,"—that is, interested in the estate, and not in the mere fees of an administration thereof. Sections 1307-1312, Code Civil Proc. A public administrator has no interest in an estate, or in the probate of a will. That is a matter which concerns only those to whom the estate would otherwise go. In *Estate of Parsons*, 65 Cal. 240, 3 Pac. Rep. 817, one J. W. Parsons had been appointed administrator, and afterwards a document was offered for probate as the will of the deceased. Parsons, as administrator, contested the probate, and afterwards charged the expenses of the contest in his account; but this court said: "This item is not a charge against the estate. It was the affair of the heirs, as such, to contest, if they wished, the probate of the document; not of the administrator." See, also, *Roach v. Coffey*, 73 Cal. 281, 14 Pac. Rep. 840, and cases there cited. If a public ad-

ministrator could legally assume the character of a standing contestant of wills, notwithstanding the wishes of heirs and devisees, he would certainly enlarge the sphere of his activities; but the limitations of the statute do not allow such inflation. Orders affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

98 Cal. 51

SWAMP-LAND DIST. NO. 150 v. SILVA et al. (No. 18,058.)

(Supreme Court of California. March 31, 1893.)

DRAINAGE DISTRICTS — ORGANIZATION — ASSESSMENTS — CONSTITUTIONAL LAW — FORFEITURE OF FRANCHISE.

1. Where, under Act March 30, 1874, (St. 1873-74,) providing that, immediately after the passage of the act, owners of land in swamp-land district No. 150 may elect trustees, and proceed in the work of reclamation, as provided in the Code, the landowners organized the district by electing trustees, and making and recording by-laws, the organization was complete; and an attack on the validity of such organization could not be considered in an action by such district to recover assessments against land of persons lying within such district.

2. Such act is constitutional, since, under Const. art. 4, § 31, providing that corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, the legislature could create a reclamation district by special act.

3. Pol. Code, § 3459, as amended by Act March 30, 1874, provides that if the original assessment is insufficient for the reclamation of the district lands, or if further assessments are necessary to maintain the reclamation work, the trustees must present to the board of supervisors by which the district was formed a statement of the work "done" or "to be done." Held that, where an assessment was levied for work "to be done," it was not rendered invalid because the trustees, in their statement to the board of supervisors, did not specify the work already done.

4. Nor was such assessment invalid because it included incidental expenses, and the sum of \$33,400 for erecting and maintaining a pump.

5. The fact that the officers of, and owners of land in, the district, failed to act as a corporation, does not destroy the corporate existence of the land district, since no acts or misconduct of the agents or officers of a corporation can operate to forfeit its charter.

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by swamp-land district No. 150 against A. J. Silva and Mary Silva. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Johnson, Johnson & Johnson, for appellants. Add. C. Hinkson and John W. Armstrong, for respondent.

PATERSON, J. Plaintiff brought this action to recover from the defendants the sum of \$953.11, the amount of an assessment levied against the land of the defendants lying within reclamation district No. 150. The act of March 30, 1874, (St. 1873-74, p. 867,) under which the plaintiff was organized as a reclamation district, provides that immediately after the passage of the act the "owners of land in swamp-land district No. 150 consisting of

what is known as 'Merrit Island,' in Yolo county, may proceed to elect trustees, and make and record by-laws, * * * and they shall thereafter proceed in the work of reclamation, as provided in said Code, with the modifications herein contained." Under this act the landowners organized the district by electing trustees, and making and recording by-laws. A notice was given on the 7th day of April, 1874, that a meeting for the purposes stated would be held on the 18th day of April, and at the time and place mentioned in the notice all the landowners in the district met, and elected trustees, and adopted by-laws. This is all the act required, so far as the organization of the district is concerned, and the points made by the appellants, seeking to impeach the validity of the organization of the district, cannot be considered. A reclamation district is a public corporation for municipal purposes, and the creation thereof may be shown by acts recognizing its existence. *People v. Reclamation Dist.*, 53 Cal. 346. The validity of the organization itself cannot be collaterally attacked in an action to recover an assessment levied upon land by a de facto district. *Reclamation Dist. v. Gray*, 95 Cal. 601, 30 Pac. Rep. 779.

It is claimed by appellants that the act above referred to was clearly unconstitutional, and gave the plaintiff no power to act, but no grounds are stated upon which this claim is based. Section 31, art. 4, of the old constitution, provided that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." Under this provision the legislature had the power to create a reclamation district by special act.

It is claimed by appellants that the assessment is invalid because the trustees, in their statement to the board of supervisors, did not specify the work which had already been done. Section 3459 of the Political Code formerly authorized an additional assessment only for work necessary to complete the reclamation. It did not authorize an assessment to be made for work already done. By an act approved March 30, 1874,¹ this section was amended by inserting the words "done or" before the words "to be done." Unless the assessment is to be for work already done, in whole or in part, there is no necessity for a statement as to what work has been done. The assessment in this case was levied for work to be done under section 3459, *supra*. *Hagar v. Board*, 51 Cal. 477.

The contention that the assessment is invalid because it includes incidental expenses, and the sum of \$33,400 for the purpose of erecting a pump and maintaining the same, cannot be sustained. *Reclamation Dist. v. Hagar*, 66 Cal. 56, 4 Pac. Rep. 945.

¹Pol. Code, § 3459, as amended by Act March 30, 1874, provides that if the original assessment is insufficient for the reclamation of the district lands, or if further assessments are necessary to maintain the reclamation works, the trustees must present to the board of supervisors by which the district was formed a statement of the work done or to be done.

It is claimed by the appellant that the district "lost its corporate existence by reason of the nonuser of its functions, and by reason of the total failure on the part of its officers and land owners to act as a corporation." But there is no such thing in this country as forfeiture of a charter of a municipal corporation through the acts or misconduct of its agents or officers. Any neglect to use the powers in which the public or individuals have an interest may be corrected by the courts. As such corporations can exist only by legislative sanction, so they can only be deprived of their existence by act of the legislature, or a judicial sentence based upon legislative provision and sufficient facts.

The court did not err in overruling the defendants' objection to the introduction in evidence of the order of the board of supervisors of Yolo county appointing commissioners. The act under which the plaintiff was organized provides that "all assessments for reclamation purposes in said district shall be made as provided in the Political Code." The act itself shows that the district is entirely within the boundaries of Yolo county. It follows, therefore, that, although the board of supervisors of that county did not form the district, yet such board is the proper tribunal to which report should be made. *Reclamation Dist. v. Goldman*, 65 Cal. 643, 4 Pac. Rep. 676.

Other errors are alleged, but we find no merit in any of the points made by the appellants. The judgment and order are therefore affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

SWAMP-LAND DIST. NO. 150 v. BUMP. SAME v. CORNISH, (two cases.) SAME v. WINTER. (Nos. 18,059-18,062.)

(Supreme Court of California. March 31, 1893.)

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Four actions by swamp-land district No. 150 against Bump and others to recover the amount of assessments levied against defendant's land. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Johnson, Johnson & Johnson, for appellants. Add. C. Hinkson and John W. Armstrong, for respondent.

PER CURIAM. Upon the authority of *Swamp Land Dist. v. Silva*, (No. 18,058, this day decided,) 32 Pac. Rep. 866, the judgment and order are affirmed.

98 Cal. 55

MARSHALL v. TAYLOR. (No. 14,674.)

(Supreme Court of California. March 31, 1893.)

SEDUCTION—EVIDENCE—DAMAGES.

1. In an action for seduction it appeared that plaintiff, 16 years of age, was working as a waitress in a hotel, and sleeping alone in a cottage near by; that she was on friendly terms with defendant, who was her employer, and a man of wealth and years; that defendant called on her at the cottage, after dark, and, after conversing on ordinary topics, offered her a glass of wine, which she drank,

and was soon scarcely able to stand without assistance; that defendant placed his arm around her, expressed his affection for her, caressed her, promised her future friendship and assistance, and finally assisted her to a bed, where he had intercourse with her. *Held*, that the evidence establishes a cause of seduction, whether plaintiff was or was not conscious at the time of intercourse.

2. Where, by reason of the intercourse, plaintiff became pregnant, and had a child, a verdict of \$25,000 was not excessive.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Jessie N. Marshall against Jacob S. Taylor for seduction. There was judgment for plaintiff, and defendant appeals. Affirmed.

C. C. Sephens, for appellant. W. T. Williams and W. W. Holcomb, for respondent.

GAROUTTE, J. This was an action for damages, plaintiff alleging by her complaint that the defendant with force and violence made an indecent assault upon her, and then and there wickedly seduced, debauched, and carnally knew her, when and whereby she became pregnant with child. A trial resulted in a verdict for plaintiff in the sum of \$25,000, and this appeal is prosecuted from the judgment and order denying a motion for a new trial.

It is developed by the evidence that the defendant is a man of mature years, of large property interests, and at the time the alleged cause of action arose was residing with his wife and daughters at a seaside resort in San Diego county, and, among his various business callings, was there engaged in keeping a hotel. The plaintiff was an employee of the defendant, engaged as a waitress at the hotel. She was of the age of 16 years and 10 months, had seen considerable of the world, having resided with her mother in various localities, and, as indicated by her evidence and correspondence introduced at the trial, may be considered a bright and intelligent girl for her years. The proof of the seduction rests alone upon the testimony of the plaintiff, and her evidence is squarely and entirely contradicted in every essential particular by the testimony of the defendant; he denying ever having had any sexual intercourse with her at any time or under any circumstances. Indeed, at every step of the trial perjury was there in all its hideousness; but all those matters came before the jury, and, as evidenced by their verdict, her statements were believed.

It is now insisted that, conceding the facts to be as detailed by the plaintiff, no case of seduction has been made out by her evidence. Her testimony upon cross-examination as to the circumstances of the act is stronger in her behalf than her testimony in chief, and may be summarized as follows: That in the early part of October, 1888, on a Saturday evening, either the 6th or 13th thereof, about 8 o'clock, while she was in her room at a cottage alone, a short distance from the hotel, Taylor visited her, having called upon her once before, and brought her

some books. He conversed with her for a while, and then asked her if she ever drank any wine. He then handed her a glass of wine, which she drank. He poured out some for himself, and tasted it, but said it was too sweet, he did not like it. She continues: "In about five minutes from the time I took the wine I began feeling sick. At first I began to feel sick at my stomach. My head began to go around. I had sensations of tingling all over my body. I never felt that way before. I had difficulty in talking. My voice was husky. That lasted a moment or two. I got up and said, 'I am quite sick, Mr. Taylor.' I got up, but could not stand; my limbs felt so heavy and numb, I could not step. As I stood up, Mr. Taylor stood up, and I rested by hand on the front of the table. As he got up he stepped towards me. I was glad to have support, as I could scarcely stand. I didn't repulse him, because I couldn't stand up. There was in my ears a sound like the rushing of waters. My voice sounded to me very distinct and clear. His voice sounded the same. He put his arms around me and assisted me to the bed. When he put his arms around me, he bent and kissed me, and assisted me to the bed, and said that he loved me, and, 'You poor little girl, I am sorry you are sick.' He said that just before or just after he kissed me, I don't remember which. He half carried me to the bed. It was a very short distance. I didn't lay down at once. I sat on the edge of the bed. He sat beside me, with one arm still around me. I can scarcely recollect anything that happened distinctly. I asked him to get me a drink of water. As he got up I fell backwards on the bed; couldn't sit up. He got me a drink of water. He had his arm around my waist, and kissed me again. I asked him to go away, and he said he did not want to leave me if I was going to be ill. He kissed me again, and told me that he loved me. He told me that he loved me, and put his hand in my dress, and asked me if I loved him; and then he asked me if I would care if he stayed with me. I made no reply. I could scarcely speak. I don't remember distinctly what occurred after that. I don't know what happened at all until I knew he hurt me. I had not gone to bed. I know it was wine Mr. Taylor gave me, because I had seen it served to the guests at the hotel." At another stage of the proceedings, in referring to this event, she testified as follows: "Mr. Taylor assured me of his friendship, and promised me that he would also be a friend to me; that he had plenty of means, and I would never want; and he gave me his word that he would never see me in any trouble, and I then yielded. He said these things to me while I was lying in bed. I had a child which was born on August 22, 1889. The defendant was the father of that child. Until I met Mr. Taylor I was a chaste and virtuous girl."

In actions of the character under present investigation, where the plaintiff is a young girl, poor and friendless, and the defendant a man of mature years, married

and wealthy, it may well be said that the contest is an unequal one; but her youth and poverty are often weapons of victory, for frequently they form a citadel of strength in the minds of jurors, which is impregnable to successful attack by the opposition. Thus in her weakness lies her strength, while a defendant's wealth, his family, and his gray hairs are elements which, when placed before the jury, often tend only to his own destruction. These things are made plain by a perusal of the history of legal jurisprudence upon the subject, and this unequal struggle between the parties so appearing to juries has frequently caused verdicts to be rendered opposed both to the law and the evidence; and the extreme danger which arises in this class of cases that a man may be despoiled of his good name and his property demands of courts a careful consideration of the evidence which forms the basis of such verdicts. For these reasons, and from the additional facts that the case as disclosed by the record is a most peculiar one, and that the verdict rendered largely exceeds in amount any verdict returned by a jury in an action of seduction in any of the courts of this country to which our attention has been directed, we have given the record a most careful examination. As before intimated, the evidence is squarely conflicting. The plaintiff says the defendant seduced her; the defendant says he never had sexual intercourse with her at any time. The plaintiff says she was a chaste and virtuous girl; the defendant's witnesses say, in effect, she stood but little above the plane of the common strumpet. But the jury were fairly and fully instructed by the court as to the law of the case, including the rules of law applicable to the weight of evidence, and the credibility of witnesses; and upon this conflicting evidence, taken in connection with the law, they found for the plaintiff, and, under an established practice, we have not the right to disturb those findings of fact, even if we were so inclined.

Does the plaintiff's evidence establish a case of seduction? And that brings us to the inquiry, what is the meaning of the word "seduction," as used in the Code of Civil Procedure, for it is there provided, (section 374:) "An unmarried female may prosecute as plaintiff in an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor." Plaintiff's evidence may be viewed from two distinct standpoints. Viewed from one standpoint it indicates that she had lost consciousness from the effect of the wine, at the time the act was committed. If this be so, the defendant was guilty of rape; and while it is held in those states where seduction is a criminal offense that proof of a rape will defeat a prosecution for seduction, (*State v. Kingsley*, 39 Iowa, 439; *State v. Lewis*, 48 Iowa, 578; *Croghan v. State*, 22 Wis. 444,) yet no case is found in the books where a party has failed to recover in damages for seduction when the evidence at the trial disclosed the defendant guilty of the more heinous offense of rape. Such a showing but aggravates the injury, and

furnishes ample ground for exemplary damages. Perhaps it was from this standpoint of vision that the jurors viewed this case, and for that reason assessed the damages at such a large amount. It does not lie in the mouth of the defendant to say: "I am not liable to pay any damages in this action, because the evidence discloses I did not seduce the plaintiff, but committed the atrocious crime of rape." The complaint in this case is broad in its allegations, and, except as to the use of force, the elements forming the measure of damages in a case either of seduction or rape are very similar. Where a parent sues for the seduction of his daughter, and consequent loss of service, and it appears that the intercourse was accomplished by force, such a showing will not defeat the action, but will aggravate the injury. *Furman v. Applegate*, 23 N. J. Law, 28; *Kennedy v. Shea*, 110 Mass. 147; *White v. Murtland*, 71 Ill. 250. While the recovery of the parent is based upon a different principle from that involved where the female is the complainant, yet we see no bad effect to follow an application of the same rule in her case. Certainly a court will not be astute in drawing fine distinctions from the evidence in order to discover a case of rape, if such fact would defeat a recovery. For the foregoing reasons we conclude that, if plaintiff was unconscious from the effects of the wine at the time defendant had intercourse with her, her cause of action was not defeated by reason of such fact.

Assuming her to have been conscious at the time the act of intercourse took place, and consenting thereto, was she seduced? "Seduction" is not defined by our statute; and seduction, as recognized at the common law, based purely upon the loss of service to the master, is such that we are bound to hold our statute, in using the word, intended other things. We think the word is there used in its popular acceptance as recognized in this country. The court, in its instructions to the jury, declared the law upon this question as follows: "The word 'seduction,' when applied to the conduct of a man towards a female, means the use of some influence, promise, art, or means on his part, by which he induces the woman to surrender her chastity and her virtue to his embraces. There must be something more than a mere reluctance on the part of the woman to commit the act, and her consent must be obtained by flattery, false promises, artifice, urgent importunity based on professions of attachment, or the like, for the woman; and that, relying solely on said promises or professions of flattery or artifice or importunity, she surrendered her person and chastity to her alleged seducer; and that, relying and being influenced solely by such promises, flattery, artifice, and urgent importunity, she then being chaste, surrendered her person and chastity to her alleged seducer." After a careful examination of many cases, we are satisfied the law is fairly declared in the foregoing instruction, and that such instruction is in line with the authorities in this country. *State v. Pierce*, 27 Conn. 319; *Croghan v. State*, 22

Wis. 444; *Brown v. Kingsley*, 38 Iowa, 222. Modern lexicographers define seduction as the act of persuading a woman to surrender her chastity. In its ordinary acceptance it implies a betrayal of confidence, and for that reason a great majority of this class of cases are based upon a violated promise of marriage, but this is not a universal rule by any means; for a married man may seduce a girl, and that, too, though she is aware of his marriage. There are many cases to this effect, but they have arisen generally where the injured parties, being young girls, and easily beguiled, could not be held to the plane of responsibility occupied by women possessing a wider knowledge of the world. In the present case we have a chaste girl, not 17 years of age, making her living far distant from her few friends, stopping at night alone in a cottage. She is visited after dark by her employer, with whom she was upon friendly terms, a man of wealth and years. After a conversation upon ordinary topics, lasting some time, he gives her a glass of wine which she drinks, and her mind is seriously affected thereby. He expresses affection for her, repeatedly caresses her, makes promises of future friendship and assistance, and, after all these things have been going on for some length of time, he seduces her; at least a recital of these events would picture a case of seduction to the ordinary mind. They do not disclose a cold, deliberate transfer of virtue for a consideration. Neither do they describe a sacrifice of virtue to the demands of lustful passion; but the blandishments, the expressions of friendship, the promises, the wine, weapons of the seducer, were all there. If the plaintiff were a woman of years, with that knowledge of the world which age brings with it at the present day, the case might present a different aspect. The struggle would not have been so unequal, and she would have been held to a stricter responsibility. But we cannot charge her with that judgment and discretion which come only with age and experience. The drinking of the wine seriously affected her, and its administration alone may well be termed an artifice that conduced to her downfall. If these things which she has said be true, (and the jury has so found the facts,) her cause of action is supported by the evidence.

We have examined in detail the alleged errors of law relied upon by the appellant in the admission and rejection of evidence by the court, and either find them not well taken, or the error, if committed, not prejudicial to appellant.

It is insisted that respondent's counsel was guilty of such misconduct during the progress of the trial as to have prejudiced defendant's case thereby in the minds of the jurors. This misconduct is claimed to have consisted in attempting to get before the jury matters not within the issues by means of asking improper questions and "offers to prove," etc. It was held in the case of *People v. Ah Len*, 92 Cal. 282, 28 Pac. Rep. 286, that this character of misconduct could be carried to such lengths as to justify a new trial, and for that reason a new trial was there ordered. The

rule is a most wholesome one, and in criminal cases especially its rigid enforcement will be maintained by the court. A trial court should always be alert to prevent an attorney from obtaining advantages in jury trials by the practice of methods not countenanced by the ethics of the profession. The record here presented does not disclose sufficient in this regard to justify a new trial of the case. Neither do we think the showing made for a new trial based upon affidavits sufficient.

We are not prepared to say that the damages are excessive. Courts are not disposed to make smooth the ways of the seducer. At common law, in these cases, verdicts of juries were seldom held to be excessive, and this, too, where the parent recovered damages upon the fiction of loss of service. With much greater reason should we not disturb the amount of a verdict where the party directly injured is the party plaintiff. The law is most liberal in these matters, and rightly so. Through the seducer's arts a young girl has been outlawed from society. She has been cast upon the world robbed of her innocence; an injury has been done which nothing can repair; a loss has been suffered which nothing can alleviate. For the foregoing reasons let the judgment and order be affirmed.

We concur: PATERSON, J.; DE HAVEN, J.; McFARLAND, J.

HARRISON and FITZGERALD, JJ., not having heard the argument, do not participate in the decision hereof.

98 Cal. 78

Ex parte WHITWELL. (No. 20,954.)

(Supreme Court of California. April 1, 1893.)

CONSTITUTIONAL LAW—REGULATION OF USEFUL BUSINESS—JUDICIAL POWERS—PRIVATE INSANE ASYLUMS.

1. It is competent for the court to determine whether any particular regulation of a useful business is a reasonable restriction on the constitutional right of the citizen to engage in such business.

2. The business of maintaining a private asylum for the treatment of mild forms of insanity, inebriety, and other nervous diseases is a lawful one, and cannot be prohibited, either directly or indirectly.

3. Ordinance of board of supervisors of San Mateo county of March 16, 1892, regulating the business of keeping asylums for the care of persons afflicted with insanity, inebriety, or other nervous diseases, provides (section 3) that the board shall not grant a license to any person to conduct such business unless the walls of the asylum designated in his application are rendered fireproof by being constructed of brick and iron, or stone and iron, and the grounds accessible to patients are surrounded by a brick wall at least 18 inches thick and 12 feet high, and the premises are distant more than 400 yards from any dwelling house or schoolhouse. Section 4 provides that no license issued by the board shall authorize male and female patients to be cared for in the same building. *Held*, that sections 3 and 4 are unconstitutional and void, being an arbitrary exercise of the police power.

In bank.

Habeas corpus proceeding by Dr. Whitwell, who was imprisoned for conducting

an insane asylum without securing a county license therefor. Petitioner discharged.

Geo. C. Ross, for petitioner. Robert Y. Hayne and G. W. Towle, for respondent.

DE HAVEN, J. This is a proceeding upon habeas corpus, and it appears, from the return to the writ issued herein, that at the date of its service the petitioner was imprisoned by the sheriff of San Mateo county upon a charge of maintaining within that county a hospital for the treatment, for reward, of insane persons, without having procured a license so to do, as required by an ordinance adopted by its board of supervisors March 16, 1892. The ordinance referred to purports to be one "to license for purposes of regulation and revenue the business of keeping, * * * within the county of San Mateo, * * * hospitals, asylums, homes, retreats, or places for the care or treatment, for reward, of insane persons, or persons of unsound mind, or inebriates, or persons affected by or suffering from any mental or nervous disease, or who are suffering from the effects of the excessive use of alcoholic liquors." By the first section of this ordinance it is made unlawful to maintain within the county of San Mateo any hospital, asylum, or place for the care or treatment, for reward, of any insane person, or person belonging to either of the classes mentioned in the title of the ordinance, unless the keeper of such hospital or asylum shall have first procured a license therefor. The second section provides that, before any such license shall issue, the person desiring the same shall make a written application therefor to the board of supervisors, in which he "shall state specifically the location, purpose, place of business, its distance from the nearest dwelling house owned or occupied by any other person, with the name of the owner or occupant of such dwelling house, the class of persons that the applicant desires or intends to receive, as being the insane, or inebriates, or other persons designated in section 1 hereof, and whether the same are to be male or female," and the number of persons it is intended to care for, the name of the general superintendent, and that of the attending physician or physicians. It is further provided that such application shall be accompanied by an architect's diagram of the premises to be used in connection with such business, with a statement of the height of the ceilings from floors, and an official survey and description of the land to be used in connection therewith. The third section provides for giving notice of the time for the hearing of such application, when any person interested in favor of, or in opposition to, the granting of such license may be heard, and the sworn testimony of persons may be taken in relation to such application; and if, after such hearing, the board shall be satisfied "that the designated premises are suitable for the purpose, and that the persons designated in such application as superintendent and attending physician or physicians are

proper and suitable persons for their several stations," said board shall grant such applicant a license: "provided, however, that in no case shall such license be granted unless the board shall be satisfied * * * that the building and buildings designated in such application is and are what are usually known as fireproof, by reason of being constructed of brick and iron, or stone and iron, and that such building so designated in said application is not more than two stories in height, and that the same and the land used in connection therewith, or such part of said land as any of the patients are to have access to, is surrounded by a brick or stone wall not less than eighteen inches in thickness, and not less than twelve feet in height, and in which wall there is but one opening, which opening is closed by a solid iron door, * * * so constructed and fitted into said wall as that the same may be securely fastened by a combination lock, and said door is furnished with a combination lock; and provided, further, that no such license shall be granted if the premises designated in the application are within a distance of four hundred yards from any dwelling house or schoolhouse." Section 4 provides "that no license issued hereunder shall authorize male and female persons, or more than one of the classes of persons designated in section 1 hereof, to be cared for or treated in the same building, or put together in the same building, or in any inclosure connected with any building." Section 9 gives the form of the license which is to be issued, and which by its terms only authorizes the person to whom it is issued to carry on the business of keeping a hospital or asylum for the care or treatment of one of the classes of persons designated in the first section of the ordinance, subject to all the conditions, restrictions, and penalties in the ordinance contained.

The petitioner alleges that he is a physician and surgeon, and that the particular branch of the profession to which he especially devotes his attention is the treatment of insane persons, and patients with nervous and mental disorders, and inebriates, and persons suffering from the excessive use of intoxicating liquors, and that for the purpose of more effectually treating such persons he, long before the passage of said ordinance, at great expense purchased, and now owns, 22 acres of land in the county of San Mateo, on which he has erected buildings which he uses as a home or asylum for them; but such buildings are not fireproof, or of the character designated and required by the ordinance, and are also situated within 400 yards of the dwellings of other persons. The petitioner further alleges that he treats in the asylum established by him both male and female persons suffering from any and all nervous diseases and from mild forms of insanity, such as melancholia, dementia, and hysteria, but that he does not knowingly admit or treat violent or dangerous cases. It is claimed by the petitioner that the provisions of the ordinance above set out impose unreasonable restrictions upon his right to prosecute a lawful business, and to devote his

property to a lawful use, and that such provisions are therefore in conflict with the constitution of the United States and of this state, and are for this reason void. Upon the other hand, the respondent contends that the ordinance is a police regulation, designed, among other things, to protect the patients in such asylums from the danger which might result to them from fire, and also to promote the comfort and peace of the community in which such an asylum may be located, by requiring insane patients to be confined within walls, and so prevented from coming in contact with people who are entitled to be free from such annoyance; and it is further said that the nature of the business conducted in such an asylum or hospital is such as to justify a regulation that it shall only be carried on in a building removed from the dwellings of others a sufficient distance; and in this connection it is argued that the ordinance does not in either of its requirements conflict with any general law, and that the court is not authorized to declare it invalid because in its judgment the ordinance may be deemed unreasonable.

The police power—the power to make laws to secure the comfort, convenience, peace, and health of the community—is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for that purpose is necessarily committed to the legislative body in which the power to make such laws is vested. *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. Rep. 933. But it is not true that, when such power is exerted for the purpose of regulating a useful business or occupation, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or profession which in itself is recognized as innocent and useful to the community. As the right of the citizen to engage in such a business, or follow such a profession, is protected by the constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power. *Tied. Lim.* §§ 85, 194; *Pennsylvania R. Co. v. Jersey City*, 47 N. J. Law, 286; *Com. v. Robertson*, 5 Cush. 438; *Austin v. Murray*, 16 Pick. 121. This principle is stated very forcibly in the case of *Mugler v. Kansas*, 123 U. S. 661, 8 Sup. Ct. Rep. 273, in the following language: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." And so, also, in *Re Jacobs*, 98 N. Y. 108, *Earl, J.*, in delivering the opinion of the court in that case, said in relation to the power of the legislature to

make police regulations: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks, its voice must be heeded. It furnishes the supreme law and guide for the conduct of legislators, judges, and private persons, and, so far as it imposes restraints, the police power must be exercised in subordination thereto." And this necessary limitation upon the power of the legislature to interfere with the fundamental rights of the citizen in the enactment of police regulations was recognized by this court in *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. Rep. 245, in which case we said that the personal liberty of the citizen and his rights of property cannot be invaded under the disguise of a police regulation. This power of the courts to declare invalid what they may deem an unreasonable legislative regulation of a business or occupation which the citizen has the constitutional right to follow, although undoubted, must, from the nature of the power, be exercised with the utmost caution, and only when it is clear that the ordinance or law so declared void passes entirely beyond the limits which bound the police power, and infringes upon rights secured by the fundamental law. The rule upon this subject is thus expressed by the supreme court of the state of Missouri in the case of *St. Louis v. Weber*, 44 Mo. 547: "In assuming, however, the right to judge of the reasonableness of an exercise of corporate power, courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will always be exercised with the highest discretion, and, when it is plainly granted, a clear case should be made, to authorize an interference upon the ground of unreasonableness." But while the police power vested in the various counties of the state need not be exercised with the highest discretion, it must be so exercised as not to trench upon the constitutional rights of the citizen.

With this general statement of the power and duty of the court, we proceed to consider whether the ordinance before us is a valid regulation of the right to maintain such an asylum or hospital as the petitioner alleges he is now conducting in the county of San Mateo. The state may, of course, make proper laws for the care, government, and safe-keeping of the unfortunate insane within its limits. This duty it owes, not only to those who are thus rendered incapable of taking care of themselves, but also to the community at large, the members of which are entitled to protection from the acts of persons not subject to the commands of reason. *In re Colah*, 3 Daly, 529; *Browne, Insan.* § 6. In the discharge of this duty the state has provided public asylums, to which persons who are so far disordered in mind as to be dangerous to remain at large may, upon satisfactory proof of such condition of mind, be committed by the judge of a superior court, but it has

made no provision at all for those of unsound mind who are not regarded as dangerous to themselves or the property or persons of others; and, even as to those who are insane to such a degree that they may under the law be committed to the state asylum, the statute provides that "the kindred or friends of an inmate of the asylum may receive such inmate therefrom on their giving satisfactory evidence to the judge of the court issuing the commitment that they, or any of them, are capable and suited to take care of and give proper care to such insane person, and give protection against any of his acts as an insane person." Section 19 of "An act to provide for the future management of the Napa State Asylum for the Insane," approved March 6, 1876. St. 1875-76, p. 133. It will thus be seen that it was not the intention of the legislature, in providing public asylums for the insane, to deprive the kindred and friends of even dangerous lunatics of the privilege of caring for them elsewhere, upon showing their ability and willingness to do so, while, as to those not regarded as dangerous to themselves or others, the law does not contemplate that they shall be confined in such asylums at all. But unfortunate persons belonging to this latter class are not to be denied the right to receive the patient attention, and often healing treatment, of a comfortable private asylum or hospital, if they or their kindred or friends are able and willing to incur the expense of such care and treatment. The business, therefore, of conducting a private asylum, in which proper care can be given to such persons by a member or members of the medical profession having experience and special skill in the treatment of such cases, is a necessary and humane one; and the right to maintain such an asylum or hospital, and to follow and practice this particular branch of the medical profession, cannot be prohibited or burdened with unreasonable and oppressive conditions.

In our opinion the ordinance now under consideration imposes arbitrary and wholly unnecessary conditions upon the right to maintain such an asylum as that which petitioner alleges he is now conducting,—an asylum in which only those afflicted with mild forms of insanity and the other diseases named in the ordinance are treated. While it is doubtless true that the board of supervisors of a county have the power, in the absence of any general legislation upon the subject, to prescribe by ordinance proper regulations for the protection of the patients in such an asylum from the danger which might result to them from the destruction of the asylum building by fire, still the requirement that such hospital or asylum shall be maintained only in a building constructed of either brick and iron, or iron and stone, without any reference to the size of such building, or the number of patients it is designed to accommodate therein, and without regard to other safeguards against fire with which it may be provided, is clearly unreasonable. It may be conceded that there would be less danger from fire in a building of the character re-

quired by the ordinance than in one differently constructed; but experience has not shown that the danger from fire in such a hospital is such an imminent peril, when reasonable care is taken to guard against it, as to justify a requirement that such hospital shall be conducted only in a building made from the materials named in the ordinance. Of course, in the management of a hospital where insane persons are treated, it is necessary to have, and it must be presumed that there will be, a sufficient number of competent attendants to prevent danger or damage from any unreasonable actions of such insane persons. Without such attendants no such asylum or hospital could be properly conducted. The fact, however, that a person is suffering from an insane delusion requiring treatment does not necessarily make him dangerous to himself or others, or render inactive in him the ordinary instincts which prompt self-preservation. On the contrary, as was said by Mr. Justice Cooley in his opinion in the case of *Van Deusen v. Newcomer*, 40 Mich. 129, "many insane persons, even after they have become hopelessly so, are to all appearance perfectly harmless, and for years continue to discharge the common duties of life in the most regular and acceptable manner, being trusted by every one in those particulars to which the insane delusion does not extend. The law takes notice of the fact that in many cases the disease leaves the person in the responsible possession and control of most of his faculties, and that the same motives influence his action in the employment of them that influence those not afflicted." It is the duty of the superintendent or attending physician of such an asylum to ascertain the nature of the delusion affecting any person received for treatment; and if there should be one admitted afflicted with pyromania, or whose actions would for any reason be difficult to control, it cannot be assumed that such person would not be properly guarded, or that the hospital would not be managed with that degree of prudence which would render the patients therein reasonably safe from danger on account of fire. Legislation of this character which imposes an onerous burden of expense upon a lawful and highly meritorious business, cannot be justified by the mere possibility of the danger which it ostensibly seeks to avert. It must rest upon the fact that experience has demonstrated that such danger, in the absence of such legislative regulation, is one which may reasonably be anticipated as the probable result of conducting such business, notwithstanding the exercise of ordinary care to prevent it.

The provision that no asylum in which persons suffering from any degree of insanity are treated shall be permitted within 400 yards of any dwelling or school cannot, in our judgment, be sustained as a lawful police regulation. A law or ordinance, the effect of which is to deny to the owner of property the right to conduct thereon a lawful business, is invalid unless the business to which it relates is of such a noxious or offensive character that the health, safety, or comfort of the surround-

ing community requires its exclusion from that particular locality; and an asylum for the treatment of mild forms of insanity is not properly classed as such. If rightly conducted, such asylum would not render the occupation of dwellings or schools in its neighborhood uncomfortable to such a degree that its maintenance would be deemed a nuisance, or any impairment of the substantial rights of occupants of such dwellings or schools. It is not like a private asylum for the confinement of dangerous lunatics, or a hospital for the treatment of loathsome or contagious diseases; and the reasons which make it necessary and proper to exclude from the thickly settled portions of cities and towns slaughterhouses, soap factories, and tanneries, with their offensive smells, magazines for the storage of powder, and powder mills, with their attendant dangers, or any business or occupation which seriously interferes with the health or comfort of others if permitted in such localities, do not apply to a hospital whose inmates are harmless, although insane. It is possible that the maintenance of such an asylum would be to some people in its vicinity disagreeable and annoying, in the sense that it would be more or less repulsive to them, but this is not enough to justify a regulation like that under consideration. There are many unpleasant, and even annoying, things which must be borne by persons living in a state of organized society, in order that others may also enjoy their equal rights under the law.

The ordinance further denies to any one the right to conduct such an asylum unless the building or buildings used for that purpose, and the grounds to which the insane persons may be allowed access, shall be surrounded by a brick or stone wall at least 12 feet high and 18 inches thick. The erection of such a wall would be costly, rendering the buildings and surrounding grounds uninviting and unsightly to the eye, and would be a manifest injury to the unfortunate persons placed therein for care and treatment. This requirement of the ordinance cannot be defended upon the ground that it is reasonably necessary for the protection of the public. Whatever justification there might be for such a provision if applied only to a private asylum in which dangerous lunatics are to be confined, it is plainly unreasonable when applied to a hospital of the character maintained by the petitioner, where only persons suffering with mild forms of insanity and who are harmless are received. Such persons, if properly attended, do not require prison walls to restrain them, and it would be barbarous and inhuman to subject them to such treatment. The board of supervisors of a county, or the legislative department of any city or town, in which such an asylum is erected, may, undoubtedly, provide by ordinance that patients therein shall not be permitted to leave the grounds upon which it is erected unless accompanied by an attendant, and may impose a penalty upon the superintendent or keeper of such asylum for a failure to conform to such regulation. Such an ordinance would be reasonable, afford-

ing all necessary protection to the public, without conflicting with the rights of any one.

The ordinance further provides that only one of the classes of persons therein mentioned shall be treated in the same building, and that a separate license shall be required for the treatment of each of the diseases named, and that male and female patients shall not be "cared for or treated in the same building." This provision is clearly invalid. The treatment of inebriates and insane persons, and of mental and nervous diseases not amounting to insanity, is a special branch of practice in the medical profession, and no reason exists why a physician desiring to maintain an asylum or hospital for the treatment of such cases should be required to erect separate buildings for the treatment of persons suffering from each of such diseases. Such a requirement is an unnecessary interference with the business of maintaining such an asylum, without any corresponding benefit to the public. If it be said that the welfare of the patients may demand this separation,—that persons suffering from nervous prostration, for instance, should not be treated in the same building with the insane,—the answer is that this is a matter which may be safely left to the judgment of the physician, whose business it is to treat such cases, and whose education and experience, it must be presumed, qualify him to superintend such an asylum. The power to pass upon such a question has not been committed to boards of supervisors of the different counties, and such a regulation of the manner of conducting the business of maintaining such a private asylum is therefore unauthorized and void. In relation to that part of the ordinance requiring the separation of the sexes, it is sufficient to say that the admission of male and female patients to a private asylum or hospital conducted in one building is not immoral per se, nor can it be made so by any legislative declaration.

It is unnecessary to further discuss the provisions of this ordinance, or to pass upon other objections which have been urged against it. Viewed separately, we think each provision discussed in this opinion invalid, and, when the ordinance is considered as a whole, the invalidity of each provision becomes more plainly apparent. The ordinance covers completely and entirely the business of maintaining such an asylum as petitioner alleges he is now conducting, and imposes upon it such burdensome, oppressive, and unreasonable conditions as in effect to amount to its prohibition. The case has been argued here, both orally and in the briefs of counsel, with great learning and ability, and we have given to the questions involved the careful consideration which their importance demands, and our conclusion is—First, that it is competent for the court to determine whether any particular regulation of a useful business or occupation is a reasonable restriction upon the constitutional right of the citizen to engage in such business or follow such occupation; second, that the business of maintaining a private asylum for the treat-

ment of mild forms of insanity, and of persons afflicted with the other diseases named in the ordinance before us, is a lawful one, which cannot be prohibited, either directly or indirectly; third, that the ordinance which petitioner is accused of violating is, in each and all of the provisions referred to in this opinion, unreasonable, and therefore void. It follows that the petitioner is entitled to be discharged.

Petitioner discharged.

We concur: McFARLAND, J.; PATERSON, J.; GAROUTTE, J.; HARKISON, J.; FITZGERALD, J.

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FISCHER et al. v. SUPERIOR COURT OF TUOLUMNE COUNTY et al. (No. 15, 175.)

(Supreme Court of California. April 1, 1893.)

PARTNERSHIP—DISSOLUTION—APPOINTING RECEIVER.

Where property is actually owned by a copartnership, but the title thereto stands in the name of a corporation organized for the sole purpose of operating the property, in an action by one of the partners for a dissolution and an accounting, for fraud on the part of another partner, in which the corporation is made a party, the court is authorized to appoint a receiver to take charge of the property. Beatty, C. J., and De Haven, J., dissenting.

In bank. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Petition by Jacob A. Fischer and others against the superior court of Tuolumne county and others for a writ of prohibition to restrain the execution of an order of respondent court. Denied.

J. L. Crittenden, J. C. Campbell, and F. W. Street, for petitioners. Pillsbury, Blanding & Hayne, Scrivener & Schell, and Wheaton, Kalloch & Kierce, for respondents.

GAROUTTE, J. During the pendency of an action entitled Behlow et al. vs. Fischer et al., one Lane was appointed receiver to take possession of and manage certain mining property pending the result of the litigation. Subsequently a judgment was rendered for plaintiffs in said action, in which judgment said Lane was reappointed receiver with full power and authority to manage, conduct, and carry on this mining property. The present proceeding is an application for a writ of prohibition, commanding respondents to desist from acting under said order. The application for the writ and the order to show cause were made prior to the rendition of the aforesaid judgment, but that judgment includes the authority under which the receiver is now acting; and for that reason we shall address ourselves to the legal sufficiency of that authority, although the jurisdictional question presented is probably the same under either order, and the arguments of counsel so seem to concede. Petitioner's position, as stated in his reply brief, is that the "superior court acted without jurisdiction in wresting the possession of the mines from the corporation, which was the un-

disputed owner of them, and placing a receiver in charge of them, and carrying on the business of the corporation." The case of Behlow v. Fischer is now in this court upon an appeal from the very judgment in which the order appointing the receiver, and which order we are now considering, is found; and that nothing may be said in this opinion which might interfere to any degree with the full consideration of the appeal upon the merits, when it is finally submitted, we feel constrained to confine the examination at hand within narrow limits.

The action of Behlow v. Fischer may fairly be said to be a suit in equity for the dissolution of a copartnership, for an accounting, and for the setting aside of certain transfers of stock, on the ground of fraud practiced by the alleged copartner Fischer. A corporation known as the Consolidated Golden Gate & Sulphuret & Developing Company was joined as codefendant, it appearing that the title to the property over which the receiver was placed in charge stood in the name of said corporation. It will not be necessary to enter into a discussion of the principles and authorities relied upon to sustain the proposition that a court of equity cannot appoint a receiver to take possession of the property of a corporation pending litigation, for petitioner's case fails before it reaches that position. The complaint charged that Behlow, Fischer, and others were copartners, and as such owned and worked the mining property mentioned in this litigation. That said partnership has not been dissolved, but still exists. That said copartners, with the object and purpose of carrying on the business of said copartnership by said corporation, under a corporate name, organized the corporation defendant heretofore referred to. It was further agreed as to the parties who should hold the offices and conduct the various business affairs of said copartnership. That the said agreement was carried out, and the copartners transferred by deed the mining property here involved to the corporation for the purpose of carrying out the said agreement. That said corporation is merely a nominal corporation, and was organized by said copartnership merely for the purpose of carrying on its business, and is not an independent corporation. Upon issue joined the trial court found "that said so-called corporation has ever since its organization and incorporation been a mere name and agent of said copartnership; that it was not the owner of said mining property; and that said partnership is the owner, and entitled to the possession and management, of said property." The foregoing findings come fairly within the allegations of the complaint, and squarely contradict the theory of petitioner, that this mining property was the property of the defendant corporation. As indicated by the quotation from petitioner's brief, he rests his application for relief upon the theory that the corporation is the owner of the property, but he cannot be allowed the benefit of any such assumption, for the adjudication of the court is directly to the contrary, and that adjudication is au-

thorized by the pleading. From some portions of the complaint, it may appear, inferentially, that the corporation was the owner of the property in dispute, but the allegations heretofore quoted indicate a contrary view; and in this proceeding the complaint will be deemed sufficient if any material can be found therein which will furnish support for the findings and judgment, bearing upon the question of the ownership. The court finds this property to be the property of the partnership, and that said corporation was a mere name and agent of said partnership. If a state of facts could ever arise where a corporation was a corporation in name only, and where property standing in its name as grantee was in truth and in fact the property of another, then, for the purposes of this investigation, we assume such state of facts to be present in this case. The existence of such conditions are not impossible, and, assuming them to exist, we have a copartnership, the actual owner of a large amount of property, the title to which stands in the name of another, that person possessing no interest whatever in the property. A dissolution of the partnership and an accounting are asked for. Under such circumstances this property is assets of the copartnership, and the court is authorized to appoint a receiver to take charge of the same. For the foregoing reasons let the application for the writ be denied.

We concur: McFARLAND, J.; PATERSON, J.; HARRISON, J.

We dissent: BEATTY, C. J.; DE HAVEN, J.

98 Cal. 105

KLAUBER et al. v. SAN DIEGO STREET-CAR CO. (No. 19,189.)

(Supreme Court of California. April 7, 1893.)

REVIEW ON SECOND APPEAL.

Though a determination of the supreme court on a former appeal is conclusive on a second appeal if the record presents the same matters, either of fact or law, such judgment is not final on a second appeal if the record contains matters directly affecting the findings whereon the judgment rests, which were not before the court on the former appeal.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by A. Klauber and others against the San Diego Street-Car Company to enforce specific performance of a contract. From a judgment for defendant, plaintiffs appealed. The judgment was reversed, and judgment directed to be entered for plaintiffs. 30 Pac. Rep. 555. Defendant now appeals, and plaintiffs move to dismiss the appeal. Motion denied.

Gibson & Titus, for appellant. Parrish, Mossholder & Lewis and Luce & McDonald, for respondents.

HARRISON, J. Motion to dismiss the appeal. Upon the trial of the cause, findings of fact were made and filed by the court, upon which judgment was rendered in favor of the defendant. From that

judgment the plaintiffs appealed directly to this court, upon the judgment roll alone, without any bill of exceptions, and upon the hearing in this court the judgment was reversed, and the superior court directed to enter a judgment upon the findings in accordance with the prayer of the complaint, (95 Cal. 353, 30 Pac. Rep. 555;) and upon the going down of the remittitur the superior court caused judgment to be entered in favor of the plaintiffs in accordance with the directions of this court. Thereupon, within the time authorized by section 650, Code Civil Proc., the defendant prepared a bill containing certain exceptions taken by him at the trial, and the same was settled by the judge who had tried the case, and filed with the clerk. The defendant has now appealed from the judgment entered against it, as aforesaid, bringing up with the judgment roll this bill of exceptions. The respondents move to dismiss the appeal upon the ground that the former action by this court has become the law of the case, and that the judgment entered thereunder has become final, from which no further appeal can be taken.

The "law of the case" is a phrase which has been formulated in this state to give expression to the rule that the final judgment of the highest court upon a question of law arising between the parties to an action on a given state of facts establishes the rights of the parties to that controversy, and is a final determination thereof, and, like a final judgment in any other case, estops the parties thereto from afterwards questioning its correctness. This court has no appellate jurisdiction over its own judgments, and such judgment, therefore, constitutes an estoppel of record, of the highest character, and is conclusive between the parties as to the matters adjudged. Hence it has been invariably held that, upon a second appeal in a cause, this court must accept its former determination as conclusive, and is precluded from any re-examination of the matters therein determined. As this rule is, however, applicable only to matters which have been determined by the court, it is only when the same matters that were determined on the first appeal are brought before it on the second appeal that the rule can be invoked; and, being a rule which tends to prevent a judicial consideration of the case, it is not to be extended beyond the exigencies which demand its application, and it is therefore held that whenever, upon the second hearing, the record presents a different state of facts, the former determination ceases to be an estoppel. When an appeal is taken to this court the record on the appeal is brought here by the appellant, and if the appeal is merely from the judgment the only portion of the records of the court below that he is required to bring up is the judgment roll, and "any bill of exceptions or statement in the case upon which the appellant relies." Code Civil Proc. § 950. If a judgment has been rendered in favor of the defendant, and the plaintiff appeals therefrom, the defendant is only interested in maintaining the judgment, and cannot ask this court to con-

sider any errors against him which the court below may have committed at the trial. This court will examine only the statement or bill of exceptions upon which the appellant relies, and in the preparation of such bill of exceptions, only such errors as the moving party deems essential to present his ground of reversal, and so much of the evidence as is necessary to explain them, are to be included. "Any exception taken by the prevailing party, either to the exclusion of evidence offered by himself, or to the admission of evidence against his objection, would be useless and redundant matter, and should not be allowed by the judge as an amendment to a bill proposed by the losing party. The amendments which may be proposed to the draft of a bill relate to the evidence or other matter which section 648 authorizes to be stated in the bill for the purpose of explaining the objection taken, and do not include exceptions taken by the party proposing the amendments, or any evidence or other matter necessary to explain the same." In *re Gates*, 90 Cal. 259, 27 Pac. Rep. 195. Upon the hearing in this court only such errors as are relied upon by the appellant for the reversal of the judgment will be considered. Hence the respondent is precluded upon the appeal from having any consideration by this court of those errors which, if the judgment had been adverse to him, might have been sufficient for a reversal; and, even though a bill of exceptions containing those errors had been settled by the judge before the appeal, it would form no part of the transcript, and would not be considered by this court upon an appeal from a judgment in his favor. As it is only when, upon the second appeal, the record presents the same matters, either of fact or of law, upon which the determination of this court was rendered at the former appeal, that that determination is held to be final, it follows that if there is presented upon the second appeal a different state of facts, or any errors that were committed by the trial court which were not presented in the former record, this court is at liberty to consider them as fully as though presented upon a first appeal. In case, therefore, the respondent upon the first appeal shall afterwards appeal from a judgment rendered against him upon a second trial, in which the same errors were committed as were committed at the first trial, he will not be precluded from having them considered by this court, even though the effect thereof should be a reversal of the second judgment, and indirectly a determination by this court that the first judgment of the court below should have been in his favor.

Section 650, Code Civil Proc., provides that a party who desires to have the exceptions taken at a trial settled in a bill may, within 10 days after receiving notice of the judgment, prepare a draft thereof, and have the same settled by the judge. A judgment is the final determination of the rights of the parties to an action or

proceeding, and, as there can be only one final judgment in an action, if for any reason a judgment that has been entered is vacated, and another judgment entered in lieu thereof, this last judgment becomes the only one in the case, and the notice of its entry is the point of time from which the right to have a bill of exceptions settled begins to run. For this purpose there is no distinction between a judgment rendered by the trial court upon its original determination of the cause, and a judgment which it enters in obedience to the direction of this court after an appeal; and a judgment entered by it in obedience to such direction has no greater sanctity upon an appeal than if it had been entered under the direction of this court to try the cause anew, and render a judgment in accordance with the opinion of this court. If, in either case, any errors had supervened prior to the entry of the judgment, and which conduced thereto, that were not presented in the record upon the former appeal, this court is not precluded from their examination. If the findings of fact upon which the judgment rests are based upon evidence that was improperly admitted, the party against whom the judgment was rendered is entitled to have those errors corrected. The statute permits an appeal from a judgment by any party who is aggrieved thereby, and it also permits him to have any exceptions taken at the trial which he desires incorporated in a bill of exceptions settled by the judge. It also makes all bills of exceptions taken and filed a part of the judgment roll, (Code Civil Proc. § 670,) and requires the appellant to bring to this court, upon an appeal from the judgment, a copy of the judgment roll, (Code Civil Proc. § 950.) If, upon such appeal, there are found in the record matters which were not determined upon the former appeal, he has the right to be heard thereon. In *Heinlen v. Beans*, 73 Cal. 240, 14 Pac. Rep. 855, this court had directed the superior court to enter a judgment in favor of the defendants, and when the remittitur went down such judgment was accordingly entered. The plaintiff, however, sought to procure an amendment of his complaint, which was denied, and, on his appeal from the judgment thus entered against him, brought to this court no other record than the judgment itself, and an exception to the ruling of the court refusing leave to amend his complaint. This court very properly dismissed the appeal, as there was no pretense of error in the judgment entered by the court below. The present case differs materially from that, however, in that it presents a bill of exceptions containing matters directly affecting the findings of fact upon which the judgment rests; and as those matters were not before the court upon the former appeal the "law of the case" has no application. The motion is denied.

We concur: PATERSON, J.; GAROUTTE, J.

(98 Cal. 120)

SHAIN v. PEOPLE'S LUMBER CO. (No. 19,176.)

(Supreme Court of California. April 8, 1893.)

DISMISSAL OF APPEAL — FAILURE TO FILE POINTS — EXTENSION OF TIME.

Sup. Ct. Rule 2 provides that an appellant shall file his points and authorities within 30 days after the filing of the transcript, and that the time shall not be extended except by order of the court upon stipulation of the parties, or an affidavit showing good cause therefor, and in no case for more than 20 days. Rule 5 provides that if the points and authorities are not filed within the prescribed time the appeal may be dismissed, on motion, upon notice given. Held that, to obtain an order extending time within which to file points and authorities, appellant should have shown, by the affidavit on which he asked for such order, the date when the transcript was filed, and whether any time in addition to that limited by the rule had been given, either by order or by stipulation, and that, having failed to do this, a motion to dismiss the appeal was properly granted.

In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Shain against the People's Lumber Company. There was judgment for defendant, and plaintiff appeals. Appeal dismissed.

Blackstock & Shepherd, for appellant.
W. H. Wilde and E. S. Hall, for respondent.

HARRISON, J. Motion to dismiss the appeal. The transcript in this case was filed October 20, 1892, and on November 1st the respondent stipulated with the appellant that he might have "twenty days in addition to the time allowed by the rules of this court in which to serve and file his points and authorities, * * * and that the order of the court may be entered herein, in accordance with this stipulation, upon its being filed." The stipulation was not, however, filed, nor was any order obtained thereon, as was contemplated by it; but on the 8th day of December, upon an affidavit of Vincent Neale, one of the attorneys for the appellant, an order was made by the court "that appellant have twenty days' additional time to that allowed by rule of court within which to prepare and serve his opening brief herein." The affidavit did not state the date when the transcript was filed, or when the time allowed by the rules of the court for filing points and authorities would expire, nor did it state whether any order or stipulation had been made, granting time for filing points and authorities; and when the above order was asked for the words, "to that allowed by rule of court," were inserted therein before the order was signed. On the 19th of December the respondent moved to dismiss the appeal upon the ground that no points and authorities had been filed on the part of the appellant, and on the 28th of December the appellant filed his points and authorities.

Rule 2 of this court requires the appel-

lant to file with the clerk his printed points and authorities within 30 days after the filing of the transcript, and declares that the time so limited shall not be extended "except by order of the court upon stipulation of the parties, or an affidavit showing good cause therefor, and in no case for more than twenty days;" and rule 5 provides that if the points and authorities are not filed within the time prescribed the appeal may be dismissed, on motion, upon notice given. For the purpose, therefore, of enabling the court to determine whether an order extending the time to file points and authorities should be granted, the proper practice for an attorney who would seek such additional time is to show by the affidavit upon which he asks for the order the date when the transcript was filed, and whether any time in addition to that limited by the rule has been given, either by order or by stipulation, so that it may be determined therefrom whether it is within the discretion of the court to grant the time asked for. In the present case the time provided by the stipulation, as well as that granted by the order, covered the same period of time, viz. 20 days in addition to the time allowed by the rules of the court, and expired on the 9th day of December. The notice of the motion to dismiss the appeal was not served until the 19th of December, and at that date the respondent had the right, under rule 5, to a dismissal. The right of the respondent to have the appeal dismissed must be determined by the facts as they existed at the time that notice of the motion was given, and was not destroyed by the subsequent filing of points and authorities on the part of the appellant. Rules of court are designed to facilitate the business of the court, as well as for the convenience of litigants, and the rule requiring the points and authorities on behalf of the respective parties to be filed within specified times after the filing of the transcript confers rights which may be enforced by the litigants. The right of the appellant to be heard depends in the first place upon his compliance with the provisions of the Code of Civil Procedure in taking his appeal, as well in the manner as within the time provided by that Code; and after his appeal has been taken his right to a consideration thereof by this court depends upon his compliance with the rules of this court in perfecting his appeal by filing his transcript, and thereafter his points and authorities, within the time specified in those rules. The rules themselves provide for additional time to be granted if, by reason of any intervening cause, through no fault of the appellant, he may have been prevented from a strict compliance therewith; but, if the appellant would invoke such provision, he must bring himself within the terms upon which the favor is to be granted. If he neglects to procure a stipulation from the respondent, or an order of the court upon a proper affidavit, he is not in a position to resist a motion of the respondent to enforce the penalty which the rules have declared shall follow such

neglect. The motion to dismiss the appeal is granted.

We concur: BEATTY, C. J.; DE HAVEN, J.; PATERSON, J.; McFARLAND, J.; GAROUTTE, J.; FITZGERALD, J.

(3 Cal. Unrep. 851)

PEOPLE v. SHERMAN. (No. 20,922.)

(Supreme Court of California. April 11, 1893.)

INFORMATION—INDORSING NAMES OF WITNESSES—LARCENY—EVIDENCE—INSTRUCTIONS.

1. The names of witnesses examined before the committing magistrate need not be inserted at the foot of or indorsed on the information filed in court against defendant after he had been examined before such magistrate, though Pen. Code, § 943, provides that when an indictment is found the names of the witnesses before the grand jury must be so indorsed.

2. Where there is evidence before the convicting magistrate that a watch was taken from one B. when he was asleep, and when defendant and one F. were present, and it was afterwards found concealed on the person of F., so as to indicate that it must have been taken feloniously, a finding by the trial court that defendant had been legally committed by the magistrate will not be disturbed on appeal.

3. The stealing of a watch from the person of another is grand larceny, though the value of the watch is less than \$50.

4. Testimony to show improper relations between the state's witnesses, a man and woman, in order to impeach the woman's testimony, is inadmissible.

5. The court has a right to amend imperfect instructions submitted.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Al. Sherman was convicted of grand larceny, and appeals. Affirmed.

L. L. Chamberlain, for appellant. Atty. Gen. Hart, for the People.

BELCHER, C. The defendant and one Lulu Franks were examined before a magistrate, and held to answer upon a complaint charging them with the crime of larceny, committed in the county of Placer, on or about the 7th day of June, 1891, by "willfully, unlawfully, feloniously, and maliciously stealing, taking, and carrying away one watch of the value of \$75, the property of one S. T. Bowers." Thereafter the district attorney filed in the superior court of the county a information charging that the defendant, on or about the 7th day of June, 1891, in the county of Placer, "did then and there feloniously steal, take, and carry away from the person of S. T. Bowers one gold watch, of the value of seventy-five dollars," etc. When the defendant was called upon to plead to the information, he moved the court to set it aside upon the grounds: "(1) That the names of the witnesses examined before the committing magistrate are not inserted in or at the foot of said information, or indorsed thereon. (2) That before the filing of said information the said defendant had not been legally committed by a committing magistrate, in this: that after hearing the proofs it did not appear that a public offense had been committed, and there was not

sufficient cause to believe the defendant guilty thereof." The court denied the motion, and the defendant, reserving an exception to the ruling, then pleaded not guilty to the charge. Subsequently the defendant was tried and found guilty of grand larceny, and judgment was entered that he be imprisoned in the state prison at Folsom for the term of six years and three months. From this judgment, and an order denying his motion for a new trial, defendant appeals.

The first point made for a reversal of the judgment is that the court erred in refusing to set aside the information upon both of the grounds stated in the motion. Section 943 of the Penal Code provides: "When an indictment is found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court." And section 995 of the same Code provides that an indictment must be set aside, on motion, upon several grounds, and, among others, when the names of the witnesses are not inserted or indorsed as required. There are, however, no provisions requiring the names of witnesses to be inserted at the foot of or indorsed upon an information, and the only grounds stated on which an information must be set aside are: "(1) That before the filing thereof the defendant had not been legally committed by a magistrate; (2) that it was not subscribed by the district attorney of the county." See sections of Code above cited. It is clear, therefore, that the court rightfully refused to set aside the information upon the first ground stated.

As to the second ground, it is earnestly urged that defendant had not been legally committed by a magistrate, because there was no evidence before the magistrate showing that he was guilty of the offense charged. But there was evidence showing that the watch had been taken from the person of Bowers when he was asleep, and when defendant and Lulu Franks were both present; and besides, it was afterwards found concealed upon the person of Lulu Franks, in such a way as to clearly indicate that it must have been taken feloniously. We do not think, therefore, that it can be said there was no evidence tending to show the defendant's guilt, and, this being so, the ruling of the court below cannot be disturbed on appeal.

It is next claimed that the evidence was insufficient to justify the verdict, and that at most defendant should have been convicted of petit larceny only. This claim is rested upon the fact that the principal evidence that defendant took the watch from the person of Bowers was that of Lulu Franks, an accomplice, and that the value of the watch was proved to be only "about \$45." But the testimony of the accomplice was amply corroborated by other evidence, and, if the watch was taken from the person of Bowers, the offense was grand larceny, whether its value was greater or less than \$50. Pen. Code, § 487. There is no merit, therefore, in this point.

When the prosecution rested, the defendant called as a witness Esther Brown, who testified that she had been in the county jail, and that "Miss Frank's room and mine were right alongside." She was then asked, "Did you see any one, or did you see Mr. Brisentine, enter this woman's room?" The question was objected to by the district attorney as irrelevant and immaterial, and the objection sustained. This ruling is now assigned as error, and it is said by counsel that "Brisentine was a witness for the prosecution, as was also Lulu Franks, and it was proper for the defense to show the character of Lulu Franks, and her deportment while in jail, together with the relation existing between her and Brisentine." If, as would seem from the language above quoted, the purpose was to show improper relations between Brisentine and Lulu Franks, and thus to impeach her testimony, the question was clearly irrelevant and immaterial, as that is not the way prescribed for impeaching a witness. Sections 2051, 2052, Code Civil Proc. We see no error in the ruling.

Finally, it is claimed that the court erred in modifying, and giving to the jury as modified, certain instructions asked by defendant, and in refusing to give certain others asked by him, and also in giving certain instructions of its own motion. The learned attorney, however, simply quotes the instructions, and says the action of the court in regard to them was erroneous. The defendant requested the court to give to the jury thirty-two separate instructions, and it gave twenty-two of them as requested, amended two, and gave them as amended, and refused to give eight. It also gave four instructions of its own motion. The instructions, as amended, stated the law correctly. The court had a right, therefore, to make the amendments, and its action cannot be complained of. *People v. Dodge*, 36 Cal. 448; *People v. Hall*, 94 Cal. 595, 30 Pac. Rep. 7. The instructions not given were properly refused, because some of them had already been substantially given, and the others did not correctly state the law of the case. There was, therefore, no error in the refusal. The instructions given by the court of its own motion were general statements of the law, and such as have been given in criminal cases and approved by this court many times. The instructions, as a whole, covered the case, and seem to have been full, fair, and correct. We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

98 Cal. 133

PEOPLE v. AH LEN. (No. 20,995.)

(Supreme Court of California. April 11, 1893.)

MURDER—INSTRUCTIONS—REASONABLE DOUBT.

On a murder trial, where there is evidence that defendant and others were together

when deceased was shot, it is proper to modify an instruction that if the jury find that the evidence points as clearly to the commission of the crime by another as by defendant, and if they entertain a reasonable doubt as to defendant's guilt, they should acquit him, by adding, unless they find that such other person is the guilty party, and that defendant aided and abetted him in committing the crime.

In bank. Appeal from superior court, Los Angeles county.

Ah Len was convicted of murder, and appeals. Affirmed.

C. C. Stephens and Geo. J. Davis, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. 1. There was no error in admitting the dying declarations of the deceased, and the evidence was sufficient to show that they were made under a sense of impending death.

2. The defendant requested the court to give the following instruction: "The jury are instructed that if they find, from a consideration of all the evidence, that it points as clearly to another person who committed the crime in question as it does to the defendant, and if, after a full and fair consideration of all the evidence, the jury entertain any reasonable doubt as to whether the defendant is the guilty party, then the jury should acquit the defendant." The court gave the instruction, but at the same time modified it by adding thereto the following: "Unless you find from the evidence, beyond a reasonable doubt, that such other person is the guilty party, and that the defendant aided and abetted him in committing the crime." The court did not err in thus modifying the instruction requested by defendant. As given, the instruction correctly stated the law. The evidence upon the part of the people tended to show that the defendant and others were acting in concert at the time of the shooting of the deceased, and under these circumstances the instruction, in the form requested by defendant, was misleading; and it was the duty of the court to modify it in the respect stated, and instruct the jury as it did.

There are many other errors assigned, but none of them require particular discussion. We find no error in the record.

Judgment and order affirmed.

98 Cal. 121

PEOPLE v. GARDNER. (No. 20,943.)

(Supreme Court of California. April 11, 1893.)

CRIMINAL LAW—JUDGMENT—MOTION IN ARREST—TERM OF IMPRISONMENT—EVIDENCE—ATTEMPT TO RAPE.

1. An objection that an information for attempt to rape a girl under the age of 14 years states that the girl was 11 years old, and therefore does not charge the offense, if of any merit at all, is too technical to be raised by motion in arrest, or otherwise than by special demurrer.

2. It is no ground for motion in arrest that no punishment for the offense was fixed by the statute, as such a motion, under Pen. Code, § 1185, can only be based on defects appearing on the face of the indictment or information.

3. A prosecution for attempt to commit rape is not governed by Pen. Code, § 220, providing the punishment for assault with intent to commit rape, as the offenses are different.

4. Under Pen. Code, §§ 264, 671, rape may be punished by life imprisonment, or by not less than five years; and section 664 provides that an attempt to commit an offense may be punished by imprisonment not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense. *Held*, that punishment for attempt to rape by imprisonment for five years cannot be objected to on the ground that the term of half a life cannot be calculated, and that the statute therefore prescribes no punishment for attempt to rape.

5. Such a term is within the statute, even assuming that imprisonment for life is a longer term than imprisonment for any stated number of years.

6. The testimony of a witness at the preliminary examination, where the witness is out of the state at the time of the trial, cannot be proved by the testimony of the stenographer, who was present at the examination, and heard the testimony, as Pen. Code, § 686, gives the accused the right to be confronted with the witnesses against him in the presence of the court, without any other exception than that the deposition of a witness at the preliminary examination may, under certain circumstances, be read. *People v. Chung Ah Chue*, 57 Cal. 567, and *People v. Qurise*, 59 Cal. 343, followed. *People v. Carty*, 19 Pac. Rep. 490, 77 Cal. 213, explained.

7. In a prosecution for attempt to rape, a witness may testify as to statements made to him by the prosecuting witness that she was going to get some money out of defendant if she had to put up a job on him, as tending to show her prejudice and interest in the case, provided the proper foundation had been laid while she was on the stand.

Department 1. Appeal from superior court, Sacramento county; *W. C. Van Fleet*, Judge.

Daniel Gardner was convicted of attempt to rape, and appeals. Reversed.

Grove L. Johnson and S. Solon Hall, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The defendant was convicted of the crime of an attempt to commit rape upon a girl under the age of 14 years, and this appeal is taken from the judgment and order denying a motion for a new trial.

Defendant moved to arrest the judgment upon the grounds: (1) The court had no jurisdiction to affix any penalty or render any judgment, for the reason that no punishment was provided for the offense by the statute. (2) The information did not state facts sufficient to constitute a public offense. The objectionable language of the information is: "Said Lizzie Cox being then and there of the age of eleven years." It is now insisted that the information does not show the child to have been under 14 years of age. Appellant's position has no merit, and the objection to the information, if it is objectionable, is entirely too technical to be reached otherwise than by special demurrer.

As to the remaining ground relied upon to arrest the judgment, it was not a matter that could be urged upon the hearing of such a motion. A motion of that character can only be based upon defects appearing upon the face of the information or indictment. Section 1185, Pen. Code; *People v. Fair*, 43 Cal. 147; *People v. McCarty*, 48 Cal. 559. But the question is before us upon appeal from the judgment,

and we proceed to its consideration. The defendant was sentenced to imprisonment in the state prison for the term of five years, and it is now asserted that no penalty is prescribed by statute for a conviction of the offense here charged. It will be noticed that the defendant was convicted of an attempt to commit rape, and not of the offense of an assault with intent to commit rape, for which provision is made by section 220 of the Penal Code. There is a distinction between these offenses, and the facts required to prove an attempt are not necessarily sufficient to prove an assault with intent. We had occasion to consider at some length this question in *People v. Lee Kong*, 95 Cal. 666, 30 Pac. Rep. 800, and leave the matter with a reference to that case and the case of *State v. Godfrey*, (Or.) 20 Pac. Rep. 625. Judgment was pronounced upon this defendant by virtue of section 664 of the Penal Code, which provides: "Any person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: (1) If the offense so attempted is punishable by imprisonment in the state prison for five years or more, or by imprisonment in a county jail, a person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense." In order to determine, therefore, what the punishment for an attempt to commit rape is, we must look for the longest term of imprisonment imposed for the commission of the crime of rape. Section 264 of the Penal Code is as follows: "Rape is punishable by imprisonment in the state prison for not less than five years." In such a case, where the minimum punishment only is limited, by virtue of section 671 of the Penal Code, the penalty may be affixed in terms at imprisonment for life. Therefore a defendant convicted of rape may be sentenced to imprisonment in the state prison for the term of his natural life, or he may be sentenced to imprisonment for any specified term of years not less than five. It will thus be observed that the court has the power to visit upon such defendant either one of two judgments. It is now insisted that a judgment of life imprisonment is a longer term of imprisonment than one for any stated number of years, and, the statute providing that the judgment upon the defendant should be for a term of years not exceeding one half the longest term prescribed upon a conviction for rape, it follows that the judgment should be for a term of years not exceeding one half of the defendant's life; and, such a term of years being impossible of calculation, the statute is meaningless, and consequently no penalty for this offense is found in the law. This reasoning is ingenious, but not sound. If the statute only allowed a judgment of imprisonment for a term of years not less than five upon a conviction of rape, then the judgment in this case would be strictly within the law, for it would declare a

term of imprisonment not exceeding one half the longest term that the court would have the power to impose. Again, if it be conceded that any term, no matter how long, would be a longer term of imprisonment than a judgment of imprisonment for life, then the judgment under investigation comes strictly within the law. Now, assuming appellant's position to be true, that a judgment of imprisonment for life is a judgment for a longer term than one for any stated number of years, then the judgment at bar is equally sound, for the greater includes the less; and if the judgment in this case is a valid judgment, computed upon the basis of any judgment that might be rendered for a term of years under a conviction of rape, it necessarily is a valid judgment computed upon the basis of a judgment of imprisonment for life, for, as counsel for appellant insists, such judgment is for a longer term of imprisonment than any judgment could be that prescribed imprisonment for a stated time. In other words, if the judgment of five years is not in excess of one half of the longest term that could be given, in case the statute did not allow a life imprisonment, then it cannot be in excess of one half of a life imprisonment, for that is a longer term. The evidence is sufficient to support the verdict, and in this class of cases the evidence of the prosecuting witness, if convincing the jury and satisfying the law, need not be corroborated. *People v. Mayes*, 66 Cal. 597, 6 Pac. Rep. 691; *People v. Stewart*, 90 Cal. 212, 27 Pac. Rep. 200; *People v. Fleming*, 94 Cal. 308, 29 Pac. Rep. 647.

The court erred in admitting the testimony of the witness Briar. One Stone was examined as a witness at the preliminary examination of defendant. At the trial it was proven that said Stone could not be found in the state, due diligence being used. Thereupon the district attorney attempted to introduce in evidence the deposition of Stone taken at the preliminary examination. The deposition was rejected by reason of a defective certificate thereto, and thereupon the stenographer, Briar, was called, and testified as to the evidence given by the witness Stone at the preliminary examination. One of the objections made to the admission of the evidence was that the evidence of an absent witness, given at the preliminary examination, could only be used at the trial by the introduction of his deposition taken at that time. Both reason and authority sustain this position. To permit the testimony of an absent witness to be given to the jury through the medium of the recollection of a bystander at the hearing (and the reporter occupied no different position) is to deprive the defendant of the right to be confronted by the witnesses, and to place before the jury the purest hearsay. While hearsay testimony, under certain peculiar circumstances, is allowed to be placed before the jury, the facts here divulged by the record do not place this case within the exceptions to the general rule. Whatever may be the rule of evidence regarding these matters in civil actions, as declared by section 1870, subd. 8, Code Civil Proc.,

that rule has no application to criminal cases. Section 1102 of the Penal Code provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code;" and as to these matters it is very apparent that the Penal Code otherwise provides. Section 686 declares the rights of a defendant in a criminal action; and subdivision 3 thereof provides: "To produce witnesses on his behalf, and to be confronted with the witnesses against him in the presence of the court, except that, where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has either by person or by counsel had an opportunity to examine the witness, * * * the deposition of such a witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot, after due diligence, be found within the state." The law thus states that the defendant is entitled to be confronted with the witnesses against him, in the presence of the court, with but a single exception, and this case is not that exception. By rejecting the official notes the court in effect held that it was not a deposition; and, that fact being established, the exception provided by the statute requiring the presence of the witness in court at the trial was not present, and the witness' knowledge of the facts of the case could only have been produced before the jury from his own lips. This question was directly adjudicated upon, and the foregoing views supported in *People v. Chung Ah Chue*, 57 Cal. 567, which decision was followed in *People v. Qurise*, 59 Cal. 343. In those cases it was held that the official report of the witness' evidence as given at a previous trial could not be received before the jury, as it failed to come within the exception found in subdivision 3, § 686, already quoted. If such evidence is not allowed to go before the jury, for the same reasons the recollections of persons present as to what the witness said at the preliminary examination is doubly objectionable. It is intimated in *People v. Carty*, 77 Cal. 213, 19 Pac. Rep. 490, that this character of evidence is admissible, but the intimation was purely voluntary, and was not demanded by the exigencies of the case. The rule in civil actions evidently possessed the mind of the learned commissioner at the time he threw out the suggestion. No authority has been called to our attention, decided since the adoption of the Codes, that justifies the admission of the evidence here introduced. The remaining objection to the admission of the evidence of the witness Briar does not seem to be well founded in view of the last provision of section 2047 of the Code of Civil Procedure.

The proposed evidence of the witness Rich as to the statements made to him by the prosecuting witness, that she was going to get some money out of the defendant if she had to put up a job on him, was admissible as tending to show her prejudice and interest in the case, provided the proper foundation was laid

when she was on the stand, but we are not referred to the folio of the transcript where such evidence may be found. The other statement proposed to be shown by this witness was clearly not a proper matter to go to the jury.

The objections made by the attorney general to the consideration of the record in this case are technical in the extreme, and we pass them by as not demanding extended notice. We see no other matter in the record demanding our attention. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.

LYONS v. KNOWLES et al. (No. 18,010.)

(Supreme Court of California April 11, 1893.)

INJURY TO EMPLOYEE—DEFECTIVE APPLIANCES—EVIDENCE.

In an action by a servant against the master for injuries caused by the breaking of the hook of the upper block on a derrick used in moving stone, there was evidence that the hook, which was of wrought iron, broke because of crystallization. The derrick, block, and hook had been in use but a few months. Defendant's expert testified that, if the iron had been flawless, the hook could have been safely used for about five years in lifting from seven to ten tons, while plaintiff's expert testified that if the hook was new it would support six tons, which was the weight of the stone being raised when the hook broke. *Held*, that the evidence was insufficient to charge defendant with negligence.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Charles C. Lyons against F. E. Knowles and others for personal injuries. From a judgment for plaintiff, defendants appeal. Reversed.

James G. Maguire, A. A. Moore, and J. C. Martin, for appellants. Thompson & King and Church & Cory, for respondent.

TEMPLE, C. This action was brought to recover damages for a personal injury, alleged to have been caused through the negligence of defendants. It is alleged that defendants, as partners, were engaged in quarrying rock and transporting the same by railroad, and employed one Dusy to haul the rock from the quarry to the railroad station, and there load the same on the cars; that by the terms of their contract with Dusy they agreed to furnish all necessary and proper machinery and appliances for the purpose of loading and unloading the rock, and to furnish assistance in loading the rock from the ground onto the cars; that in October, 1888, while Dusy was engaged in hauling and loading granite blocks under the contract, defendants, regardless of their duty, and the lives and safety of plaintiff and others employed in loading and unloading the same, carelessly and negligently caused to be attached to a derrick a block and tackle for the purposes of loading and unloading said granite, which block and tackle was used during all of the times mentioned in the com-

plaint; that said block and tackle, and particularly the hook of the upper block, was imperfectly constructed, defective, weak, and unsafe, and wholly inadequate in strength to support the weight of a particular block mentioned in the complaint, and that defendants knew of the imperfection and unsafeness; that on the 1st of December, 1888, plaintiff was employed and hired by Dusy to load and unload said granite, and was then and there, with the assistance of defendants and employes, engaged in loading from the ground onto a car a certain block of granite, and that, while so engaged, the hook alluded to, by reason of its imperfection and inadequacy, broke and gave way, without fault of plaintiff, causing the rock to fall, crushing his foot so that amputation became necessary. After a demurrer had been overruled, defendants answered, denying that they were partners, and in effect all the allegations of the complaint. The case was tried by a jury, which returned a verdict for plaintiff. A motion for a new trial was made by defendants, one of the grounds of which was that the evidence was insufficient to support the decision. The motion having been denied, the defendants appeal from the judgment and from the order denying them a new trial.

On the trial plaintiff testified that he was employed by Dusy, but did not know the contract between Dusy and defendants; that Dusy was engaged in hauling granite from the quarry to the switch, and in loading it upon the cars; that defendants had erected at the switch a derrick, to be used in loading the granite upon the cars. Plaintiff was employed by Dusy to attend to the loading at the switch. When the cars were ready to receive the granite as it came down on the wagons, Mr. Dusy's teamsters and plaintiff loaded it from the wagons to the cars. If no cars were there when hauled, the rock was unloaded on the ground, and, when the cars came, defendants always sent men to assist him. Defendants or their clerk would designate what rock should go upon certain cars, but otherwise exercised no supervision or control of the matter of loading. Appellants urge many reasons for a reversal of the judgment, among them that the evidence shows that defendants were guilty of no negligence.

Plaintiff's account of the accident was as follows: "I was engaged in loading a large block of granite, weighing about six tons, from the ground to a flat car. Louis Knowles, the bookkeeper of defendants, his son, and Mr. Johnson, all of whom were in the employment of F. E. Knowles & Co., were helping me. We had hoisted the block of granite from the ground, and swung it around over the flat car. I think I gave all the orders that were given on that occasion. When the granite block had been hoisted to a sufficient height to swing clear of the car, I put on the brake on the winch with which we did the hoisting, and gave the lever of the brake to Mr. Louis Knowles, and told him to hold it. I then took hold of a rope attached to the granite block, and swung it around over the car and fixed it

in the position in which it should rest upon the car. * * * I was holding the block of granite in position. I reached over with my right hand to get a timber to place under the end of the block of granite when lowered to the car. I had my left hand still on the block of granite, steadying it. Just as I leaned over to get hold of the timber, the hook of the upper block attached to the end of the boom, and from which the granite block was suspended, broke, and the granite block fell on my foot." He also testified that he thought the derrick was improperly rigged, because the block with three sheaves was at the bottom, and the block with two sheaves was at the top. It ought to have been reversed. Also, that the derrick had been erected by Dusy, at the quarry in May or June, 1888, and that witness had been employed by Dusy for several months prior to August of that year, and while so employed he worked with the same derrick. He also testified, on cross-examination, that he did not know the exact weight of the rock, but thought it was between five and six tons; that they had previously loaded several blocks of the same size with the one which fell on his foot with the same derrick, and the same block and tackle, and the same hook that broke. Another witness said that the derrick was improperly rigged, because the three sheaves ought to have been at the top instead of at the bottom. The weight would have been more evenly distributed, and a jolt or jar would not have caused so great a strain. He said: "Sometimes in hoisting rock the second row of coils of the rope on the drum of the winch will slip through the first row, causing a jar, and straining the derrick." There was no jar during the raising of the rock which fell and injured plaintiff.

It appeared that the hook was composed of common wrought iron, an inch and a quarter thick, and the evidence tended to show that the break was caused by the crystallization of the iron,—a defect which no one could have discovered by examining the iron. A witness was examined for plaintiff as an expert who said that he was a machinist, but did not know the breaking weight of common black iron. He was allowed to testify, however, without objection on that ground, and said he thought the hook, when new, would not sustain more than six tons as a breaking weight; didn't think it would be safe in hoisting a ton when it broke, but thought the breaking weight of such a hook would be about six tons, and its working weight about four tons. He thought from appearances that the block and tackle were old. Defendants proved by Dusy, whose testimony was uncontradicted, that the derrick and block and tackle were procured new in March of that year, and had therefore been used only a few months before the accident; and by Sheppard, a civil engineer, who claimed to be familiar with the tensile strength of iron and steel, that the lowest tensile strength of an inch bar of common black iron was 22 tons; and he said that in 30 experiments conducted by

scientific men the lowest breaking weight found was 22 tons. The hook which broke here was one inch and a quarter, and should sustain a weight in excess of 22 tons, by at least 25 per cent. He thought if the iron had been free from flaw it could safely have been used for from four to five years in lifting from seven to ten tons. The hook had not been used one year. Berchig, plaintiff's expert witness, thought it must have been old, but said, if new, it would support six tons. But, to charge defendants with negligence in allowing the hook to be used, it must not only appear that it was in fact insufficient, but that defendants knew of its defectiveness, or by the use of ordinary diligence and care could have known it. It was shown that the iron was apparently sound, and that its defect could not have been discovered by an examination. It was apparently sufficient for the purpose for which it was used. It had been frequently used in lifting blocks of the same size. Although it proved to be in fact insufficient, its continued use under such circumstances is not proof of negligence. *Sappenfield v. Railroad Co.*, 91 Cal. 57, 27 Pac. Rep. 590.

As to the rigging of the derrick, plaintiff's means of knowledge of the defect, if any, was at least equal to defendants'. It appears as a fact that he did not know of it, and, as there was no jolt or jar at the time of the accident, it is difficult to see how it could have contributed to the accident. The injury, therefore, must be attributed to accident for which no one can be held responsible. An employer does not guaranty the sufficiency of appliances furnished, but only for the exercise of such skill and diligence in providing safe machinery as discreet and prudent men would use where the risk is their own. I do not think negligence on the part of defendants could reasonably be inferred from the evidence. Taking this view of the case, it is not necessary to consider the other points raised. For the purpose of this decision it is assumed, but not decided, that defendants would have been responsible had it been shown that there was negligence in the use of the derrick. I think the judgment and order should be reversed, and a new trial had.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

98 Cal. 40

RISLEY v. GRAY et al. (No. 18,013.)
(Supreme Court of California. March 29,
1893.)

ACTION ON NOTE—WANT OF CONSIDERATION—INDORSEMENT AFTER MATURITY.

Where, in an action against the maker and payee of a note which plaintiff had purchased after maturity, it appears that the note was given in payment for a portion of a mine, and that the mine was worthless, the defense of failure of consideration, which would have

been good in an action on the note by the payee, is good as against plaintiff, who acquired the note after maturity.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by one Risley against one Gray and others on a promissory note. Judgment was entered in favor of defendants, and plaintiff appeals. Affirmed.

Sayle & Coldwell, for appellant. Church & Cory, for respondents.

HARRISON, J. Action upon a promissory note, executed by the defendant Gray to the defendant Stevens. The plaintiff's title to the note was derived by a purchase thereof after its maturity at a sheriff's sale under an execution issued upon a judgment against Stevens. The note had been executed by Gray in part payment for the purchase of an interest in a mine in Fresno county. At the time of the purchase and execution of the note, Stevens represented to Gray that the value of the ore in the mine was enough when worked out to meet the amount of the purchase price and notes given therefor, and the purchase by Gray and the execution of the note were made in reliance upon these representations. Upon working the mine it proved to be of no value, and thereupon Gray and Stevens mutually agreed to a surrender of the note and cancellation of its obligation, but the note itself was left with Stevens, and was not in fact delivered to Gray. This agreement was after the maturity of the note, and prior to the purchase by the plaintiff at the sheriff's sale. The defendant Gray, in his answer, alleged that the only consideration for the note was the purchase of this interest in the mine, and that he made the purchase upon the mutual agreement and understanding between him and Stevens that the mine was worth more than the amount paid for it, but that in fact it was of no value whatever. At the trial the court found in accordance with these allegations. These findings have not been excepted to by the plaintiff, and are sufficient to sustain the judgment. If Stevens had brought an action against Gray upon this note, the failure of consideration would have been a sufficient defense thereto, and the plaintiff, having acquired the note after its maturity, took it subject to the same defense. This renders it unnecessary to consider what would have been the effect of the failure to surrender the note to Gray in pursuance of the oral agreement between him and Stevens for its cancellation, if the note had in fact been upon a sufficient consideration. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

101 Cal. 500

GORDON v. CITY OF SAN DIEGO. (No. 18,031.)

(Supreme Court of California. April 17, 1893.)

QUIETING TITLE—EVIDENCE—ESTOPPEL.

1. By Act Jan. 30, 1852, the city of San Diego was organized, and the board of trustees

authorized to sell as much city property as was necessary to pay certain debts. Section 11 provides that, "when the debts of the city are paid, no more of the city property shall be sold, except by a vote of the inhabitants of said city they shall be authorized to do so." Act Feb. 7, 1874, § 1, provides that "no deed * * * made prior to the 24th day of November, 1871, for and on behalf of the city of San Diego * * * for a valuable consideration, by the corporate authorities of the city, shall be invalid by reason of the want of a corporate seal." Held, in an action against said city by its grantee, to quiet title to land under a deed made in 1869, which recited that the officers who executed the same were authorized so to do by a vote of the inhabitants, such deed is admissible in evidence, though it was not attested by defendant's corporate seal.

2. In an action to quiet title to the east half of a tract of land, it appeared that defendant, being the owner of the entire tract, conveyed to plaintiff the undivided half interest therein; that afterwards, but before plaintiff's deed was recorded, defendant conveyed to another the west half of the tract in fee. Held, that the fact that defendant thus undertook to convey the entire interest in the west half of the tract did not estop it to claim its undivided interest in the east half.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action to quiet title by H. C. Gordon against the city of San Diego. Plaintiff had judgment, and defendant appeals. Reversed.

William H. Fuller, for appellant. Cassius Carter, for respondent.

SEARLS, C. This is an action to quiet title to the east half of pueblo lot 1,215, containing about 45 acres of land, situated in the city of San Diego. The appeal is taken by defendant from a judgment in favor of plaintiff, adjudging him to be entitled to said east half of pueblo lot 1,215, according to the Poole map of the pueblo lands of the city of San Diego made in 1856, and adjudging that defendant has no title thereto, etc.; also from an order denying a motion for a new trial. The city of San Diego was a municipal corporation, organized under two acts of the legislature, approved January 30, 1852, and April 28, 1852, respectively. The title of respondent is derived from the appellant, the city of San Diego, through a conveyance executed by the trustees of said city on the 27th day of February, 1869, to one Thomas Whaley, and which conveys "the undivided half of lot twelve hundred and fifteen, (1,215,) according to the official map of said city made by Charles F. Poole, A. D. 1856, and on file," etc. The deed is executed by the president and trustees of the city, who attach their private seals, it being recited that no corporate seal had been "as yet provided." Among the recitals of the deed are the following: "Whereas, the president and trustees aforesaid, by the vote of the duly-qualified electors of the said city of San Diego, at an election for the especial purpose, held in said city on the 25th day of May, A. D. 1868, in pursuance of the provisions of an act of the legislature of the state of California entitled 'An act to repeal the charter of the city of San Diego, and to create a board of trustees,' approved January 30,

1852, were directed, authorized, and empowered to sell pueblo or city lands, the property of said city; and whereas, on the twenty-seventh day of February, A. D. 1869, the said president and trustees, in compliance with said vote and said act of the legislature, sold to said party of the second part the land and premises herein-after described for the sum of twenty dollars in gold coin of the United States of America, being at the price of twenty-five cents per acre, upon the conditions provided for and prescribed in a certain resolution or order of said board of trustees, made and entered on the 8th day of June, A. D. 1868; and said party of the second part has made and completed all the improvements upon said lands by said resolutions or order required to be made, and has fully paid said sum of twenty dollars into the treasury of said city." The conveyance was duly acknowledged, and was recorded in the office of the county recorder of the county of San Diego, August 21, 1869. On the 28th day of February, 1869, the same trustees, by a like deed containing like recitals, conveyed the west half of the same lot (No. 1,215) to one J. C. Babcock, which deed was acknowledged and duly recorded March 1, 1869, viz. prior to the acknowledgment and recordation of Whaley's deed. At a special meeting of the board of trustees held June 8, 1868, it was resolved "that the only way pueblo lands will be granted is as follows." Then follow the conditions, which are, in substance, that one half of the purchase price is to be paid on securing certificate; the land to be occupied and improved within six months after certificate is taken, and it must be taken out within one month after approval of the petition; \$250 worth of improvements to be placed upon tracts of 40 acres or less, and \$400 upon tracts of 80 acres, within one year, and, if not made, previous payment to be forfeited, and land to revert to the city. When the improvements were made, the petitioner became entitled, upon payment of the residue of the purchase price, to a deed; surveys to be made at expense of purchaser.

It was conceded at the trial that title to the pueblo lands, of which lot 1,215 was a part, was at the date of the execution of the Whaley deed in the city of San Diego, and that whatever title passed by that conveyance was vested in H. C. Gordon, the respondent. Appellant objected at the trial to the introduction of the Whaley deed upon several grounds, the most important of which was that said deed was not executed on the part of the city as required by law. The specification of the reasons why not executed as required by law shows that there was no showing that the city ever passed a resolution authorizing the sale or transfer of the property described in the deed; that the property was not sold or conveyed in accordance with the charter of the city of San Diego. The Whaley deed recites the particular facts upon which the authority of the city trustees to convey is supposed to be founded.

That particular recitals in a deed are binding upon parties and privies, and that this doctrine applies to the author-

ized acts of a corporation, does not seem to be disputed by appellant. It is essential to an estoppel by deed that the deed itself should be a valid instrument; and if void, though under seal, it does not work an estoppel at law or in equity. *Cafrey v. Dudgeon*, 38 Ind. 512; *Merriam v. Railroad Co.*, 117 Mass. 241. The contention of counsel for appellant is that, the deed to Whaley not being executed under the corporate seal of the city of San Diego, before it was admissible in evidence respondent should have been required to show that the corporate authorities possessed the power to sell the property, that it was sold under such power, and that the board of trustees, when assembled and acting as such, sold the property, and directed the execution of the deed to Whaley. The city of San Diego, as it existed at the date of the execution of the Whaley deed, as before stated, was organized under an act of the legislature of the state of California approved January 30, 1852, and by an act approved April 28, 1852. The first-named act provided for the election of three trustees, one of whom should be president, etc. The seventh section of the act authorized the board of trustees to sell as much of the property of the city as was necessary to pay its debts, "giving at least ten days' notice of any property to be sold, and to continue the sale from time to time until said debt is paid." Section 11 of the act provided that, "when the debts of said city are paid, no more of the city property shall be sold, except by a vote of the inhabitants of said city they shall be authorized to do so," etc. It appears from the act that there had been a previous corporation of the same city, the charter of which was repealed by the act first above cited, and the provisions of section 7 were intended to apply to the payment of the debts thereof. The language of section 11, that after the debts were paid "no more of the city property shall be sold, except by a vote of the inhabitants of said city they shall be authorized to do so," must be construed to empower the trustees to sell upon a vote in favor thereof. When the debts were paid, the power of the trustees under section 7 ceased, and thereafter their power of alienation came, if at all, from section 11 and the vote of the inhabitants. According to the recitals of the Whaley deed, the qualified electors, at an election for that purpose held, directed, authorized, and empowered the trustees to sell the land in question, and the board of trustees duly assembled, and, acting as such by resolution, prescribed the terms and conditions upon which sales would be made. The recitals in the deed, coupled with the law, are sufficient evidence to bind the parties and show that title passed by the deed, provided it was properly executed. We have seen before that it was executed by the trustees, who purported to act for and in the name of the city, except that they signed their names as trustees, and affixed their private seals, etc. On the 7th day of February, 1874, an act of the legislature was approved in the following language: "Section 1. No deed, conveyance, or grant of

land in fee, made prior to the 24th day of November, A. D. 1871, for and on behalf of the city of San Diego and the inhabitants thereof, for a valuable consideration, by the corporate authorities of said city, shall be invalid by reason of the want of a corporate seal, but all of said deeds, conveyances, and grants shall have the same force, effect, and validity as if a corporate seal of said city had been regularly provided and properly affixed thereto by the proper corporate authorities of said city."

It is not deemed necessary to go to any great length in discussing the question of the power of the legislature to enact valid curative laws. The field is a broad one, often involving questions of constitutional law, vested rights, retroactive laws, etc., and giving rise to distinctions sometimes too subtle to be readily grasped by the ordinary mind. Judge Cooley, in his work on Constitutional Limitations, at page 457, states concisely the rule on this subject, thus: "If the thing wanted or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Tested by this rule, all doubt must vanish as to the power of the legislature to enact the curative law above quoted. No question has ever been suggested, so far as known, of the power of the legislative branch of government to abolish the distinction between sealed and unsealed instruments, as was done by section 1223 of the Civil Code. That a like provision might be enacted in reference to corporate and official documents can scarcely admit of a doubt. It is therefore held that the deed of conveyance to Whaley is to be taken, received, and interpreted between the parties to this action precisely as though sealed with a corporate seal of the city of San Diego at the date of its execution. Had vested rights in third parties accrued between the execution of the instrument and the passage of the curative act, a different question would be presented. That question need not concern us in the present case. Treating the deed as duly executed in point of form, under a statute conferring power upon the officers to sell and convey the lands of the city upon a majority vote of the inhabitants, the recitals in the deed that an election had been held pursuant to the provisions of the statute, at which the trustees "were directed, authorized, and empowered to sell pueblo or city lands, the property of said city," etc., is *prima facie* evidence that an election had been held. It is not here a question of power, but of proof. Many of the authorities go much further in holding to the binding force of recitals in deeds executed by municipal corporations than is necessary to uphold the con-

veyance in this case. *Jamison v. Fopiana*, 43 Mo. 565; *Devl. Deeds*, § 348, and cases cited. I am certain the court did not err in the admission of the Whaley deed. Like considerations apply to the admission of the conveyance from the city to Babcock, provided, always, that it was material testimony in the case, relevant to the issues joined therein, all of which may properly be considered in connection with the findings.

The point is made that the judgment is contrary to the findings, and not warranted by the facts as found in the case. The facts as found by the court may be epitomized as follows: (1) The city of San Diego, being the owner of pueblo lot 1,215, on the 27th day of February, 1869, conveyed in due form and by valid deed an undivided one half thereof to one Thomas Whaley; that the plaintiff herein, H. C. Gordon, is the successor in interest, by proper mesne conveyance, of the land and interest conveyed to Whaley. (2) That on the 28th day of February, 1869, one day after the conveyance to Whaley, the city of San Diego executed to one J. C. Babcock a proper deed of conveyance of the entire west half of the same lot, viz. lot 1,215. (3) The deed to Babcock was first acknowledged and recorded. Upon this state of facts the court entered judgment quieting and confirming plaintiff's title to the entire east half of lot 1,215, and perpetually restraining defendant, the city of San Diego, from asserting title thereto, and that it be decreed to have no title thereto. The position of respondent is (1) that by the conveyance to Whaley of the undivided one half of lot 1,215 he became tenant in common with the city therein. This no doubt is a correct conclusion. (2) That when, on the next day, the city conveyed the entire west half of the same lot to Babcock, it had conveyed the whole thereof, and, as a consequence, ceased to have any interest in any part of the lot. This second position is not readily apparent. No doubt two halves of a thing are equal to the whole of it; but the undivided one half and the whole of one half of a thing are not equal to the whole of it. When Whaley received a deed of an undivided one half of lot 1,215 he was a tenant in common with the city, and when on the next day the city sold the whole of the west half of the same lot, it simply attempted to convey the whole of a parcel of the lot in which it owned but an undivided half. If a grantor conveys lot A, which he does not own, I am at a loss to see how, in the absence of mistake or fraud, he can be deemed to have conveyed lot B, which he does own. If the title of Whaley failed to the west half of the lot, it was by a failure to have his deed acknowledged and recorded prior to the recordation of the Babcock conveyance.

There is, however, another and distinct theory upon which respondent contends the judgment of the court below can be upheld. Section 764 of the Code of Civil Procedure, so far as material, is as follows: "Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being an

owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be allotted or set apart without material injury to the rights and interests of the other cotenants who may not have joined in such conveyance." Under this section, or rather by analogy to it, respondent claims that where there are two tenants in common, each owning an undivided half of land, while neither can make a partition binding upon the other by assuming to convey either half specifically, yet if one does so convey, the other would be at liberty to acquiesce and to accept the remaining half; and that where he has, as in the present case, done so by conveying such remaining half specifically, the two conveyances operate as a complete and binding partition. In support of this proposition we are referred to *Freem. Coten.* §§ 188, 535, and to the cases of *Dall v. Brown*, 5 Cush. 289, and *Eaton v. Tailmadge*, 24 Wis. 223. At section 188 of *Freeman*, supra, it is said: "A deed of a specific parcel of land made by one cotenant is not binding on the others, nor can their rights be, to any extent, prejudiced by it. Such a conveyance is not void, but only voidable. It may therefore be approved and ratified by the cotenants, and thereby be made to operate as a conveyance in severalty." *Eaton v. Tailmadge*, cited supra, is substantially to the same effect as the above quotation. The same may be said of many decisions upon the same question. A parol agreement for the partition of land is void under the statute of frauds, and cannot be enforced; but where consummated and ratified by the parties it will be upheld. In *Borel v. Rollins*, 30 Cal. 409, it was held that, where an attorney in fact exceeded his authority in executing a deed of partition, his principal, who had ratified the act of partition by his own acts and conduct of solemn significance, such as the execution of deeds of conveyance, which necessarily recognized the partition as of legal validity, was estopped from saying there had been no partition. If the city of San Diego is bound by its acts in the premises, it must be upon the ground of estoppel. But estoppels must be mutual. All the authorities are to the effect that a sale by a tenant in common by specific bounds of a portion of the land held in common is not binding on his cotenant unless ratified by him. I fail to find in the record any evidence of ratification by Whaley, or those holding under him. It is true it appears that the deed to Babcock was first acknowledged and first recorded; but Babcock, for all that appears, may have taken with actual notice of the prior deed

of Whaley. Had Whaley conveyed the whole of the east half of lot 1,215, an inference might be predicated, perhaps, on that act, as tending to show his acquiescence in a partition; but so far as appears he did not do so. It was stipulated at the trial "that the plaintiff in this action succeeds by proper mesne conveyances to any title and interest in and to said pueblo lot No. 1,215, which was conveyed to Thomas Whaley by the deed dated February 27, 1869." The finding of the court is in harmony with the stipulation.

I fail to find in these points any basis for an estoppel in pais. Non constat but that Whaley or his grantees may still hold an undivided interest in the west half of lot No. 1,215. I recommend that the judgment and order appealed from be reversed, and the court below directed to enter a judgment quieting plaintiff's title to the undivided one half of the east half of pueblo lot No. 1,215, described in the complaint, and adjudging defendant to be an equal owner and tenant in common with plaintiff therein.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the court below is directed to enter judgment quieting plaintiff's title to the undivided one half of the east half of pueblo lot No. 1,215, described in the complaint, and adjudging defendant to be an equal owner and tenant in common with plaintiff therein.

98 Cal. 123

COCKRILL v CLYMA et al. (No. 18,099.)
(Supreme Court of California. April 11, 1893.)

SUBSTITUTION OF PARTIES — ORDERS — RECORD —
PRESUMPTIONS ON APPEAL.

1. Plaintiff sued as executrix of the will of her husband, to recover damages for the conversion of property. During the pendency of the suit the decree of distribution of the estate was made, and the causes of action were assigned to plaintiff. Held that, under Code Civil Proc. § 385, providing that, in case of a transfer of interest, the court may allow the person to whom the transfer is made to be substituted in the action, the court properly substituted plaintiff in her own right as plaintiff.

2. On admission by both parties in open court of the facts on which the substitution was based, the court, on application of defendant, made the order of substitution, but the record did not show whether the order was entered on the minutes of the court. Held that, while the order should have been entered in the minutes as a distinct order made before judgment, the fact that it was prefixed to the judgment, and recorded in the judgment book, and made a part of the judgment roll, does not affect its validity.

3. Where the record does not show that any objection was made to defendant's application for the substitution, or that the order was excepted to, and at the trial plaintiff admitted all the facts proper for making the order, and, after the decree of distribution, actually continued the action in her own right, the appellate court will assume that, when defendant made the motion, plaintiff consented thereto.

Department 1. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Action by Cynthia A. Cockrill against Thomas Clyma and William Clyma to recover damages for the conversion of certain cattle. Judgment was entered in favor of defendants, and plaintiff appeals. Affirmed.

Henry Sears, for appellant. M. E. Sanborn, for respondents.

PER CURIAM. Action in the nature of trover to recover damages for the conversion, by the defendants, of certain cattle. In the original complaint, filed November 23, 1891, the plaintiff described herself as executrix of the will of Christopher Cockrill, deceased, who, she alleges, died on January 6, 1891, and whose will was probated and letters testamentary issued to her on January 31, 1891. The cause of action alleged is that on May 4, 1891, "the plaintiff, as such executrix, was the owner and in the possession of" the cattle described, of the value of \$1,268; that on that day the "defendants wrongfully took said property, and converted the same to their own use, to the damage of the plaintiff, as such executrix, in the sum of \$1,268;" and "that, by reason of the detention of said property, the plaintiff, as such executrix, has been further damaged in the sum of \$250," for the sum of which damages she prays judgment. The answer denies the alleged ownership and possession of the cattle by plaintiff as such executrix, or in any other capacity or character; but does not deny the alleged death of Christopher Cockrill, the probate of his will, nor the appointment and qualification of plaintiff as executrix. The case was tried by the court, and of the 21 findings of fact the 6th, 7th, and 8th are as follows: "(6) That since the commencement of this action, and prior to the trial thereof, to wit, on the — day of —, 1892, the said superior court of said Yuba county duly made its order and decree in the matter of the estate of said Christopher Cockrill, therein pending, finally distributing the entire estate of said Christopher Cockrill, deceased, to the persons entitled thereto, according to law and the terms of the last will and testament of said deceased, by which said order and decree the causes of action alleged in the complaint herein were duly assigned to the said Cynthia A. Cockrill, plaintiff herein, in her own right. (7) That, since the decree last above referred to, said plaintiff, Cynthia A. Cockrill, has continued this action in her own right and interest. (8) That all the foregoing facts were admitted to be true in open court by the parties hereto, and defendants have asked the court that this action be continued in the name of said Cynthia A. Cockrill." On all the issues made by the pleadings, the findings were in favor of defendants. As conclusions of law the court found "(1) that said Cynthia A. Cockrill should be substituted as plaintiff herein, in her own name and right; (2) that the defendants are entitled to judgment against said Cynthia A. Cockrill for their costs herein." The judgment, after reciting the trial and submission of the cause, and that written findings had been

filed, proceeds as follows: "Wherefore it is by the court now considered, ordered, and adjudged that said Cynthia A. Cockrill, in her own name and right, be, and she is hereby, substituted as plaintiff herein, in lieu of the said Cynthia A. Cockrill, executrix of the estate and will of Christopher Cockrill, deceased. It is further ordered and adjudged that the defendants, Thomas Clyma and William Clyma, do have and recover of and from said plaintiff, Cynthia A. Cockrill, their costs of suit herein, taxed at \$81.75. E. A. Davis, Judge of said Court." The plaintiff, C. A. Cockrill, appeals from this judgment on the judgment roll, without a bill of exceptions.

The appellant contends that the court erred in substituting as party plaintiff Cynthia A. Cockrill simply, for Cynthia A. Cockrill in her representative character as executrix, etc., whereby she was made personally liable for defendants' costs, taxed at \$81.75. There is no substantial merit in this point. Beyond question the facts found made a proper case for the substitution under section 385¹ of the Code of Civil Procedure. By the decree of distribution of the estate of Christopher Cockrill, pending this action, the entire cause of action had been assigned to Cynthia A. Cockrill, who, since said decree, had continued the action in her own right and interest. Upon the admission of these facts by both parties in open court at the trial, the defendants asked that the action be continued in the name of Cynthia A. Cockrill. No objection appears to have been made to this motion, and the record does not show whether any order of the court upon the motion was entered in the minutes; but the court found the facts thus admitted by the parties to be true, and, as a conclusion of law therefrom, found that the substitution should be made, and on the same day made the order of substitution. As a matter of correct practice, this order should have been entered in the minutes as a distinct order made before judgment, but the fact that it is an order prefixed to the judgment, and recorded in the judgment book, and made a part of the judgment roll, is not inconsistent with its previous entry in the minutes of the court. In its position in the judgment it appears to have been made prior thereto, and as distinct from the judgment as if it had been separately entered in the minutes of the court. It is incumbent upon the appellant to make it affirmatively appear that error was committed by the court below. The record herein does not show that any

¹Code Civil Proc. § 385, provides: "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

objection was made to the defendants' application for the substitution, or that the order was excepted to by the plaintiff. It appears from the findings that at the trial she did admit all the facts proper for making the order of substitution, and, in addition to this, admitted that, since the decree of distribution, she had actually continued the action "in her own right and interest." Under these circumstances, we are authorized to assume in support of the action of the court that, when the defendant made the motion, she expressly consented to the order. If the order was warranted by any possible state of facts not negatived by the record, it must be presumed in justification of the action of the court that such state of facts existed. *Caruthers v. Hensley*, 90 Cal. 560, 27 Pac. Rep. 411. "All presumptions are in favor of the correctness of the proceedings of courts of general jurisdiction, and as the consent of the defendants [plaintiff] would have justified the order of the court, we must presume that such consent was given, there being nothing in the record to show that it was not." *Parker v. Altschul*, 60 Cal. 380.

The judgment is affirmed.

98 Cal. 155

THOMPSON v. BRANDT et al. (No. 18,016.)
(Supreme Court of California. April 19, 1893.)

CHANGE OF VENUE—MORTGAGE FORECLOSURE.

In an action brought in T. county to foreclose a mortgage on lands, a part of which are in T. county and a part in F. county, after presenting material issues of fact by answer, defendants moved for a change of venue to F. county, alleging by affidavit that all the parties and all of defendants' witnesses reside in F. county, except one, and that it would be as convenient for him to attend the trial at F. as at T. In reply to the motion, plaintiff denied the matters alleged in defendant's answer, but did not deny the materiality of defendant's witnesses, nor that their convenience required a change in the place of trial, nor allege that a change would cause a delay in the trial. *Held*, that the motion should have been granted.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by O. M. Thompson against Otto Brandt and Ambrose Caldwell to foreclose a mortgage. From an order denying a motion for a change of venue, defendants appeal. Reversed.

Justin Jacobs, for appellants. N. O. Bradley, for respondent.

HAYNES, C. Defendants moved to change the place of trial from the county of Tulare to the county of Fresno, on account of the convenience of witnesses, and this appeal is from an order denying said motion. The action is to foreclose a mortgage upon lands, a part of which are in Tulare, and a part in Fresno, county. Defendants answered, presenting material issues of fact. The affidavit upon which the motion is based was made by defendant Brandt, and shows that defendants' evidence consists of records and files in the courthouse at Fresno, including the testimony of a deceased witness, whose

name is given, and the testimony of two other witnesses, bankers in Fresno, whose names are also given; that defendants have but one witness in the county of Tulare; and that it is as convenient for said witness to go to Fresno as it would be to go to Visalia. The statement of facts expected to be proved by the two living witnesses at Fresno is sufficient, as is also the affidavit of merits as supplemented by the affidavit of Justin Jacobs. The plaintiff also lives in Fresno.

In plaintiff's affidavit in reply, he says he brought the action in Tulare county because his counsel lived there; denies the matters alleged in defendants' answer; alleges that defendant Caldwell is interested in the determination of the cause; but does not deny in any manner the materiality of defendants' witnesses, nor that their convenience requires a change of the place of trial, nor that the ends of justice would be promoted thereby; nor is it alleged that it would cause delay in the trial; nor is the good faith of defendants impugned therein. Caldwell does not make an affidavit in support of the motion, but he joined with his codefendant in the answer to the complaint, and the motion is made on behalf of both defendants by the same counsel who answered for them, and it is not shown that the motion was not made with his consent. The presumption must be that his counsel had authority to represent him in making this motion. The record does not show the grounds upon which the court denied the motion, and we are at a loss to conceive of any grounds upon which the order appealed from could be justified. The action could properly have been brought in Fresno county, in which county the greater part of the land lies; and, no reason appearing in the record against the change, the order cannot be justified upon the ground that granting such orders are in the discretion of the court, for here there was no fact or reason against the change, and hence no basis for the exercise of discretion. The order should be reversed, and the court below directed to enter an order granting the motion.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the court below is directed to enter an order granting the motion.

98 Cal. 189

STOCKTON SAV. BANK v. STAPLES et ux.
(No. 18,019.)

(Supreme Court of California. April 25, 1893.)

ESTOPPEL—DEED OF MARRIED WOMAN—RIGHT OF
CORPORATION TO HOLD LAND — ADVERSE POS-
SESSION—EVIDENCE.

1. Where there is a substantial conflict of
evidence, a finding on the issue to which it re-
lates will not be set aside.

2. A husband who witnesses a deed of the wife purporting to convey the wife's separate estate, and who, although he must be presumed to know its contents, does not dispute or object thereto, is estopped to deny the validity of the deed.

3. A corporation is presumed, in the absence of any showing to the contrary, to have the right to purchase and hold land.

4. Declarations of one in actual possession of land, showing that he claims to be sole owner, is admissible on an issue of adverse possession, as tending to show the character of the possession.

Commissioners' decision. Department

1. Appeal from superior court, San Joaquin county.

Action by the Stockton Savings Bank against D. J. Staples and Mary P. Staples, his wife. Judgment for plaintiff, from which, and an order denying a new trial, defendants appeal. Affirmed.

Arthur Rodgers and John E. Budd, for appellants. Louttit, Woods & Levinsky, for respondent.

VANCLIEF, C. Action to quiet title to an undivided half of a quarter section of land situate in the county of San Joaquin. The judgment was in favor of the plaintiff, and defendants have appealed therefrom, and from an order denying their motion for a new trial. Robert Coffee, who is admitted to have been the source of title, conveyed an undivided half of the quarter section to the defendant Mary P. Staples in March, 1870; and it is not disputed that she remained a tenant in common with him until the 2d day of June, 1875, at which time it is claimed by plaintiff that he ousted her, and thence maintained a continuous adverse possession of her interest until September 11, 1888, when he conveyed the whole quarter section to Alice L. Hudson, who continued the adverse possession until September 20, 1890, when she conveyed the entire quarter section to the plaintiff. This action was commenced October 15, 1890. The court found all the essential elements of a continuous adverse possession by Robert Coffee, Alice L. Hudson, and plaintiff, except notice to Mary P. Staples of its hostile character, from June 2, 1875, until the commencement of this action; and further found, substantially, that Mary P. Staples had actual notice of the adverse and hostile character of such possession from 1884 until the commencement of this action. Thus it appears that the title upon which plaintiff recovered was found to have been acquired by prescription.

1. Counsel for appellants contend, with considerable force and plausibility, that the findings as to adverse possession are not justified by the evidence; and, if it were merely a question of preponderance of the evidence, I should be inclined to agree with them; but after a careful examination I think there is sufficient evidence, positive and circumstantial, substantially tending to support those findings, to bring the case within the rule that, where there is a substantial conflict of evidence, a finding upon the issue to which it relates should not be set aside.

2. It appears that at the date of the deed from Coffee to Mrs. Hudson she was

a married woman, and that the consideration for that deed was her promise to support Coffee during the remainder of his life. It does not appear, however, that this consideration was expressed in the deed from Coffee to Mrs. Hudson, as no copy of any part of that deed appears in the record. The consideration was proved on the trial by the testimony of Mrs. Hudson, who testified that an oral agreement for the deed and the consideration therefor had been made about the time of her marriage. Upon this showing it is claimed for appellants that the land must be presumed to have been community property, which could not have been conveyed to the plaintiff by the wife, and therefore that her deed to plaintiff conveyed no title. But it further appears that the deed from Mrs. Hudson to plaintiff was signed by her husband as a witness to her execution of it, and that the deed contained the following recitals: "The right, title, and interest hereby conveyed, being the separate property and estate of the said party of the first part, [the wife,] the same having been by her acquired by deed dated September 11, 1888, made, executed, acknowledged, and delivered by Robert Coffee to said party of the first part, the consideration paid for the said deed * * * being then and there the separate property and estate of the said party of the first part." The facts thus recited in the deed, if true, show that the land was the separate property of the wife; and if the husband, when he signed the deed as a witness, knew its contents, and did not then dispute nor object to those recitals, he would be estopped from denying their truth to the prejudice of plaintiff's title, (Bigelow, Estop. p. 553;) and as against the defendants, for all purposes of this case, it must be presumed, in the absence of evidence to the contrary, that he did know the contents of the deed when he signed it, and that he has ever since acquiesced in the conveyance. Prima facie, therefore, whatever title the husband had passed to plaintiff by the estoppel. The plaintiff was in possession of the land before and at the time of the commencement of this action. The possibility that this prima facie case may be overcome by facts not disclosed by the record in this case can be of no avail to the defendants in any event, since it appears that they have lost their title, whether the plaintiff has acquired it or not; the term of five years' adverse possession having expired before the date of Mrs. Hudson's deed to plaintiff.

3. Appellants contend that the court erred in overruling their objections to the introduction in evidence of the deed from Mrs. Hudson to plaintiff. The ground of the objection was that the plaintiff "was not shown to have the power to purchase, hold, or receive said land, nor that said land was conveyed to it for any of the purposes of the corporation." There was no evidence to show for what purpose the corporation had been organized, or what business it was conducting. The court found according to the allegation of the complaint, not denied in the answer, that at all the times stated the plaintiff "was a corporation duly organized and incor-

porated under and by virtue of the laws of the state of California, and having its office and principal place of business in the city of Stockton, county of San Joaquin, state of California." Under these circumstances I think it must be presumed (as against the defendants, at least) that the corporation had power to purchase and hold the land. *Mining Co. v. Clarkin*, 14 Cal. 545; *Evans v. Bailey*, 66 Cal. 112, 4 Pac. Rep. 1089; *Hagar v. Board*, 47 Cal. 222; *People v. La Rue*, 67 Cal. 526, 8 Pac. Rep. 81; *Spel. Priv. Corp.* §§ 203, 206. It does not appear under what statute, or for what purpose, the plaintiff was incorporated, nor what business it was engaged in, nor for what purpose the property was purchased or used. In answer to a similar objection in *People v. La Rue*, supra, it was said: "If there was anything in its charter, or the business in which it was engaged, or in the law under which it was organized, in any manner abridging its right to hold land, it does not appear of record; hence we deem the objection untenable."

4. It is contended that the court erred in admitting evidence of the declarations of Coffee, while in possession, that he claimed to be the sole owner of the land. That Coffee was in the actual possession and the sole occupant of the land during the whole term of his alleged adverse possession was admitted by the defendants at the trial, and the questions contested related only to the character of his possession, namely, did he intend and claim it to be adverse, and did the defendants have notice that it was so intended and claimed? I think the declarations admitted tended in some degree to show the character of his possession, and for that purpose were admissible. *Cannon v. Stockman*, 36 Cal. 536; *Lick v. Diaz*, 44 Cal. 479. I think the order and judgment should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

3 Cal. Unrep. 855

BENICIA AGRICULTURAL WORKS v.

ESTES et al. (No. 18,006.)

(Supreme Court of California. April 17, 1893.)

MORTGAGE FORECLOSURE—DEFENSE—UNLAWFUL CONSIDERATION—EVIDENCE.

1. On a mortgage foreclosure the evidence showed that, at the time the note and mortgage were given, there was pending, in insolvency proceedings against defendants' father, the latter's petition for discharge and plaintiff's opposition thereto; that the consideration of the note, though not expressed therein, was an assignment to defendants by plaintiff of his claim against the insolvent, which was of the same amount as the note, and that the estimated value of the claim was one-sixth of its face; that by agreement plaintiff's claim against the insolvent assigned to defendant was to be held by plaintiff's attorney, and, when paid, to be applied on the note; that, after the giving of the note and mortgage, plaintiff's opposition to the discharge of the insolvent was withdrawn. *Held*, that the mortgage and note were void as against public policy.

2. The fact that a mortgage was given as security for the performance of an unlawful contract may be shown by oral testimony in an action for foreclosure, though no infirmity appears on the face of the mortgage. *Buffen-deau v. Brooks*, 28 Cal. 642, followed.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the Benicia Agricultural Works, a corporation, against Lyman W. Estes and M. Estes, for the foreclosure of a mortgage. Plaintiff had judgment, from which, and an order denying a new trial, defendants appeal. Reversed.

R. P. Davidson, for appellants. R. B. Terry and G. B. Graham, for respondent.

VANCLIEF, C. Action to foreclose a mortgage executed by Lyman W. Estes to the plaintiff, to secure a joint and several promissory note for \$1,200 made by both defendants. The only defense to the action is that the consideration for the note and mortgage was unlawful, as being contrary to the policy of express law. Judgment was rendered in favor of the plaintiff, and defendants appeal from the judgment, and from an order denying their motion for a new trial.

The facts of the alleged defense are substantially as follows: That, at the time of the execution of the note and mortgage, there was pending in the superior court a proceeding, under the insolvent act of 1880, against one Albert Estes, the father of the defendants, instituted by his creditors, in which he had been adjudged an involuntary insolvent, and had filed his petition for a final discharge from all his debts and liabilities; that the plaintiff, as one of the creditors of the insolvent whose claim had been proved, opposed the final discharge of the insolvent, and had filed in the court in which the proceeding was pending written specifications of the grounds of its opposition; that said petition of the insolvent for discharge, and the opposition thereto by the plaintiff, were pending and undecided at the time of the making and execution of the note and mortgage; and that the only consideration for the making of said note, and the execution of said mortgage, was the withdrawal by plaintiff of its opposition to the final discharge of the insolvent. The cause was tried by the court, and the only findings upon the issues tendered by the answer are, in substance, that the plaintiff did not promise the defendants that, if they would make and execute the note and mortgage, the plaintiff would withdraw all opposition to the discharge of said insolvent; and that defendants did not make and execute the note and mortgage in consideration of any agreement or promise of the plaintiff to withdraw its opposition to the discharge of said insolvent. The appellants contend that these findings are not justified by the evidence; and this is the only ground upon which a reversal of the judgment and order is asked.

On the trial, the allegations of the answer in respect to the pending of the insolvency proceeding against Albert Estes, and the opposition to the discharge of the

insolvent, were admitted by the plaintiff. The only oral testimony at the trial was that of the defendants on their own behalf, and that of G. B. Graham, Esq., who had been the attorney for the plaintiff in the matter of its opposition to the discharge of the insolvent, on behalf of the plaintiff. Besides this, there was some documentary evidence, which will be noticed hereafter. It appears without dispute that the trial of the matter of the opposition to the discharge of the insolvent had been set for trial on the 22d day of March, 1890, and that one of the defendants had been subpoenaed as a witness on that trial; that during the morning of that day, before the hour appointed for the trial, the defendants called upon Mr. Graham, when negotiations were commenced between him and them for a compromise or settlement of the matter of the opposition to their father's discharge. The defendants testified, in substance, that Mr. Graham, on behalf of plaintiff, first proposed the compromise, and offered to withdraw plaintiff's opposition to their father's discharge if they would pay, or secure the payment of, \$1,200; that they said they had no money, but would accept the proposal if they could give satisfactory security, but they wanted a few days to consider the matter. Thereupon it was agreed that Mr. Graham should have the trial postponed until March 29th, to give time to complete the settlement, which he did. On March 24th the defendants returned, and on that day a compromise was effected, according to the terms of which they signed the note and mortgage in suit, and placed them in Mr. Graham's hands, with the understanding that they should be considered delivered, and take effect, when he should withdraw the plaintiff's opposition to their father's discharge, provided no other creditor should have filed opposition to such discharge; but if plaintiff's opposition should not be withdrawn, or if any other creditor should file opposition before the discharge, the note and mortgage were to be returned to defendants. That it was also agreed that defendants should be credited on their note the amount of dividends which should be paid by the assignee on the plaintiff's claim against the insolvent, which, it was then understood, would not exceed \$200. Defendants further testified that there was no other consideration for the note and mortgage than above stated.

The minutes of the court in which the insolvency proceeding was pending show that on March 22d the trial of the matter of opposition to the discharge of the insolvent was postponed, at request of Mr. Graham, by stipulation with opposing counsel, until March 29th, and that on March 29th the opposition of plaintiff to the discharge of the insolvent was withdrawn by Mr. Graham as attorney for plaintiff, the minute of the withdrawal being as follows: "Insolvency of Albert Estes. Now comes G. B. Graham, attorney for Benicia Agricultural Works, and in open court withdraws his opposition to the discharge of the insolvent heretofore filed." Plaintiff's counsel objected

and excepted to all oral testimony as to the transaction, on the ground that the only agreement made had been reduced to writing, and signed by defendants, and they contend here that the written instrument so signed is the only competent evidence of the transaction; and there is no question that the following instrument was drawn by Mr. Graham, and signed by the defendants: "March 24, 1890. Whereas, L. W. Estes and M. Estes have this day given their notes to Benicia Agricultural Works for the sum of \$1,200, payable in seven months from this date, and the said L. W. Estes executed a mortgage on certain real estate to secure said note, which said note was given to secure the amount by them agreed to be paid to the Benicia Agricultural Works for the transfer to them of a certain claim by the said Benicia Agricultural Works against the estate of Albert Estes, an insolvent, which proceedings in insolvency were begun and are pending in the superior court of Fresno county, state of California; and it is hereby agreed by the undersigned that said claim so transferred to them by the said Benicia Agricultural Works shall be held by Geo. B. Graham, its attorney, as collateral security to said note and mortgage, and he shall have the right to collect and receipt to the assignee of said insolvent estate for any dividends that may be payable on account of said claim, and credit the same on said note. Said mortgage is not to be recorded until March 29, 1890; and, in case any creditor shall, of his own motion, file opposition to the discharge of said insolvent before or at that time, said note and mortgage to be surrendered back to them, and they to retransfer said claim. L. W. Estes. M. Estes." This instrument was put in evidence by plaintiff, and is admitted to have been drawn by Mr. Graham, and signed by defendants, at the time the note and mortgage were signed.

Mr. Graham testified that this instrument, as written, is the agreement that was entered into, and contains all its terms; that he never agreed to withdraw plaintiff's opposition to the discharge of the insolvent, except at the request of defendants; that he told defendants the opposition to the discharge would be within their control. "They told me they wanted to dismiss it. Then I said, 'I will go up to court, and dismiss it on Saturday (March 29th) on your request;' and I did dismiss it for them, and not for anybody else. * * * There was not a word said about my signing the agreement; never intended to sign it. * * * I notified the Benicia Agricultural Works of the mortgage, and they ratified everything I did with it." He further testified that defendants first proposed the settlement or compromise, and that he immediately said to them: "You can't settle it or compromise anything with me. The only way you can do in the matter is to buy the claim. * * * I don't think I told them it would be illegal to do so. I knew it myself, and just shut it all off by telling them they need not say anything except about the purchase of the claim. I told them if they purchased the claim

they could dismiss the opposition,—control it; the right to control it would pass to them. * * * I told them I would do whatever they directed me to do; it would be under their control. Did not tell them I would have them substituted in the proceeding, and appear as their attorney. I did not have them substituted in the proceeding. I appeared as their attorney in the way I did. They told me to dismiss, and I did it. Did not make any intimation to the court of any change in the relationship. I simply dismissed it. I was in the case as attorney for the Benicia Agricultural Works." Being asked to explain the last part of the written agreement the witness said: "I think I can state that so you can understand it. They said they didn't want to buy the claim if there was going to be other opposition filed, * * * and this agreement was written up in accordance with what was then understood and agreed between us,—that in case other opposition should be filed, that then I was to surrender it, and there was to be no sale; if there was no other opposition filed, then it was to be an absolute sale. Question. Then, unless the withdrawal of the opposition you had filed, could be made effective, there was to be no sale. That was the understanding, was it? Answer. You can draw your own conclusions about that. I have stated to you what was said. They directed me to dismiss the opposition after I had turned it over to them. Q. Then you have no other explanation than that you have given of that last clause of the agreement? A. The clause explains itself. It is according to the terms of the agreement between us. There is no explanation to be given growing out of the contract or agreement between the parties. I have an opinion about it, but my opinion, the court has said, was not proper to be given. No, sir; I have no explanation to make." The testimony of the defendants that it was estimated and understood that the dividends to be paid by the assignee on plaintiff's claim against the insolvent would not exceed \$200 was not disputed.

Conceding the truth of Mr. Graham's testimony as to facts, exclusive of his opinion as to their legal effect, and considering only such parts of the testimony of the defendants as are undisputed, it seems too clear to admit of debate that the entire substance of the consideration for the note and mortgage consisted of the withdrawal of plaintiff's opposition to the discharge of the insolvent, Albert Estes. Mr. Graham must have known that the defendants had in view, and sought to accomplish, only that object; and it is clearly apparent that they received, and were to receive, nothing else beneficial to themselves or detrimental to the plaintiff. It was not disputed that the parties understood that the dividends on plaintiff's claim against the insolvent would not exceed \$200, nor is it pretended that such understanding was incorrect. Therefore, the formal assignment of that claim, on the condition that plaintiff should continue to hold it as collateral security, and receive and credit the divi-

dends on the note, did not operate as a consideration, or even as a partial consideration, for the note. The note and the conditional assignment of the claim, having been parts of the same transaction, are to be construed together, and in the light of the circumstances of the case; especially the circumstances that the parties understood that the dividends on plaintiff's claim against the insolvent would not exceed \$200, and that the sole object of the defendants was to secure the discharge of their father. By so construing the note and written agreement, any attempted disguise is made transparent, the alleged transfer of plaintiff's claim against the insolvent is discovered to be mere form without substance,—a mere subterfuge,—and the real nature of the transaction is clearly revealed. The provision that the claim, said to have been assigned, was to be held and the dividends thereon collected by plaintiff, and credited on the note, becomes merely a qualification or contingent limitation of the liability of defendants on their note, the only effect of which is that, instead of being unconditionally obligated to pay \$1,200, as expressed in the note, the defendants are only bound to pay \$1,200, less the amount of the dividends paid plaintiff on its claim against the insolvent. It is the same as if the contingent qualification or limitation had been expressed in the note.

If the views above expressed as to the effect of the evidence are correct, it follows that the consideration for the note and mortgage was illegal, because "contrary to the policy of express law," in the sense of the second subdivision of section 1667 of the Civil Code, and consequently the note and mortgage are void. The authorities to this effect are numerous, only a few of which, specifically applicable to this case, need be cited. The facts of the case of *Bell v. Leggett*, 7 N. Y. 176, are almost entirely similar to the facts of this case. The bankrupt proceedings in question in that case were under the United States bankrupt act of 1841, the policy of which in respect to withdrawing opposition to the discharge of the bankrupt cannot be distinguished from that of our insolvent act of 1880. Indeed, that case was cited by our code commissioners as an example falling under the second subdivision of section 1667 of the Civil Code. See note 2 under that section in *Deering's Code*. It is also cited as authority, on a point similar to the principal point in this case, in *Estudillo v. Meyerstein*, 72 Cal. 317, 13 Pac. Rep. 869. The case of *Rice v. Maxwell*, 53 Amer. Dec. 85, is also specifically applicable to this case. As having a general bearing upon the main question in this case the following cases may be consulted: *Valentine v. Stewart*, 15 Cal. 403; *Beard v. Beard*, 65 Cal. 354, 4 Pac. Rep. 229; *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. Rep. 391; *Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. Rep. 36; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. Rep. 735. The point made by counsel for respondent to the effect that the oral testimony was incompetent is not tenable. *Buffendean v. Brooks*, 28 Cal. 642, and cases above cited. For the reason that the finding excepted to is not justified by

the evidence, I think the order and judgment should be reversed, and a new trial granted.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order and judgment are reversed, and a new trial granted.

98 Cal. 143

KENNEDY v. GLOSTER et al. (No. 18,020.)
(Supreme Court of California. April 17, 1893.)

HOMESTEAD—SELECTION OF—ABANDONMENT.

1. Where portions of a tract of land selected as a homestead are situated in different counties, a declaration of the homestead, executed in duplicate, and one recorded in each county, has the same effect as one declaration recorded in both counties.

2. The fact that the owner of a farm selected as a homestead took cattle to pasture for hire, when he had more pasture than was necessary for his own animals, and sometimes sold hay therefrom, does not vitiate the selection as a homestead, as being within the rule that property used for business purposes solely cannot be selected as a homestead.

3. Under Civil Code, § 1243, providing that "a homestead can be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged," a conveyance of land as security only does not operate as such abandonment after a reconveyance.

4. Under Civil Code, § 1262, providing for the selection of a homestead by a declaration, which must be acknowledged in the same manner as grants of real property, and section 1186, providing that the acknowledgment of a married woman shall not be taken unless she is made acquainted with the contents of the instrument by the officer, on an examination without the hearing of her husband the selection of a homestead by a married woman is void, when the certificate does not recite that she was examined by the certifying officer apart from her husband.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county; John Caldwell, Judge.

Action by John J. Kennedy against D. M. Gloster, Catherine Gloster, and others, for the foreclosure of a mortgage. Plaintiff had judgment against all of the defendants except Catherine Gloster, and as to her the action was dismissed, from which judgment, and from an order denying a new trial, plaintiff appeals. Reversed.

P. Reddy, Chas. F. Hanlon, and Frank R. Wehe, for appellant. T. L. Ford and Goodwin & Goodwin, for respondents.

BELCHER, C. In 1874, and for several years prior thereto, the defendant D. M. Gloster was the owner of a tract of land situated partly in Plumas county and partly in Sierra county, in this state, the part in Sierra county being described as the N. W. $\frac{1}{4}$ of a certain section 5. He was a married man, and the land was all community property. There was a dwelling house on the quarter section in Sierra county, in which he, with his wife and children, then lived, and has ever since lived. The whole tract was inclosed by a

fence, but was subdivided into separate fields, a portion of the land being used for pasturing stock, and a portion for raising hay; and around his house was also a fence, which inclosed about two acres. On September 1, 1874, Mrs. Gloster, the defendant Catherine, for the joint benefit of herself and husband, executed, in duplicate, a declaration of homestead upon the whole tract. Each copy of the declaration was separately acknowledged by her in proper form, and one of them was filed for record in Sierra county on the 5th, and the other in Plumas county on the 9th, of the same month. On December 21, 1875, Mr. and Mrs. Gloster executed to Michael Coffey and Margaret Gloster a deed, absolute in form, of all that part of the land situate in Plumas county. The deed was given to secure the payment of an indebtedness from Mr. Gloster to the grantees, and on its payment, in July, 1879, they reconveyed the property to him. Meantime he remained in possession of the land, using it as before. On November 17, 1886, Mrs. Gloster, for the joint benefit of herself and husband, executed, in duplicate, a new declaration of homestead upon all the land described in the declaration of 1874, and two other quarter sections,—one situate in Plumas county, and the other in Sierra county. Each copy of this declaration was in fact properly acknowledged by her, but the certificates of acknowledgment were defective in form, in that they failed to state, as required by statute, that, upon an examination without the hearing of her husband, she was made acquainted with the contents of the instrument. One of the copies was filed for record in Plumas county, and the other in Sierra county, on the 22d day of the same month. On January 23, 1888, the defendant D. M. Gloster executed a mortgage to the plaintiff's assignor upon all the land in Plumas county described in the homestead declaration of 1874, and upon the two quarter sections in Sierra county described in the declaration of 1886. The plaintiff commenced this action to foreclose that mortgage, making Mr. and Mrs. Gloster and certain other parties defendants. All of the defendants, except Mrs. Gloster, suffered their defaults to be entered. She answered and set up in defense of the action the two declarations of homestead, executed and filed for record by her, as before stated. The court below found all the facts alleged in the complaint to be true as against D. M. Gloster, and also found that, at the time the mortgage was executed, there was a valid homestead, covering all the land described in the declaration of 1886, and hence that the mortgage was void. Judgment was accordingly entered in favor of the plaintiff, and against D. M. Gloster, for the amount found due, and in favor of Mrs. Gloster, dismissing the action as against her, with costs. From this judgment in favor of Mrs. Gloster, and from an order denying his motion for a new trial, the plaintiff appeals.

1. It is claimed for appellant that, when a copy of the homestead declaration of 1874 was filed for record in Sierra county, the land described therein and situated in

that county immediately became and constituted the homestead of the declarant, and that the filing of the other copy in Plumas county a few days later was, in effect, an attempt to select a second homestead while the first was in force; and it is argued that, as one cannot have two homesteads at the same time, the land in Plumas county did not become impressed with the character of homestead. It is admitted, however, that a valid homestead may be declared upon land situated partly in two counties; but it is said that to effect that end the same declaration or paper should be filed in each county. We do not think this claim should be sustained. When an instrument is executed in duplicate, it is, in effect, but one instrument. Here the declaration was evidently executed in that way that it might more conveniently and promptly be sent to the two county seats for record; and, if it had not been executed in duplicate, it clearly could not have been recorded in both counties at the same time, and yet in that event the objection interposed would seem to be equally tenable.

2. It is also claimed that the homestead must be limited to the dwelling house in which the claimant resided, and the separately inclosed two acres of land on which it was situated. This claim is rested upon the theory that the balance of the land was used for purposes of business, and hence was not subject to selection as a homestead. But it is well settled in this state that a farm may be selected as a homestead. In *Gregg v. Bostwick*, 33 Cal. 227, it is said: "Both in the constitution and in the statute the word 'homestead' is used in its ordinary or popular sense; or, in other words, its legal sense is also its popular sense. It represents the dwelling house at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country, it may include a garden or farm. If situated in a city or town, it may include one or more lots, or one or more blocks." Here it was proved that the whole tract was used as a farm by its owners, principally for pasturing and feeding their own cows and other domestic animals, though sometimes, when there was more pasturage than was necessary for their animals, they took in other cattle to pasture; and, when they had more hay than their animals would consume in the winter, they sold some of it. But these facts did not, in our opinion, make the farm such a place of business as to bring it within the cases holding that property used for business purposes solely cannot be selected as a homestead. The declaration was in proper form, and, when filed for record, we think it had the effect to impress upon the whole farm a valid homestead claim.

3. It is further claimed that when Mr. and Mrs. Gloster executed their deed in December, 1875, they abandoned their homestead upon that part of the land covered by the deed. The answer to this claim is that "a homestead can be abandoned only by a declaration of abandonment, or

a grant thereof, executed and acknowledged." Section 1243, Civil Code. Here the proof is clear that the deed was given only as a mortgage, and therefore it did not pass the title, and could not operate as a grant.

4. It is claimed that the declaration of 1886 did not create any new homestead rights, for the reasons, among others, (1) that it was an attempt to select a second homestead, while that of 1874, if valid, was still in force; and (2) that the certificates of acknowledgment attached to the declaration were not in the form prescribed and made necessary by the statute, and hence it was not entitled to be recorded. It is admitted by respondent that the certificates of acknowledgment were not in proper form, but contended that, notwithstanding the defects, the declaration might still be filed for record, and that, when so filed, it constituted a valid homestead. The Civil Code has the following provisions: "Sec. 1262. In order to select a homestead, the husband or other head of a family, or, in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record. Sec. 1263. The declaration of homestead must contain" certain specified statements. "Sec. 1264. The declaration must be recorded in the office of the recorder of the county in which the land is situated. Sec. 1265. From and after the time the declaration is filed for record, the premises therein described constitute a homestead," etc. As we read these sections, the requirement is imperative that a married woman's acknowledgment of a declaration of homestead must be taken and certified in the manner prescribed by section 1186 of the Civil Code¹ and it was, in effect, so held in *Beck v. Soward*, 76 Cal. 527, 18 Pac. Rep. 650. The certificate must be attached to the declaration, and the paper may then be filed for record, and constitute a homestead; but, if the certificate is not made in substantial conformity to the requirements of the statute, the paper is not entitled to record, and, if filed and recorded, it will not constitute a homestead. Looking at the whole record, we conclude that Mrs. Gloster had a valid homestead upon all the land described in her declaration of 1874, and as to that land that the mortgage was void, but that the plaintiff was entitled to have his mortgage foreclosed upon the quarter section in Sierra county, which was covered by it, and not included in the homestead. The judgment and order should therefore be reversed, and the cause remanded, with directions to the court below to modify its judgment in accordance with the views above expressed.

¹The section provides: "The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken unless she is made acquainted by the officer with the contents of the instrument, on an examination without the hearing of her husband; nor certified, unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution."

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded, with directions to the court below to modify its judgment in accordance with the views herein expressed.

98 Cal. 193

WEILL v. LIGHT, Justice of the Peace,
(No. 18,065.)

(Supreme Court of California. April 25, 1893.)

WRIT OF REVIEW.

A writ of review will not be granted until after the time has expired for taking an appeal.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Proceedings by R. Weill for writ to review a judgment rendered by Charles Light, a justice of the peace. From a judgment annulling the said judgment, defendant appeals. Reversed.

J. B. Webster and L. W. Elliott, for appellant. Loutitt, Woods & Levinsky, for respondent.

VANCLIEF, C. This is an appeal from a judgment of the superior court of San Joaquin county, annulling a judgment of a justice of the peace upon a writ of review. The action in which the judgment of the justice of the peace was rendered was brought by the History Company, a corporation, against R. Weill, to recover from the defendant therein the sum of \$86.70 for certain books alleged to have been sold to the defendant by the plaintiff, and a judgment by default was rendered by the justice of the peace for the sum demanded on the 29th day of January, 1892. The writ of review was issued by the superior court, and served on the justice of the peace, on the 16th day of February, 1892. It is claimed by counsel for respondent here that the justice's court exceeded its jurisdiction, because there was no valid service of summons on the defendant, Weill. On the other hand, appellant's counsel contend (1) that service of summons was waived by an appearance of the defendant; and (2) that defendant might have appealed from the judgment of the justice's court, as the time within which such appeal might have been taken had not expired when the writ of review was issued and served. I think this second point of appellant must be sustained, and that it is finally decisive of the case in favor of the appellant. It is too well settled to admit of doubt that the writ of review will not be granted on the petition of a party who is entitled to appeal from the order or judgment of which he complains. *Stuttmeister v. Superior Court*, 71 Cal. 322, 12 Pac. Rep. 270, and cases there cited. See, also, *Heinen v. Phillips*, 88 Cal. 557, 26 Pac. Rep. 366. I think the judgment should be reversed, and the superior court directed to dismiss the proceeding.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the superior court is directed to dismiss the proceeding.

98 Cal. 179

CITY OF FRESNO v. FRESNO CANAL & IRRIGATION CO. et al. (No. 18,034.)

(Supreme Court of California. April 24, 1893.)

IRRIGATION—CANAL THROUGH CITY—NUISANCE—ACTION TO ABATE—INCONSISTENT FINDINGS—DECREE DESTROYING PROPERTY.

1. In an action by a city against an irrigating canal company to enjoin the operation of its canal along one of plaintiff's streets, and abate it as a nuisance, the court found, *inter alia*, that said canal can be constructed below the surface of the street, and covered up so that it will not be an obstruction to the street. *Held*, that such finding is inconsistent with a finding, or conclusion of law, that "said canal, where it traverses the streets of said city, is a nuisance per se," and a judgment granting an injunction, and ordering the nuisance abated, must be reversed.

2. It appeared that the canal was constructed at great expense, more than five years before the incorporation of plaintiff, and eleven years before the suit was brought, and had ever since been used by the canal company adversely to all the world; that the proprietors of the land where the city is located induced such company to run its canal through the town, and located the latter on the assurance that the company would do so; that the supervisors were consulted at the time, and made no objections; that taxes on the canal were paid to the city, and its trustees, by ordinances and official acts, recognized its existence; that a mill of the company was erected at an expense of nearly \$100,000; that there are other expensive mills on the canal operated by its waters; that, after leaving the city, the canal distributes water for the irrigation of many farms; and that it can be constructed below the street and covered so that the surface can be restored to its former condition. *Held*, that a decree ordering the canal to be abated as a nuisance by filling it up was erroneous.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the city of Fresno against the Fresno Canal & Irrigation Company and the Fresno Milling Company to enjoin and abate as a nuisance such irrigation company's canal, which runs along certain streets of such city, and on the banks of which such milling company has erected a mill. From a decree granting the relief prayed, and ordering the nuisance abated by filling the canal, defendants appeal. Reversed.

T. P. Ryan, for appellants. Reel B. Terry, C. C. Merriam, and Church & Cory, for respondent.

McFARLAND, J. This action was brought by the city of Fresno, in its corporate capacity, to obtain a decree abating as a nuisance a certain ditch or canal owned by the Fresno Canal & Irrigation Company, and which runs through parts of certain streets of said city. The Fresno Milling Company, which had purchased water from the ditch of the other defendant, and had built a large flouring mill on the banks of the canal, was also made a party defendant. The court declared the

canal a nuisance per se, and ordered it to be entirely abated; that is, filled up and entirely destroyed. From the judgment, and from an order denying a new trial, said defendant the Fresno Milling Company appeals.

The said canal was constructed at great expense more than five years before the incorporation of said city; the mill of the milling company was erected at an expense of nearly \$100,000; other expensive and costly mills have been erected upon the banks of the canal, and are operated by its waters; and the canal, after leaving the city, distributes water for the irrigation of many farms. There are therefore many equitable considerations in favor of defendants; and such large properties should not be thus utterly destroyed, unless such result necessarily follows from an application of the rules of law. It appears that in 1874 the land now composing the city of Fresno, and a very large body of land, consisting of many thousands of acres, adjoining it, was the property of the Contract & Finance Company, and that in said year the agents of said company visited that locality for the purpose of selecting a site for a new town or city. They consulted Mr. M. J. Church, who was the president and superintendent of the said defendant the Fresno Canal & Irrigation Company, as to a proper town site. They wanted a place to which water could be brought, saying that "a town without a stream of water was no town at all." Church informed them that the place where the city of Fresno was afterwards located could be more readily supplied with water than any other part of the territory designated, and that he would pledge himself that his company would put a stream of water through that place if they located the town there. Upon that assurance the town was shortly afterwards located at that place. Afterwards the projectors of the town, fearing that Church might fail to bring in the water, offered him inducements in the way of both money and land to bring it in. The ditch was commenced by Church's company about 1874, and was completed about 1879 or 1880, the water being brought into the town through the ditch in 1880. The board of supervisors of the county were consulted about the matter, and made no objection to the building of the ditch, although no formal action was taken by the board upon the subject. The company defendant has continuously used the ditch from 1880 to the present time. The corporation plaintiff, the city of Fresno, was not incorporated until October, 1885. This action was not commenced until December, 1891. At the time the ditch was in course of construction, the defendant was urged to build it by the persons who then owned all the property in what is now the city of Fresno; but in 1876 the owner of the property made a deed to Fresno county, "granting a perpetual right of way to public streets and alleys" of said proposed town or city. After the plaintiff was incorporated, its trustees, by ordinances and official acts regularly done, recognized the existence of said canal. The canal was assessed in

1888, and the city tax paid thereon. The court finds that "about the year 1880, before the incorporation of the city of Fresno, a canal or a ditch was built through certain streets of said city by the defendant the Fresno Canal & Irrigation Company, and has been maintained and used by said company ever since, uninterruptedly, continuously, and adversely to all the world, but without color of title." The words "without color of title" are of no significance here, because the defendant had actual, and not merely constructive, possession of the canal; and, of course, as against private persons, the said defendant would have acquired a perfect title by prescription.

It is contended, however, by respondent, that, as the streets were dedicated to the public in 1876, the appellant could acquire no right to any part thereof by adverse user; and this, of course, is the general rule. If, however, it were necessary to discuss the proposition here, it is not clear under the law that in this case an estoppel in pais cannot be invoked by appellants as against the respondent. In 2 Dillon's Municipal Corporations the author, after reviewing the subject at great length, and referring to many authorities, uses this language, which seems to be the result of such authorities: "The author cannot consent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but, upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require." Section 675. And many cases are cited by the author, mainly from Illinois, Indiana, Iowa, and Ohio,—all exceptional cases,—in which the doctrine of estoppel in pais was successfully invoked as against the public; and the case at bar seems to be as safely within the rule as are many of the cases there cited. But we do not deem it necessary to determine absolutely whether or not that rule would apply to the case at bar, for we think that in this case another principle comes into play.

The court finds "that said canal is an irrigating ditch; that it flows out west of the city, and is there distributed, and supplies water for the irrigation of many farms; that within the city extensive and costly mills for the purpose of crushing grain and manufacturing flour have been erected on its banks, to be operated by its waters; that these industries would be injured should the canal be prevented from running within the city." The court also, in finding 14, finds "that said canal can be constructed below the surface of said street, and covered up in such a manner that the surface of said street can be restored to its former condition, so that it will not be an obstruction to the free use and enjoyment and travel of said street." The constitution of the state (section 1, art. 14) declares that "the use of all water now appropriated,

or that may be hereafter appropriated, for sale, rental, or distribution, is hereby declared to be a public use." See, also, *People v. Stephens*, 62 Cal. 209; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. Rep. 264; *Fresno Co. v. Fowler Switch Canal Co.*, 68 Cal. 359, 9 Pac. Rep. 309. And the statutes of the state recognize ditches and canals as of public use, and regulate such use. For instance, section 551 of the Civil Code provides that, where they cross or are on the lines of public highways, their works "must be so laid and constructed as not to obstruct public highways." The canal of the defendants was constructed in the face of, and without objection by, the supervisors of the county or the public, and the city of Fresno, when it was incorporated, found said canal occupying parts of certain streets in the city which it then took control of. Under these circumstances, if the nuisance consists merely in the manner in which the canal is conducted and managed, it is a nuisance which can be remedied without a total destruction of the property, and the rule stated in *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. Rep. 795, should be applied; that is, the appellant should be enjoined from conducting the canal in such a manner as to make it a nuisance, but a total destruction of the property should not be decreed. This rule has been applied as against a public corporation. In *Shepard v. People*, 40 Mich. 487, the appellant was indicted for causing a public nuisance within the city of Pontiac by maintaining a milldam therein, and the trial court, in its judgment, ordered that the dam should be removed; but the appellate court reversed that part of the judgment, saying: "Property is not to be destroyed until its destruction is lawfully ascertained to be necessary in order to stop the nuisance, and then no other, and no more, is to be destroyed than is thus determined to be needful to effect that object." Many cases are cited. See, also, *People v. Albany*, 11 Wend. 539. But in the case at bar the findings do not clearly set forth what the real facts are. Finding 14, above quoted, is inconsistent with other findings, and particularly with the statement (whether considered as a finding of fact or a conclusion of law) that "said canal, where it traverses the streets of said city, is a nuisance per se;" and for this reason the judgment and order must be reversed. Judgment and order reversed, and new trial ordered.

We concur: DE HAVEN, J.; FITZGERALD, J.

98 Cal. 184

MAWHINNEY v. SOUTHERN INS. CO.
(No. 14,763.)

(Supreme Court of California. April 24, 1893.)

FIRE INSURANCE POLICY—ACTION FOR LOSS OF HARVESTING MACHINE—LOCATION OF PROPERTY—EVIDENCE.

In an action on a fire insurance policy on a harvesting machine while "operating in the grain fields, and in transit from place to place in connection with harvesting, in" a certificate, No. 13—60

tain county, it appeared that the machine was moved, the day after the policy was issued, from the place where it had been stored since the previous harvesting season, to a blacksmith shop, to be repaired in order to fill contracts for cutting grain. While near such shop, eight days after being taken thereto, and about the day the harvesting season commenced, the machine was burned. Held, that it was not "operating in grain fields," or "in transit from place to place in connection with harvesting," at the time it was destroyed. Paterson, Garoutte, and McFarland, JJ., dissenting.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Mawhinney against the Southern Insurance Company on a fire insurance policy. From a judgment for plaintiff, defendant appeals. Reversed.

T. C. Van Ness and J. P. Meux, for appellant. Church & Cory, for respondent.

HARRISON, J. The defendant made this policy of insurance in favor of the plaintiff's assignor, by which it insured him, to an amount not exceeding \$800, for the term of three months from June 2, 1890, against loss or damage by fire to the following described property, "while located and contained as described herein, and not elsewhere, to wit: Threshing outfit in the field. \$800 on one combined harvester, complete, all while owned by assured, and known as 'Barrett's harvesting machine and outfit,' and operating in the grain fields, and in transit from place to place in connection with harvesting, in Fresno county, Cal." The harvester was destroyed by fire June 10, 1890, and in an action upon the policy the complaint alleged that its destruction occurred "while in transit from L street, in Fresno, the place where the same was at the time of said insurance, to the grain fields, for use in connection with the harvest in said Fresno county." This allegation was denied by the defendant, and was the issue upon which the cause was tried. At the close of the plaintiff's case the defendant moved for a nonsuit upon the ground that the evidence failed to sustain this allegation of the complaint. The court denied the motion, and, the defendant declining to offer any evidence, judgment was rendered in favor of the plaintiff, from which, and on order denying a new trial, the defendant has appealed.

At the date of the policy the harvester was in a building on L street, in the city of Fresno, where it had been stored since the previous season, and on the next day after the policy was issued it was taken to a blacksmith shop in the city of Fresno, about a quarter of a mile distant, for general repairs, where it remained until it was destroyed, on the night of June 10th. The plaintiff testified: "The machine had never got to the grain fields when it was burned, but was left at this shop for the purpose of repairs. I helped to take it there. It had never been taken from the shop after being carried there." Barrett, the plaintiff's assignor, to whom the policy was issued, testified that "it required about \$175 worth of repairs upon the harvester to put it in a condition to be used, and took about two weeks to repair it.

I took the machine straight from Mr. Mawhinney's place to the shop, on the other side of the railroad track, about a mile from Mr. Mawhinney's place. It had not been used at all prior to that, when carried to the shop for repairs, and there it stood until it burned. It stood about sixty or one hundred feet away from the shop, with several machines between it and the shop. None were burned, except this one. Neither was the shop burned. I had never carried it into the field, nor put it to any use, after the insurance was procured, nor used it in any way, except to take it to the shop for repairs, and had not taken it from any place with a view of harvesting at that time, and nothing had been done in the way of harvesting that season; only the repairs I have stated. I mean I had taken it to the shop for the purpose of repairs, and with a view of going into the field for harvesting as soon as it was ready, and used it for no other purpose during that season." Upon this testimony the nonsuit should have been granted. The harvester was not "operating in the grain fields," or "in transit from place to place in connection with harvesting," at the time it was destroyed. It had not been used at all in connection with harvesting during that season, and the testimony of Barrett that it required about two weeks to make such repairs as would put it in a condition to be used shows that it could not have been, at the time of the loss, in transit from place to place "in connection with harvesting." The policy purported to be on a "threshing outfit in the field," and its terms did not cover the harvester while it was at a blacksmith shop for repairs, and it cannot be said that while it was at the shop in Fresno, to which it had been taken for the purpose of putting it in repairs for the season, it was in transit "from place to place, in connection with harvesting," any more than if it had been sent to San Francisco for repairs, and had been there destroyed. An insurer is not liable except upon proof that the loss has occurred within the terms of the policy, and when making the policy he is at liberty to select the character of the risk he will assume. If the terms of this risk are distinct, and without ambiguity, the assured cannot complain if the risk assumed does not cover the loss. The locality of the property, as well as its custody, and the incidental care that, by reason of such locality and custody, the property will naturally receive, are elements which enter into a consideration of the risk to be assumed; and, if they are made a part of the conditions of the policy they must be observed by the assured, as fully as any other conditions, before the insurer can be made liable for a loss. In the present case the insurer would reasonably assume that the harvester would be under greater care and watchfulness while it was actually operating in the fields, or in transit from place to place for such purpose, than if left standing, unhoused and uncared for, in open grounds near a blacksmith shop. But, whatever may have been the motives for limiting the extent of his risk, he cannot be made lia-

ble for a loss that was not covered by the risk assumed in the policy.

The judgment and order are reversed.

We concur: BEATTY, C. J.; DE HAVEN, J.; FITZGERALD, J.

PATERSON, J. I dissent. The plaintiff testified that the harvesting season in Fresno county commenced about the 10th of June; that the machine was sent to the blacksmith for repairs, which were nearly completed when it was burned. I. N. Barrett testified that the object of taking the machine to the blacksmith shop was to repair it for work in the field; that a contract had been made for cutting grain, and that he had made arrangements to take the machine out to the field on the 11th day of June, or as soon as the necessary repairs were completed; that one contract had been made for harvesting before the machine left plaintiff's place, and another contract after it reached the shop, but no work had been done with it that season. Upon this showing I think the motion for a nonsuit was properly denied. The taking of the machine from the place where it was housed to the shop, and the work done upon it there, were acts done "in connection with harvesting,"—as much so as if the machine had already been in operation, and had been returned to the shop for repairs. The plaintiff, when he took it out for repairs, intended, not to return it to the place where it had been stored, but to continue on to the field of operations as soon as the necessary repairs were completed. If the plaintiff had actually entered the field he was to harvest, although he knew that the machine needed repair, and had returned to the blacksmith shop, there would be no question whatever of his right to recover herein. The law did not require of him such a vain thing. Contracts had been made for the harvesting of crops, and the machine was "in transit from place to place, in connection with harvesting," within the meaning of that language, as used in the policy, when it was destroyed by fire. It is evident that by the terms of the provision of the policy quoted the parties intended that, so long as the machine remained in the house or shed on plaintiff's place where it had been stored for the winter, the company should not be liable, but that as soon as it was removed therefrom, and started out to operate in the grain fields, the company should become liable. A machine is not so likely to be burned when in the hands of a crew of threshers as when stored in a hay barn, nor it is so likely to be burned when on the road, or when standing in front of a blacksmith shop for repairs. When plaintiff took the machine from its storehouse, his intention was to commence operations in the grain fields he had promised to harvest. The stop made at the shop for repairs was merely incidental to the main object, viz. actual work in the harvest field towards which they were headed.

We concur: GAROUTTE, J.; McFARLAND, J.

TURNER v. COFFMAN. (No. 19,258.)

(Supreme Court of California. April 7, 1893.)

In bank.

From a judgment in favor of Turner, Coffman appeals. Motion to dismiss appeal. Denied.

Blackstock & Ewing, for respondent.

PER CURIAM. Motion to dismiss appeal for failure to file transcript of the record within the time prescribed by section 1. of rule 2.

The clerk's certificate shows that a statement of the case was settled and filed on February 10th. This gave the appellant all of March 23d to file the record in compliance with the rule. The notice of this motion was prematurely served on March 21st, which is also the date of the clerk's certificate. Motion denied.

98 Cal. 203

In re WHETTON'S ESTATE. (No. 15,095.)
(Supreme Court of California. April 29, 1893.)

WILLS—CONTEST—RIGHT OF EXECUTOR TO DE-
FEND.

Under Code Civil Proc. § 1327, which makes an executor, where a will is attacked after probate, a necessary party to the proceeding, and requires the issue of a citation to him personally to show cause why the probate should not be revoked, the executor has the right to support and defend the will.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceedings by James Whetton to have the will of Catarina R. Whetton declared null and void, and letters testamentary

granted to one Navarro revoked. Decree granting the relief, from which this appeal is taken. Reversed.

Dunne & McPike, for appellants. Henry I. Kowalsky, for respondent.

GAROUTTE, J. The record in this case is in a condition of hopeless entanglement, but sufficient appears to require a reversal of the judgment. One Navarro was named as executor and made a devisee by the last will and testament of Catarina R. Whetton, deceased. He qualified as such executor, and entered upon the discharge of his duties. James Whetton, husband of deceased, filed a contest asking for revocation of his letters testamentary, and that the will be declared null and void. A citation was issued to Navarro to show cause upon a certain day why his letters should not be revoked, and the will set aside as void. Navarro appeared as executor, and filed a general demurrer to the petition. What occurred subsequently to the foregoing events is not made plain by the record, but sufficient appears therefrom, aided by the light furnished from the briefs of respective counsel, to indicate that the court was of the opinion that the executor, as such, had no right to support and defend the will, and he was thereupon denied such right. This position is not well founded. When a will is attacked after probate, section 1327, Code Civil Proc., makes the executor a necessary party to the proceeding, and requires that a citation issue to him personally to show cause why the probate should not be revoked. It would be an absurdity to cite him to show cause, and, when he appears in court in obedience to the citation, to refuse to consider the reasons which he is prepared to advance why the will should not be set aside and annulled. It is not only his privilege to make such showing, but it is his duty under his trust. While it has been held in many cases that an administrator cannot appeal from a decree of distribution, because he has no interest in the final judgment, whatever it may be, yet that principle is in no sense analogous to the right of an executor to support a will, especially so when it has once been probated. For the foregoing reasons, let the judgment and decree setting aside the will, revoking the probate thereof, and distributing the estate be reversed, and the cause remanded for further proceedings.

We concur: PATERSON, J.; HARRISON, J.

98 Cal. 195

RICHARD v. WOLFLING. (No. 18,035.)
(Supreme Court of California. April 27, 1893.)

MINES—LOCATION ON AGRICULTURAL LANDS.

A location of a mine is not invalid, as against a subsequent location, because a portion thereof was made on agricultural land, which was afterwards patented, where the agricultural land could be profitably worked only by commencing on the other portion of the location, and the money expended on such other portion was sufficient to make a valid location

of the whole, the subsequent locator not connecting his claim with the holders of the agricultural patent.

Department 2. Appeal from superior court, Tuolumne county; John M. Corcoran, Judge.

Action by E. J. Richard against M. J. Wolfling. From a judgment for plaintiff, defendant appeals. Affirmed.

F. W. Street and F. P. Otis, for appellant. Reddick & Solinsky, for respondent.

McFARLAND, J. The defendant filed an application in the United States land office for a patent to a quartz mining claim 1500 feet in length and 600 feet wide, called the "Scorpion." The plaintiff filed in said land office an adverse claim, averring that he was the owner of a quartz mine called the "Hope Mine," and that a portion of the Scorpion mine, claimed by defendant, conflicted with a portion of said Hope mine. The contest was referred to the superior court, where the plaintiff brought this action, and the court found in favor of plaintiff for the portion of the mining ground in conflict. Defendant appeals from the judgment, and from an order denying a motion for a new trial.

Plaintiff introduced evidence tending to show ownership of the mining ground in contest, first, under a location made by Alexander Araya and others in June, 1872, and also under a relocation made by said Araya and one Samuel Ralston on the 7th of April, 1880. Many of the exceptions relied on by appellant refer to said location of June, 1872, and to evidence tending to show the continued ownership of plaintiff's grantors under that location down to the second location of April, 1880. We think that plaintiff showed a good location made in June, 1872, a conveyance by the other locators to said Araya, and a full possession by Araya, under mining laws and customs, down to April, 1880, and that if plaintiff could have shown those facts under the complaint the said exceptions would not be tenable. But as the complaint seems to be based expressly upon the second location of April 7, 1880, the testimony as to the location of June, 1872, perhaps, should not be regarded at all, and therefore the exceptions as to that testimony need not be here examined.

On the 7th of April, 1880, the said Araya and said Samuel Ralston relocated the said Hope mine,—the description being the same as in the location of 1872, except that the width was made only 450 feet instead of 600,—and their notice of location contained this clause: "This claim was recorded in 1872, and has been worked and held up to date." It is not disputed that this location of April, 1880, was made in accordance with the laws of congress and the customs of the district, or that it was held by a proper mining possession, unless the whole location was invalid and void because a portion of the claim was afterwards patented as agricultural land to one St. Cyr, as hereinafter mentioned. The Hope mine runs generally in a northerly and southerly direction, and the northerly half of the claim (that is,

about one half) was on section 30 of a certain township, and the southerly half was in lot 1 of section 31, which lies immediately south of said section 30. At the time of the location it does not appear that lot 1 of section 31 had been patented, but it does appear that about three months afterwards a patent issued from the United States government to said St. Cyr for said lot 1. The northerly part of the mine in section 30 still is public land of the United States. Nearly all the work that has been done by plaintiff and his grantors on said mine is on the southerly portion of it, and upon the ground which lies within said section 31, afterwards patented to St. Cyr; and, as before said, there is no doubt that more than sufficient work was done on the said southerly portion to hold the whole mining claim. Indeed, it appears that about \$25,000 has been spent on the mine by plaintiff and his grantors. Under these circumstances, appellant contends that the whole location of the Hope mine made by Araya and Ralston in April, 1880, is void, because the southerly portion of it was upon land not open to location, and that, therefore, the work done upon the southerly part of the mine was of no value, in point of giving possession to the upper portion. It appears, however, that, within a couple of months after the location of the Hope mine, Araya and Ralston procured from the claimants of said lot 1, in section 31, a conveyance to them of the right to mine said Hope mine, on the said lot 1; and, under these circumstances, we do not think that appellant's position is tenable. If, after the second location, in 1880, plaintiff's grantors allowed St. Cyr, without opposition, to procure a patent to lot 1, as agricultural land, of course they could not have made any successful contention for the mine, as against the holders of the agricultural patent. It does not appear whether or not, at the time of the location of the mine, they knew that there was any claim of any kind for the land, as agricultural land. It was quite a common thing for miners, in locating mining claims, to be ignorant of government legal subdivisions, and of the inchoate rights of other persons to agricultural titles. In the present case the locators of the mine acquired from the agricultural owners the right to work the mine; and under these circumstances we do not think that a third person, not connecting himself with the St. Cyr right, is in a position to dispute the validity of the mining location. Appellant claims under a location made several years afterwards, to wit, in 1887; and his successful contest of respondent's right must rest upon the very narrow and technical point that a portion of the location of respondent was not on public land. But the real prior right, in justice, and in accordance with the generally received notion of valid mining locations, is with the respondent; and we know of no absolute rule of law which makes such a location as that of respondent invalid, as against the subsequent comer, who evidently relies wholly upon this supposed defect in respondent's location. There is no question that the

land in contest between the parties in this action is unoccupied public land, and the contention that respondent cannot hold it because a portion of the ground located at the time was not public land cannot be maintained. Moreover, it appears from the evidence that the northerly portion of the Hope mine could be profitably worked only by commencing on the southerly portion, and working northerly; and it has been frequently held that work done for the purpose of developing a mine is deemed to have been done on the mine, although actually done at a distance therefrom. Neither is the position tenable that there could not have been a valid relocation of the mine by plaintiff's grantors. *Thompson v. Spray*, 72 Cal. 528, 14 Pac. Rep. 182.

Appellant cites *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110. In that case, plaintiff claimed that his grantor, Thomas, had discovered a vein, and sunk a discovery shaft at a certain point, and thereupon made a valid location. But it appeared that he had not made such discovery; that one Fallon had previously made the discovery, and had previously made a valid prior location of the claim, and had made application for a patent; that Thomas did not contest Fallon's application; and that Fallon obtained a patent for his location, which included the discovery shaft of Thomas. And the court held that "a location on account of the discovery of a vein or lode can only be made by a discoverer, or one who holds under him," and that, "if the title to the discovery fails, so must the location which rests on it." The court further said that "the issue of the patent to Fallon was equivalent to a determination by the United States in an adversary proceeding, to which Thomas was in law a party, that Fallon had title to the discovery superior to that of Thomas, and that consequently Thomas' location was invalid." It is apparent, therefore, that the facts in that case were different from those in the case at bar. There nothing was involved but mining locations and rights; and the decision went upon the theory that the whole claim of Thomas rested upon an alleged "discovery," which he had not made, but which had previously been made by Fallon. And Thomas obtained no rights from Fallon, and did not connect himself with Fallon in any way. But in the case at bar the mining location of plaintiff's grantors was long prior to that of defendant, and was in every way a perfect location, except so far as it might be embarrassed by the rights of the subsequent agricultural patentee, with whom defendant does not connect himself in any way; and therefore we think that, as against the appellant, the title of respondent to that part of the Hope mine which is in conflict with the Scorpion mine is complete. To hold otherwise would be to commit an injustice which the law applicable to mining locations and rights does not demand.

There were numerous exceptions taken at the trial which we do not deem it necessary to notice. It is sufficient to say that we do not think that the court erred

in excluding the judgment roll in the case of *Wolfig v. McCormick*, and that there was no error committed in rulings concerning the testimony of the witnesses Tanzey and Araya. The other exceptions were either not well taken, or concern immaterial matters. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

98 Cal. 27

BULL et al. v. STRONG. (No. 19,108.)
(Supreme Court of California. March 28, 1893.)

HUSBAND AND WIFE—MORTGAGE ON SEPARATE ESTATE.

In an action to foreclose a mortgage on a wife's separate estate, plaintiff alleged that defendant and her husband executed and delivered a deed conveying land to him "in trust, the conditions of which are stated in a separate instrument in the hands of the parties of the first part;" that the deed was intended as a mortgage for moneys advanced to defendant's husband, and that at the time of its delivery plaintiff executed and delivered to defendant and her husband a defeasance. The court found that no such contract was made with defendant's husband, that the defeasance was never delivered, and that defendant knew nothing of it until after her husband's death. *Held*, that a judgment for defendant was proper.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Alpheus Bull, Jr., and others, executors of Alpheus Bull, deceased, against Hattie Strong. From a judgment for defendant, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Wells, Monroe & Lee, for appellants. S. M. White, John D. Bicknell, and Chapman & Hendrick, for respondent.

McFARLAND, J. This action was originally commenced by Alpheus Bull, now deceased, against John T. Coe, administrator of Charles L. Strong, deceased, and his widow, Hattie W. Strong, to foreclose a mortgage executed to said Bull by said Charles and Hattie Strong upon land admitted to have been the separate property of said Hattie. Judgment was first rendered in favor of the defendants; and upon appeal to this court the judgment was reversed, and a new trial ordered. See *Bull v. Coe*, 77 Cal. 54, 18 Pac. Rep. 808. After the return of the remittitur the pleadings were amended several times; and the action was prosecuted by the administrators of Alpheus Bull against Hattie W. Strong, alone, it having been dismissed by the plaintiffs as to the administrator of said Charles L. Strong. Judgment was again rendered in favor of the defendant Hattie W. Strong, and plaintiff appeals from the judgment and from an order denying a new trial. It is averred in the complaint that on October 31, 1882, the said Charles L. Strong, since deceased, and his wife, the said Hattie W. Strong, duly executed to said Bull, deceased, a deed which conveyed to said Bull the land in contest, which provided, however, that the said land "is herein made over to the

party of the second part in trust, the conditions of which are stated in a separate instrument in the hands of the parties of the first part." It is averred in the complaint that this deed was given and intended as a mortgage to secure certain moneys advanced or to be advanced by said Bull to said Charles L. Strong; that this deed was delivered the next day, November 1st, by said Charles to said Bull; and that at the time of its delivery the said Bull executed and delivered to said Charles and Hattie Strong an agreement in writing dated November 1, 1882, and which is called generally the "defeasance." This defeasance refers to said deed of October 31st, and declares that it was given in trust to secure the payment, with interest at 9 per cent., of all moneys advanced or to be advanced by Bull in payment of said Charles L. Strong's one-third interest in the Belmont mine, as well as for the expense of working said mine, the amount not to exceed \$11,000. It also provided that the profits of said mine should be applied in payment of the money thus advanced; and that, if such profits should not be sufficient to pay said advances, then said Bull should have the right to sell such portion of the land as should be necessary to meet the deficiency. There is a rather obscure provision about "twelve months from the date of this instrument," and there are some other provisions not necessary to be here stated. The answer denies that said defeasance was delivered either to said Charles or to said Hattie Strong at the time alleged in the complaint, or at any time. Said defendant Hattie Strong also denies in her answer that said deed was delivered to said Bull for any such purpose as that stated in the defeasance; and she avers that the deed was given only for the purpose of raising some money, if it should become necessary, not exceeding \$3,000, to pay her expenses for a trip east to be treated for her ill health, and for certain family expenses. She also denies that any money was advanced by Bull on said deed; and furthermore that the profits, sale, etc., of said mine, all of which were received and controlled by said Bull, more than repaid him for any advances which he may have made for her said husband in the business of said mine. Many other issues were made by the pleadings, but they are not necessary to be here noticed. Evidence was introduced at the trial as to a great many matters, and the findings are very full and quite lengthy. But the court finds, among other things, that the said defeasance "was never delivered to the said C. L. Strong in his lifetime, nor was it drawn up in the presence of said Strong, nor was any such contract as set forth in said defeasance ever made between said Alpheus Bull and the said C. L. Strong;" and that said defendant Hattie Strong knew nothing of said alleged defeasance until long after the death of her husband. We have carefully examined the long transcript and the exhaustive briefs of counsel, and we are satisfied that the court was warranted in making said findings. This being so, the judgment must be affirmed without reference to the many other points which

arose in the case. We may say, however, that we see no material error in the rulings of the court upon the admissibility of evidence. As the appellants rely in their complaint upon the terms of the written defeasance, they could hardly recover upon any other theory; but as to the said statement of respondent that the deed was given to secure advances, if such should be found necessary, not to exceed \$3,000, for her trip east, family expenses, etc., the court finds that if any moneys were advanced by Bull for such purpose they had been fully paid, and we cannot say that such finding was not warranted by the evidence.

The judgment and order are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

98 Cal. 149

SPINNEY v. GRIFFITH et al. (No. 18,014.)

(Supreme Court of California. April 18, 1893.)

CONSTITUTIONAL LAW—MECHANICS' LIENS—WHO MAY CLAIM—RECORDING CONTRACT.

1. Const. art. 20, § 15, providing that mechanics, material men, etc., shall have a lien upon the property upon which they have bestowed labor or furnished material, etc., and the legislature shall provide by law for the speedy and efficient enforcement of such liens, is not self-executing, but requires legislation to give a lien.

2. Code Civil Proc. § 1183, provides that mechanics, material men, contractors, subcontractors, etc., shall have a lien upon the property upon which they have bestowed labor, or furnished materials, for the value thereof. The section then provides that "in case of a contract for the work between the owner and his contractor, the lien shall extend to the whole contract price. * * * All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds \$1,000," and shall be recorded; "otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien" therefor. *Held*, that a contractor who fails to record his contract, where the agreed sum to be paid is over \$1,000, can have no lien.

3. In such case the contractor cannot claim a lien under the first part of the section, on the ground that, his contract being void, he may recover on an implied contract for the services and materials furnished; since, though, under the common law, he may be entitled to recover on an implied contract, he cannot have a lien, as the lien is created by statute solely, and the statute must be complied with.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by John Spinney against Annie T. Griffith and another. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed.

Sayle & Coldwell, for appellants. Church & Cory, for respondent.

SEARLS, C. This is an action to cancel a contract for the construction of a brick building in the city of Fresno, and to foreclose a mechanic's lien. Plaintiff had

judgment, from which, and from an order denying a motion for a new trial, defendants, Annie T. Griffith and S. N. Griffith, appeal. Defendant Annie T. Griffith is the wife of her codefendant, S. N. Griffith. She owned lots 8 and 9, in block 70, of the city of Fresno, and her husband owned, or had recently owned, lots 161 and 162, of the Central California Colony, near Fresno. On the 26th of February, 1890, the plaintiff, Joseph Spinney, entered into a written contract with the husband, S. N. Griffith, by which Spinney agreed to furnish the materials and build a brick building on said lots 8 and 9, in the city of Fresno, for the sum of \$3,940, and to accept in full payment therefor a mortgage executed by one W. D. Crichton, for \$4,000, on lots 161 and 162, in Central California Colony aforesaid. Crichton executed the mortgage to plaintiff in accordance with the contract, and the latter built the house, completing the same on or about June 1, 1890. About the time of the completion of the building, plaintiff discovered that he had been victimized in the matter of the mortgage which he had received in satisfaction of his building contract. S. N. Griffith had represented to him that he had sold the land in the Central California Colony to Crichton for \$5,500, had received \$1,500 of the purchase price in cash, and was to receive the mortgage of \$4,000 as security for the residue of the consideration; whereas, in fact, the sale was a sham, no money had been paid, and the mortgage was only given to be palmed off upon plaintiff, the mortgaged property not being worth \$2,500, etc.

In the view taken of the case, it is not deemed necessary to state at length the facts constituting the alleged fraud. Upon discovering the facts, plaintiff tendered the mortgage and notes, which it was given to secure, to Griffith, and demanded a rescission of the contract, which being refused, he proceeded and in due time filed a contractor's lien under the law for the "liens of mechanics and others" for \$3,940 upon the building which he had constructed. It is alleged in the complaint, and found as true by the court, that, in making the contract, S. N. Griffith was the duly authorized agent of his wife, Annie T. Griffith, although that fact does not appear from the contract. The court below rendered a judgment annulling the contract between plaintiff and S. N. Griffith, and awarding the former a judgment for \$3,940, with interest and attorneys' fees, amounting in the aggregate to \$4,478.50 against the defendant Annie T. Griffith, and upholding the validity of plaintiff's lien upon her premises aforesaid.

Can so much of the judgment as holds the mechanic's lien of the plaintiff to be a valid and subsisting lien on the premises of the defendant be sustained? The lien of mechanics and others on buildings and the land upon which they are erected, as security for the amount due them for labor performed and the materials furnished, is the creation of statute, and was unknown either at common law or in equity. We must therefore look to the source of its being—the statute—alike for the right to such a lien and the mode by

which it can be secured. The terms "statute" and "statute law" are here used in that broad and comprehensive sense which includes alike the organic law and the statute enacted under it. By section 15 of article 20 of our constitution it is provided that "mechanics, material men, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor, or furnished material, for the value of such labor done and material furnished; and the legislature shall provide by law for the speedy and efficient enforcement of such liens." This declaration of a right, like many others in our constitution, is inoperative except as supplemented by legislative action. So far as substantial benefits are concerned, the naked right, without the interposition of the legislature, is like the earth before the creation, "without form and void;" or, to put it in the usual form, the constitution in this respect is not self-executing. Chapter 2, tit. 4, pt. 3, Code Civil Proc., contains the statutory provisions applicable to the case at bar. That chapter (Id. § 1183) provides that mechanics, material men, contractors, subcontractors, artisans, architects, machinists, builders, etc., performing labor, or furnishing materials, to be used, etc., shall have a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished. The same section provides further: "In case of a contract for the work between the owner and his contractor, the lien shall extend to the whole contract price. * * * All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, * * * and shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated; * * * otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." It will be seen from this quotation that, when the amount agreed to be paid thereunder exceeds \$1,000, the contract must be in writing, and shall be subscribed by the parties thereto, and must be filed and recorded before the work is commenced; otherwise it shall be wholly void. If the contract is wholly void, it cannot be made the basis of a substantial claim for a lien. A void contract is no contract; it is as though it had never existed. The statute, in addition to declaring the contract void, which would seem to be quite sufficient for practical purposes, goes a step further, and declares that "no recovery can be had thereon by either party thereto." If no recovery can be had thereon, manifestly no lien thereunder would be of avail.

It has been contended that, while the contractor cannot take a lien and recover under the contract, still, the contract be-

ing void, and a lien being given by the earlier part of the section to contractors as well as to others, he is, upon well-established rules, entitled to recover upon an implied contract for the services and materials furnished, and, being so entitled to recover, and the lien being assured to contractors, he may have and enforce it. The contention may seem plausible, but is the position tenable? First, the right to recover upon a quantum meruit for services, and upon a quantum valebat for goods, wares, and merchandise sold and delivered, in case no value or price has been agreed upon by the parties, and in some cases where an attempted contract is void, is a creation of the common law, founded upon the equitable theory that he who has received and been benefited by the services or goods should pay a reasonable compensation therefor. The rule is not one created or dependent upon any statute, but exists independent thereof. The "lien law," as it is frequently termed, is with us pre-eminently a creature of the statute. It derives its existence only from positive enactment, and "not arising out of, or of the essence of, the contract for labor, or dependent on the motives which suggest its being enforced, * * * a remedy given by law, which secures the preference provided for, but which does not exist, however equitable the claim may be, unless the party brings himself within the provisions of the statute, and shows a substantial compliance with all its essential requirements." Phil. Mech. Liens, § 9. This being so, the right to a lien is not a corollary of the right to recover, but, while dependent upon such right for its efficacy, is an independent creation of the statute. Looking, then, to the text of the statute, it may be said the contractor whose contract is for more than \$1,000, and whose contract is not in writing, and is not filed for record, cannot enforce his lien under the contract, because it is declared void. He cannot have a lien independent of the contract, because the statute by implication forbids it. "In such case the labor done and material furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

All persons except the contractor shall have a lien. If it was intended that the contractor, too, was in such a case to have a lien, why was he excepted? To hold that he may under such circumstances have a lien is to hold the exception nugatory. The statute must be construed so as to give effect to all its provisions, and, when so construed, the contractor whose remuneration is in excess of \$1,000, and who has failed to comply with the provisions as to execution and recording his contract, is without the pale of the class to which liens are given by such statute. The reason of the exception is apparent. It is in the interest of laborers, subcontractors, and material men. In contracts of magnitude they are afforded a medium by which to judge as to the security afforded them under the contract. The penalty upon the owner

failing to record is found in his liability to pay for all the labor performed and materials furnished; while the contractor, for like negligence, is shut out of the class of persons to whom a mechanic's lien is given, and relegated to the personal liability of the owner given him, not by the statute, but independent of it. These views of the law preclude the right of plaintiff to a mechanic's lien. He was an original contractor, and, as such, entered into a written contract with defendant, by which he agreed to construct for the latter a building, the consideration for which was in excess of \$1,000. The contract was not at any time filed for record, or recorded, as required by section 1183, Code Civil Proc. It was therefore void, and plaintiff was not entitled to a lien. Under the circumstances of this case, we may regret the conclusion to which we are forced, but we have no duty except to declare the law as we find it. The judgment and order appealed from should be reversed, and the court below directed to take such action as may be proper, and in consonance with the views expressed herein.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order should be reversed, and the court below is directed to take such action as may be proper and in consonance with the views expressed herein.

98 Cal. 157

GRAY v. McWILLIAMS. (No. 18,098.)

(Supreme Court of California. April 20, 1893.)

SURFACE WATER—EASEMENT OF FLOWAGE—OVERFLOW FROM RIVERS.

1. The owner of the lower or servient land must permit the surface water from the higher land of his neighbor to flow unobstructed over his lower land. *Ogburn v. Connor*, 46 Cal. 346, followed.

2. The rule that the owner of the lower or servient land must permit the surface water from the higher land of his neighbor to flow unobstructed over his lower land does not apply to the overflow of water from the large rivers of the state, and the owners of land along such streams have the right to construct levees or embankments to protect their land from such overflows, though the effect thereof may be to prevent the free discharge of such water, or may tend to increase the flow of such water on the land of their neighbor, not so protected. *Lamb v. Reclamation Dist.*, 14 Pac. Rep. 625, 73 Cal. 125, followed.

3. If the owner of higher land upon a river subject to overflow fails to erect levees or embankments to protect his land from the effect of floods, his neighbor owning lower land in his rear may protect himself from such floods by erecting a levee on his own land, though the effect may be to increase the flood waters on the higher land of the neighbor, who has not so protected himself. *McDaniel v. Cummings*, 23 Pac. Rep. 795, 83 Cal. 515, followed.

4. Water seeping from a river through an embankment or levee constructed by the owner of the higher land near the river is not overflow from which the owner of neighboring lower land may protect himself by an embankment, thus accumulating it upon the higher land, but is like surface water, and he is bound to permit it to flow off over his lower land.

Commissioners' decision. Department I. Appeal from superior court, Colusa county; W. H. Grant, Judge.

Action by Mary Gray against A. S. McWilliams. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

U. W. Brown, for appellant. II. M. Albery and K. Albery, for respondent.

SEARLS, C. Action to remove and abate as a nuisance an embankment or levee, erected by defendant upon his own land, but which held back and caused water to flow upon the land of plaintiff, and to recover damages for injury caused thereby. Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant appeals. The plaintiff, Mary Gray, has been since 1888 the owner in fee in her own right, and in possession, of a tract of land consisting of over 40 acres, situate in the county of Colusa. The defendant, A. S. McWilliams, is, and since September, 1887, has been, the owner of and in possession of a tract of land of over 200 acres, lying south of and adjoining plaintiff's land for a distance of 80 rods. Upon the dividing line, between the land of plaintiff and defendant, is a roadway or avenue 50 feet wide, known as "Fruitvale Avenue." Upon the center of this avenue is an embankment, constructed in 1884, by the grantors of plaintiff and defendant, for the double purpose of a roadway, and as a check to hold water for irrigation purposes. This embankment, which runs east and west, if maintained intact throughout its length, prevents the water accumulating on the north side from flowing in a southerly or southwesterly direction to and upon the land of defendant, and, as a consequence, causes or tends to cause the same to accumulate upon the land of plaintiff. In the winter of 1889 and 1890, defendant closed up a water way through this embankment, in consequence of which plaintiff's land was flooded, her orchard thereon injured, etc. The land north and east of that of plaintiff is slightly higher than plaintiff's land, there being a slight slope over the lands of plaintiff and defendant towards the southwest. These lands are all on the west side of the Sacramento river, and east of them and on the west side of said river is a large levee, to protect the country from overflow in times of flood. West of this large levee, and east of the lands of the plaintiff and defendant, is a raised wagon road leading from Colusa to Princeton, the general course of which is northwest and southeast. Through the embankment of this road there are several openings or water ways. The court finds that commencing at the Princeton road there is a trough, water course, or washout, running thence in a southwesterly direction across the lands of plaintiff and defendant, crossing Fruitvale avenue in its course. This "trough, water course, or washout," across plaintiff's land, and for 100 feet on the land of defendant, has abrupt banks, is about 3 feet deep, and from 12 to 14 feet wide. From a point on defendant's land, say 100 feet from his north line, this trough

subsides into a depression or swale, which extends for a couple of miles in a southwesterly direction to Hoppins slough, which in turn connects with a large natural water course, called the "trough," etc. The court finds that this trough, water course, or washout was formed naturally by the action of the water, has existed certainly since 1881, and serves in time of rainy weather or high water to drain and carry off the surface and surplus water from plaintiff's land, and from lands of others naturally draining upon and over hers. The court finds, as to the sources from which the waters thus accumulating upon plaintiff's land came, as follows: "(9) That the water thus thrown back upon the plaintiff's land was surface water, and was composed partly of seepage water escaping from the Sacramento river by percolation through the river levee, and partly of rainfall; but what portion of said water was seepage or percolating water, and how much thereof was rain water, cannot be found or determined from the evidence; but there was no rush or great flow or volume of water spreading over the surface of the soil as in case of flood or overflow from the river, and at no time did it appear in such quantities but that it would have naturally passed off in the said water way or trough on plaintiff's and defendant's lands, had there been no obstruction in said water way or trough. There is a branch ditch on the west side of the Princeton road, which defendant claims by his answer served to concentrate the surface waters and seepage water coming from the Sacramento river, and pour them upon plaintiff's land at a fixed point, etc., but, as the finding of the court is against this view, the facts connected therewith need not be mentioned at length. Like considerations apply to matters of estoppel and prescription. To say that the evidence is sharply contradictory scarcely conveys an adequate idea of the antagonisms it presents. There is hardly an issue made in the case but that might have been decided differently, and the conclusion would have found support in the evidence. After the findings in the cause were filed, counsel for defendant asked the court, in addition to its findings, to pass upon 18 additional propositions, which were offered in writing, which request was refused. Some of these propositions involved facts and issues already passed upon; others may be regarded as involving evidentiary, rather than ultimate, facts, and, while it would have been of interest here to have had an exposition of a few of them, we cannot say, in the face of the somewhat full and explicit findings, that any error was committed by the court in its refusal.

Among the conclusions of law deduced by the court were: "(1) That plaintiff's land is the dominant tenement, and defendant's land the servient tenement; that the water which was obstructed, and caused the injury to plaintiff, was surface water, and that the plaintiff had an easement, and defendant owed plaintiff a servitude for the flowage of such water from plaintiff's land onto and across de-

fendant's land. (2) That the embankment of earth or obstruction complained of was a nuisance, and should be abated as such," etc.

Had plaintiff an easement in the land of defendant for the flow of the water in question over it? "An easement is a privilege without profit, which the owner of one tenement has a right to enjoy, in respect of that tenement, in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former." *Godd. Easement*, p. 2; *Stevenson v. Wallace*, 27 Grat. 87; *Ritger v. Parker*, 8 Cush. 147. "A charge or burden upon one estate, (the servient,) for the benefit of another, (the dominant.)" *Morrison v. Marquardt*, 24 Iowa, 35. Easements are of two kinds, similar to one another in many respects, but differing in many particulars. To the first class belong those easements created by act of man, and to the second those which are given by the law to every owner of land. This latter class is given by law, because without them there would be no security in the enjoyment of land by its owner. Without them a neighbor might deprive a landowner of the benefits derivable from things which in the course of nature have been provided for the common good of all, and which the law wisely provides shall not be wrested from one by the act of another. These easements are said to be inherent in the land *ex jure nature*, and are often termed "natural rights." A careful review of the adjudicated cases will, it is believed, show that a good deal of obscurity has been thrown around many questions connected with the subject under consideration, by a failure to observe the line of demarcation between these two classes of easements. As it is with the latter class that we have exclusively to do in the present case, we must eliminate from consideration such rules of construction as apply exclusively to easements founded upon grant or prescription.

What then is the "natural right" of the plaintiff in the premises? It is claimed that at common law it was held that no natural easement or servitude existed in favor of the owner of the superior or higher land, as to mere surface water, or such as falls or accumulates by rains or the melting of snow; and that the proprietor of the inferior or lower tenement or estate might at his option lawfully obstruct or hinder the flow of such water thereon; and in so doing might turn back or off of his own lands, and onto and over the lands of other proprietors, such water, without liability by reason of such obstruction or diversion. It is also claimed that the doctrine of the civil law is almost directly the reverse of that of the common law, and that under it the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating on his land which is higher, upon or over the land of the servient owner as in a state of nature; and that such natural flow or passage of the waters cannot be interrupted or prevented by the servient

owner, to the detriment or injury of the estate of the dominant proprietor. And as that conclusion is in unison with the doctrine on the same subject of the courts of fully one half of the states of our Union, all professing to be controlled as we are by the common law, we are justified in saying that with us the rule established has become and is a part of our common law. The case of *Ogburn v. Connor*, 46 Cal. 346, in which this court, in a well-considered opinion, held in substance that where two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of such upper tract of land has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude. In *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. Rep. 795, the court was urged to overrule *Ogburn v. Connor*, but refused to do so, placing such refusal upon the ground of stare decisis. The case was, however, distinguished from *Ogburn v. Connor*, and passed off upon the principle laid down in *Lamb v. Reclamation Dist.*, 73 Cal. 125, 14 Pac. Rep. 625. In view of the reasoning and conclusions in *McDaniel v. Cummings*, and *Lamb v. Reclamation Dist.*, it may be fairly assumed, as the consensus of opinion on the part of the court: (1) That the owner of the lower or servient tenement must permit the surface water from the higher land of his neighbor to flow unobstructed over his lower land, as held in *Ogburn v. Connor*, supra. (2) That the rule of *Ogburn v. Connor* does not apply to the overflow of water from the large rivers of the state, and that the owners of land along such streams have a right to construct levees or embankments for the protection of their lands from the ravages of flood waters, although the effect thereof may be to prevent the free discharge of such flood waters in as large and ample a manner as they would otherwise do, or may tend to increase the flow of water upon lands not similarly protected, as was held in *Lamb v. Reclamation Dist.*, supra. (3) That if the owner of higher land upon a river subject to overflow fails to erect levees or embankments to protect his land from the effect of floods, his neighbor owning lower land in his rear may protect himself from such floods by erecting a levee upon his own land, although the effect thereof may be to increase the flood waters on the higher land of the neighbor, who has not resorted to like means of protection, as was held in *McDaniel v. Cummings*, supra. If there is an essential difference in the conclusions reached in these several cases, the reasons for such difference are to be found in the elementary facts forming their basis.

In the case of flood waters escaping from natural streams, we view them, it is true, as a common enemy, against which we may protect ourselves without the commission of a wrong; but after all, this declaration is used in view of the means of defense resorted to, rather than in the abstract. We build the banks of the river

higher for our protection, it is true, but in so doing we aid nature in her effort to carry the water to its ultimate destination, and he who, to protect himself from a flood, should erect a barrier across the channel of one of our important rivers, would probably be met with the declaration that it was not the proper mode of warfare, even against a "common enemy." In the case of surface waters having no defined channels of escape, and the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature shall be left untrammelled in their disposition.

Was the water held back by defendant's embankment surface water, in the sense that defendant was legally inhibited from retarding its passage over his land? Surface water is usually defined to be such as falls from the clouds in the form of rain or snow, or rises to the surface in springs. The reason why the owner of the higher land has an easement in the lower land for their escape is to be found not so much in the source from which they are derived, as in the fact that nature has adopted this method of ridding the land of their presence in surplus quantity. I can see no good reason why the water which accumulated upon the land of plaintiff should not be subject to the rules in regard to surface water, as defined in *Ogburn v. Connor*, supra. A portion of such water (how much the court cannot determine) came from the seepage through the levee built to protect, or which at least does protect, all these lands from overflow. The evidence showed that this river levee was a large and high one; that the winter of 1889-90 was one of heavy floods; that for some months the water was several feet above the general level of the country, and that gradually the levee became saturated until the water seeped or percolated through and under it; that it came to the surface much as springs do, and gradually sought a lower level, not in a defined channel, but as surface water is wont to do, by percolation and by the force of gravity. It came without any act or agency of the plaintiff, and as she was, so far as appears, powerless to direct its course, it would seem rational to say that, like other surface water coming without volition, it should be permitted to pass off by the method devised by nature. It must be within the observation of many of us that these large levees, in time of protracted flood, however well constructed, are not so impervious to water under pressure but that percolation or seepage to some extent is liable to occur. Constructed as they are in this state, under the encouragement of law, for the general benefit, and effecting as they usually do great good to individuals and communities, it would seem natural that the minor inconveniences inevitable and inseparable from their existence should be borne by those upon whom they naturally fall, and that to concentrate the whole effect upon a single individual is not in consonance with our views of justice under such circumstances. Had the defendant left the water way through Fruitvale avenue open, as

he was in duty bound to do, to allow the escape of what, beyond all cavil, was the surface water upon the land of plaintiff, this seepage water, according to the finding of the court, would have passed off without injury to plaintiff, and, so far as appears, without detriment to any one. If the presence of this seepage water enhanced the servitude imposed upon defendant's land, it was without the action of plaintiff, and was and is a condition not dependent upon the acts of the parties, the result of which all the landowners subject to its effect must bear in their turn.

The only theory suggesting itself under which a different conclusion could be reached is to be found in the doctrine of *McDaniel v. Cummings*, supra, holding that, upon the failure of the landowner next the river to construct a levee, the owner of lower land in the rear of him can do so, even though the higher land near the river is surcharged with flood water as a consequence. If this may be done, it may be asked in case a levee is built by the landowner next the river, as in this case, which restrains the major portion of the flood water, why may not the owner of lower land in the rear, as in case of this defendant, protect himself from the minor portion or seepage water by a sublevee, even though it increases the quantity of water upon the owner of higher land, as in case of plaintiff here? The answer must be that the rule enunciated in *McDaniel v. Cummings* was in consonance with a sound public policy favoring a cherished object, viz. the reclamation and improvement of valuable lands subject to overflow, and was well calculated to meet and do justice in cases where the owners of higher lands along the rivers refuse or neglect to construct levees, or to join with their neighbors in doing so. It does not apply here, because a main levee has been built upon the higher land contiguous to the river, which appears to effect, in the main, the object of its construction. To permit each owner of lower lands in the rear to construct sublevees to hold back the seepage water escaping from the main levee would be to permit them to flood the protected higher land in front, and thus practically to frustrate the beneficial results of the main levee. Such a rule, when thus extended, would tend to retard rather than promote improvement and consequent prosperity. As a conclusion, after a careful examination of the case in all its different aspects, it is held that the court below was correct in its conclusions that plaintiff, as the owner of the higher land, had an easement or right to have all the water in question, including what was termed "seepage water," flow from her land to, upon, and over the land of defendant, and to that extent the land of defendant was the servient, and that of the plaintiff the dominant, tenement. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

98 Cal. 166

WHITE et al. v. FRESNO NAT. BANK.
(No. 14,758.)

(Supreme Court of California. April 21, 1893.)

CONTRACTS—PERFORMANCE—JURISDICTION—RES JUDICATA—APPEAL.

1. In an action by a contractor for constructing a building, defendant cannot set off damages for plaintiff's failure to complete the building within the time prescribed by the contract, where such failure was due solely to its own negligence.

2. Where the supreme court denies an application by a defendant corporation for a writ of prohibition, to prohibit the trial court from proceeding in the action, based on the ground that it has acquired no jurisdiction, the question of jurisdiction is *res judicata* on appeal by defendant from a subsequent judgment in the action.

3. In an action by a building contractor, defendant cannot for the first time on appeal complain that the plans and specifications referred to in the contract set out in the complaint, and introduced in evidence, were not attached to or made a part thereof, and hence that the contract was not in its entirety filed for record as required by statute.

In bank. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by W. C. White and F. R. Thomas, partners, etc., against the Fresno National Bank. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Nourse & Short, for appellant. Baldwin & Campbell, for respondents.

GAROUTTE, J. This action was brought to recover a balance alleged to be due from defendant to plaintiffs for the construction of its bank building in the city of Fresno. Plaintiffs are assignees of the contractor, and his contract was confined to the woodwork of the building. The contractor completed his work to the satisfaction of the architect, but the bank claims that it was not done within the time fixed by the terms of the contract, and by reason thereof it suffered damage in loss of rents, etc., and asks a set-off to that extent. Judgment went for the plaintiff, a motion for a new trial was denied, and the appeal is prosecuted from the judgment and order.

The principal point upon which appellant relies for a reversal of the judgment is that by virtue of section 16, art. 12, of the constitution, defendant, being a corporation, could not be sued in San Joaquin county, and therefore no jurisdiction was ever obtained over it. When this action was originally brought, the bank objected to the jurisdiction of the superior court of San Joaquin county to proceed in the matter, and applied to this court for a writ of prohibition based upon such alleged want of jurisdiction, asking for an order directing that court to refrain from further proceedings in the case. The application for the writ was heard in bank, and denied, and a petition for a rehearing was also denied. 83 Cal. 491, 24 Pac. Rep. 157. While such decision may not, technically speaking, be the law of the case, yet it is *res adjudicata* as to that

subject; and, notwithstanding the industry and learning disclosed in the present discussion of the question by appellant's counsel, we shall treat the matter as settled and foreclosed by the former decision.

Appellant's affirmative defense is based upon the failure of the contractor to complete the building within the time agreed upon, and in this respect the court found that such failure was not due to any fault or neglect of the contractor, but was attributable entirely to the negligence of the defendant. The contractor's evidence supports this finding, and we cannot disturb it. The mere fact that the brick and iron work was finished in December, and the contractor did not complete the building until some four months after that time, is not of itself sufficient to overthrow the finding of the court that the delay was not occasioned by his fault or neglect. There was also some evidence tending to show that the contract was filed in the recorder's office prior to the commencement of the work, and no evidence to the contrary.

It is insisted that the contract set out in the complaint, and introduced in evidence, is incomplete, in this: that the plans and specifications therein referred to are not attached and made a part thereof, and consequently the contract in its entirety was not filed for record, as required by the statute. No demurrer was offered to the complaint upon this ground. The answer admitted the contract as set out in the complaint, and the contract itself was introduced in evidence without objection. It is too late to raise the question for the first time in this court. The authorities cited do not support appellant's contention in this regard. In *Holland v. Wilson*, 76 Cal. 434, 18 Pac. Rep. 412, the question arose upon a special demurrer. In *Yancy v. Morton*, 94 Cal. 558, 29 Pac. Rep. 1111, it came before the court upon an objection to the evidence. *Rebman v. Water Co.*, 95 Cal. 394, 30 Pac. Rep. 564, does not appear to be in point. The errors of law are not well taken. Let the judgment and order be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; PATERSON, J.; McFARLAND, J.; DE HAVEN, J.

98 Cal. 171

BURKE v. BOURS et al. (No. 18,087.)

(Supreme Court of California. April 22, 1893.)

EJECTMENT—FINDINGS OF FACT—REVIEW ON APPEAL—PURCHASE OF LAND BY FORMER AGENT—EQUITABLE TITLE—EVIDENCE.

1. Where, in ejectment, there is evidence supporting the findings of the trial court, its decision, either on the weight of the testimony or the credibility of the witnesses, will not be reviewed on appeal.

2. In ejectment it appeared that the owner's agents employed defendant to sell the land in dispute; that he informed such agents that he had a purchaser, and sent them a deed in which neither the name of the grantee nor the consideration was inserted; that such agents forwarded the deed to the owner, who inserted the consideration, and returned it executed to such agents, who sent it to defendant. Afterwards the latter informed such agents that the

supposed purchaser refused to take the land; that he had caused his own name to be inserted in the deed as grantee, and, if satisfactory to the owner, he would take the land. The owner consented, and defendant sent the price to such agents, and took possession. *Held*, that defendant was not acting as the owner's agent in making the sale to himself, but was a purchaser dealing directly with the owner, and obtained a good title to the land, in the absence of any fraud on his part.

In bank. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action in ejectment by W. G. Burke, administrator of the estate of Jose R. Arguello, deceased, against B. W. Bours and F. A. Ruhl, Bours' tenant. From a judgment for defendants, plaintiff appeals. Affirmed.

For reports of decisions on prior appeals, see 28 Pac. Rep. 57, and *Arguello v. Bours*, 8 Pac. Rep. 49.

George D. Collins, for appellant. Jas. H. Budd, John E. Budd, and Nicoll & Orr, for respondents.

HARRISON, J. When this action was here upon the last appeal (92 Cal. 108, 28 Pac. Rep. 57) the facts before the court were that Bours had been employed by Faulkner, Bell & Co., who were agents of Arguello, to make a sale of the land, and had reported to them a sale thereof for the sum of \$4,500, sending at the same time a form of a deed to be executed by Arguello, without, however, inserting the amount of the consideration or the name of the grantee; that Arguello filled in the amount of the consideration, and executed the deed without inserting the name of any grantee; that when Bours received the deed he caused his own name to be inserted therein as grantee, and sent his check for the amount of the purchase money to Faulkner, Bell & Co., who accounted for the same to Arguello. The judgment of the court below was reversed upon the grounds that Bours was to be regarded as the agent of Arguello for making a sale of the land, and could not, as such agent, make a sale to himself. After the cause went down, another trial was had, and, in addition to the facts found upon the preceding trial, the court found that, when Bours sent the deed to Faulkner, Bell & Co. for execution, he had negotiated a sale of the property to one Ahumaja for the sum of \$4,500, but that when he received the deed, after it had been signed by Arguello, Ahumaja refused to consummate the purchase; that thereupon Bours had his own name inserted as the grantee in the deed, and wrote to Faulkner, Bell & Co., informing them of his failure to complete the sale, and "that he had had his own name inserted in said deed as grantee, and that, if this was agreeable to Mr. Arguello, he would take said property, and pay the said sum of \$4,500 therefor, and that, if it was not agreeable to Mr. Arguello, he would return the said deed to him;" that a few days thereafter he received a letter from Faulkner, Bell & Co., inclosing one from Arguello, in which Arguello stated "that he was satisfied with Mr. Bours as the purchaser of said property, and that he

was glad he had purchased it, and all that he (Arguello) wanted was to receive his money," that upon the receipt of this letter Bours caused the deed, which he had in the mean time kept in his possession, to be placed of record, and immediately remitted the \$4,500 to Faulkner, Bell & Co., and entered into possession of the property, and has since remained in possession of the whole thereof; that upon the receipt of the money by Faulkner, Bell & Co. they informed Arguello that they had received from Bours the sum of \$4,500 as the proceeds of said property, and had placed the same to his credit; and that Arguello immediately acknowledged the receipt of such information. The court also finds "that the said Jose R. Arguello, prior to the payment of the said purchase money by the said Bours, had full knowledge and notice that said B. W. Bours' name had been inserted in said deed as the grantee therein named after the signing thereof; and at the time of the receipt of said purchase price said Arguello had full knowledge and notice that said Bours was the grantee named in said deed, and had full knowledge and notice of all the facts and circumstances surrounding the said transaction." Judgment was thereupon rendered in favor of the defendants, and the plaintiff has appealed therefrom, bringing up the evidence in a bill of exceptions, and specifying therein that it is insufficient to sustain certain of the findings. There was, however testimony before the court below supporting the above findings, and the decision of that court, both upon the weight of this testimony as well as upon the credibility of the witnesses, cannot be reviewed here.

The decision of this court upon the former appeal was based upon the fact that it then appeared that Bours was the agent of Arguello for the purpose of making a sale of the land, and that the purchase by him was made without the knowledge of Arguello that he was such purchaser, and upon the well-established principle of law that when these facts were brought to the knowledge of the principal he had the right to have the sale set aside at his option, irrespective of any question of fraud or unfairness or advantage. It was said in the opinion at that hearing, "while a trustee may purchase the trust property where he deals openly with his beneficiary in the sale, and the transaction is in all respects fair and just, and the consideration full and adequate, yet that is not this case. Neither does the evidence disclose that Arguello ratified and confirmed the sale to Bours after a full knowledge of all the facts. Aside from the fact that Bours sent his personal check to Faulkner, Bell & Co. for the amount of the purchase price, there is nothing in the record to indicate that Arguello had any knowledge whatever that Bours was the purchaser.

* * * Having decided that defendant occupied such relations towards Arguello that he would not be allowed to become a purchaser of this real estate unless the sale was made with the full knowledge and consent of Arguello, or ratified and confirmed by him after a full knowledge of all the facts, neither of which conditions

existed in this case, it necessarily follows that he is not the vendee under an executed contract of sale, and possesses no equity sufficient to defeat plaintiff's rights to a recovery of the possession of this tract of land." The conditions under which the judgment of this court was then rendered do not now exist. It now appears not only that Bours dealt openly with Arguello in the sale, and that the transaction was fair and just, and the consideration full and adequate, but it also appears that "the sale was made with the full knowledge and consent of Arguello." These circumstances take the case out of the principles announced at the former hearing, and show a complete defense to a recovery by the plaintiffs. There is no inhibition upon a purchase by an agent from his principal, "where the facts are fully disclosed, and the agent acts in good faith, taking no advantage of his situation. The principal may, if he sees fit, deal with the agent as with any other person." *Mecham, Ag. § 466; Rochester v. Levering*, 104 Ind. 562, 4 N. E. Rep. 203. The agent has the same right to deal directly with his principal as has a stranger. The rule which prevents the agent from purchasing the property which he is authorized to sell for his principal is based upon the maxim that no man can serve two masters, and that an agent shall not unite in his own person his individual with his representative character, or place himself in a position where his personal interest will be in conflict with his duty to his principal. When, however, the agent deals with his principal "at arm's length, and after a full disclosure of all that he knows with respect to the property," (*Murphy v. O'Shea*, 2 Jones & La. T. 425,) or when the principal ratifies the purchase from himself with full knowledge of the circumstances connected with the transaction, he can thereafter avoid the sale only upon the same grounds as if the purchase had been made by a stranger. The powers of an agent in dealing with the property of his principal are limited in the same manner as those of a trustee. A trustee is not forbidden to deal with the trust property when the beneficiary, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. Civil Code, § 2230.

The present case does not fall within the rule which is applicable when an agent with a power of sale makes a sale to himself. Bours did not have any power of sale from Arguello, and did not in fact make any sale to himself. His relation to Arguello, resulting from his original employment by Faulkner, Bell & Co., was rather that of a broker than an agent for sale, and his subsequent proposition to them that he would himself purchase the land from Arguello at the price of \$4,500 placed him in the position of a purchaser dealing directly with the owner. Faulkner, Bell & Co. were the agents of Arguello for the sale of the property, and the persons to whom Bours, if he desired to purchase the same, would naturally make

application. He had had no direct correspondence with Arguello, and his offer and information to Faulkner, Bell & Co. must be regarded the same as if made to Arguello. Although his previous relation to Arguello, by virtue of having been employed to make a sale of the property, still left him charged with the duty of disclosing any facts or circumstances affecting the property which might have come to his knowledge while holding such fiduciary relation, yet the record does not show that there was any concealment or silence on his part which would make him guilty of constructive fraud. When Bours wrote to Faulkner, Bell & Co., making the proposition to purchase the property himself from Arguello for the sum of \$4,500, he was not acting as the agent of Arguello in making a sale of the premises to himself, but was making a direct proposition to Arguello through Faulkner, Bell & Co., who were his agents for the sale of the property. Arguello had been previously informed of all that Bours had done in attempting to effect the sale, and it is not disputed that \$4,500 was the full value of the property. The court finds that, when Bours was first employed in behalf of Arguello, he wrote to Faulkner, Bell & Co., "fully advising them of the condition of the said property;" and that, after the receipt of that letter, Arguello stated "that he agreed with Mr. Bours' opinion of the property;" and that, after Bours had endeavored to make a sale of the property, he again wrote to Faulkner, Bell & Co., "advising them therein of what he had done;" and that, as soon as he had found a purchaser, he informed Faulkner, Bell & Co. thereof. These findings are not excepted to, and, as it is not claimed that there were any facts or circumstances within the knowledge of Bours that he failed to disclose, must be construed as equivalent to a finding that he made a full disclosure of all the information he had respecting the value or condition of the property. As the sale from Arguello to Bours is to be regarded as made upon a direct dealing between them for the purchase and sale of the property, the rules governing the ratification and confirmation by a principal of the act of his agent have no application. The judgment is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.; McFARLAND, J.

98 Cal. 199

YOSEMITE COMMISSIONERS v. BARNARD. (No. 18,093.)

(Supreme Court of California. April 27, 1893.)
LANDLORD AND TENANT — MISTAKE IN LEASE —
HOLDING OVER — UNLAWFUL DETAINER — PLEADING AND PROOF.

1. On an issue as to mistake in a lease, testimony of the lessee that he understood that the lease was to run for 10 years from the expiration of a previous lease does not warrant the court in disregarding the terms of the lease that it should run 10 years from a named date.

2. In unlawful detainer the defense of an outstanding title against plaintiff, if available at all, cannot be taken advantage of unless

pleaded, notwithstanding what the court finds on the subject.

3. In unlawful detainer against a tenant holding over, an outstanding lease by the landlord to a third person, under whom the tenant does not claim, is no defense.

In bank. Appeal from superior court, Mariposa county; John M. Corcoran, Judge.

Action by Yosemite Commissioners against Barnard. From judgment for plaintiffs, defendant appeals. Affirmed.

James H. Budd and Gould & McCabe, for appellant. W. H. Hart, Atty. Gen., and Oregon Sanders, (T. C. Coogan, of counsel,) for respondents.

HARRISON, J. Action of unlawful detainer. The complaint contains the ordinary allegations in an action of unlawful detainer brought by a landlord against his tenant, who continues in possession, against the will the landlord, after the expiration of the term. The defendant made no denial of these allegations, except that he denied that the term for which the premises were demised had expired, or that he held over contrary to the terms of the lease. He pleaded, however, as a separate defense to the action, that he signed the lease set forth in the complaint, but that that portion thereof fixing the term was intended to read "from the 1st day of January, 1885, for and during the full term of ten years then next ensuing," instead of 10 years from the 1st day of January, 1882, and that the insertion in the lease of words purporting to make the term commence on the 1st of January, 1882, was made "by inadvertence and mistake." The court found "that no mistake was made in the execution of said lease."

1. It is unnecessary to determine whether such a defense can be pleaded to an action of unlawful detainer, or whether the facts alleged in the present case would entitle the defendant to any remedy whatever. The defense was an affirmative one, and, unless sustained by evidence offered in its support, necessitated a finding against its existence. The defendant, however, failed to offer any competent evidence that the plaintiffs ever intended to make him a lease of the premises for any term other than that expressed in the instrument which was executed between them, and his testimony that he understood that the lease was to run for 10 years from the expiration of a previous lease did not require the court to disregard his written agreement in the lease itself that it was to run for only 10 years from the 1st of January, 1882. The finding of the trial court upon this conflict of evidence cannot be reviewed in this court.

2. The court found "that on August 1, 1891, plaintiffs executed a written lease for the property described in the complaint to one Glascock for a period of one year from January 1, 1892, at a nominal rent." It is contended by appellant that by reason of this finding the plaintiffs were not entitled to the possession of the premises, and that judgment should therefore have been rendered in his favor. The defendant

did not, however, allege any defense of this nature in his answer, and there was no issue before the court which authorized it to make the finding; and, consequently, being a finding outside of the issues in the case, it could not form an element in determining the judgment to be rendered. See *McCreary v. Marston*, 56 Cal. 403. But, if the pleadings had properly presented an issue upon which this finding could have been made, the finding itself falls short of constituting a defense to the plaintiffs' right of recovery, for the reason that the defendant does not connect himself with Glasscock, or show that he has succeeded to Glasscock's right to the possession of the premises. Such a defense is in the nature of a plea of outstanding title, and even in those actions of ejectment that do not proceed upon strict title, but where only the right of possession is involved, the defense of outstanding title is not available to the defendant unless he connects himself with such title. Title, however, is never involved in an action of unlawful detainer. *Felton v. Millard*, 81 Cal. 540, 21 Pac. Rep. 533, and 22 Pac. Rep. 750. The tenant, having received the possession by the permission of his landlord, cannot compel the landlord to litigate the right of some other to that possession for which the tenant has no claim. As between him and his landlord, his contract as lessee obligates him to surrender the possession at the expiration of his term, and he cannot set up an outstanding title, or show any title in himself which has not been mediated or immediately derived from his landlord.

The judgment is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.

93 Cal. 168

SCOTT v. GLENN. (No. 18,088.)

(Supreme Court of California. April 22, 1893.)

ORDER DENYING NEW TRIAL — APPEAL — FAILURE TO FILE UNDERTAKING — DISMISSAL — TIME OF TAKING — SALE OF REAL ESTATE — FAILURE OF VENDEE TO SIGN CONTRACT — TENDER OF DEED — DEFAULT.

1. Where no undertaking is filed on appeal from an order denying a motion for a new trial, such appeal will be dismissed.

2. Where an appeal from a judgment is not taken within 60 days, the evidence will not be considered.

3. Where a contract for the sale of land is signed by the vendors and delivered to the vendees, and a partial payment is made thereunder, it is valid, though not signed by the vendees.

4. A vendor of real estate is not in default because he fails to tender a deed at the time the last payment falls due, though time is expressly made of the essence of the contract.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by A. E. D. Scott against G. R. G. Glenn on a contract for the sale of certain real estate. From a judgment for defendant, and from an order denying his

motion for a new trial, plaintiff appeals. Affirmed.

Geo. B. Graham, for appellant. J. P. Meux, for respondent.

GAROUTTE, J. This action arises from a contract of sale of real estate, and was commenced to recover the sum of \$600, paid to respondent and one Meux as a partial payment under the terms of the contract, and is based upon an alleged default upon the part of said respondent and Meux to carry out the terms of said contract. Glenn answered the complaint, denying the allegations thereof, and set out a cross complaint alleging tender of the deed, demand and refusal of the payment of the balance due, and asked judgment against Scott and his covendees under the contract for the balance due, and that the realty be held to satisfy such judgment. The cross complaint was denied. Meux, as a covendor, assigned his interest to Glenn, and judgment went in favor of defendant upon the main case, and also in his favor upon the cross complaint, and plaintiff appeals.

His appeal from the order denying his motion for a new trial must be dismissed, as no undertaking was filed thereon; and, the appeal from the judgment not being taken within 60 days from the rendition thereof, we cannot look into the evidence, but must confine our examination to the pleadings, findings, and judgment.

1. It is insisted that the contract is void, as a contract for the sale of real estate, because not signed by the vendees. The vendor is the party to be charged, and his signature to the contract, taken in connection with a delivery thereof to the vendee, and a partial payment thereunder, binds both parties. *Vassault v. Edwards*, 43 Cal. 458; *Dennis v. Strassburger*, 89 Cal. 583, 26 Pac. Rep. 1070; *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. Rep. 249; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. Rep. 515.

2. The signature of Meux, the covendor, was attached to the contract by Glenn, and appellant claims this was done without authority. The court finds the act of Glenn in this regard was fully ratified in writing by Meux. The evidence is not before us, and the finding concludes the matter against appellant's contention.

3. It is insisted that the vendor is in default because he did not tender the deed at the time the last payment fell due; time being expressly made of the essence of the contract. Except as to the single case of *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280, which has since been overruled in this respect, the authorities are all opposed to this doctrine upon which appellant now relies. *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. Rep. 696; *Newton v. Hull*, 90 Cal. 493, 27 Pac. Rep. 429; *Banbury v. Arnold*, 91 Cal. 609, 27 Pac. Rep. 934; *Townsend v. Tufts*, 95 Cal. 257, 30 Pac. Rep. 528; *Joyce v. Shafer*, (Cal.) 32 Pac. Rep. 320.

The findings of the court are full upon all the issues raised by the pleadings. They are favorable to defendant, and support the judgment rendered by the trial court. For the foregoing reasons let the

judgment be affirmed, and the appeal from the order denying a new trial dismissed.

We concur: McFARLAND, J.; DE HAVEN, J.

(93 Cal. 206)

PEOPLE v. SELMA IRRIGATION DIST.
(No. 18,031.)

(Supreme Court of California. May 4, 1893.)
IRRIGATION DISTRICT—DISSOLUTION OF CORPORATION—NONUSER.

Since St. 1887, p. 29, providing for the organization and government of irrigation districts, and for the acquisition of water and other property, makes no provision for a judicial sentence dissolving a corporation formed thereunder because of a nonuser, an action cannot be maintained to dissolve such corpora-



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98 Cal. 247

HUNTER v. BRYANT et al. (No. 15,151.)

(Supreme Court of California. May 12, 1893.)

ACTION ON OFFICIAL BOND — INSUFFICIENT COMPLAINT — AMENDED COMPLAINT — JUDGMENT — WAIVER OF OBJECTIONS — FAILURE TO ANSWER OR DEMUR — SERVICE OF SUMMONS — AUTHORITY OF ATTORNEY TO APPEAR — EVIDENCE — SURETIES — PRIOR JUDGMENT AGAINST CODEFENDANTS.

1. Where an amended complaint, on which judgment is rendered, is unobjectionable, the judgment will not be set aside because the original complaint did not state a cause of action.

2. Where an amended complaint contains material matters which should have been alleged by supplemental pleading the irregularity cannot be questioned for the first time on appeal.

3. On appeal by defendants on a judgment roll containing neither answer nor demurrer, the plea of the statute of limitations is unavailable.

4. Where, on a motion to set aside a default, the evidence as to whether or not the summons was served on defendants is full and conflicting, a refusal of the trial court to grant the motion will not be disturbed.

5. The appearance of an attorney in an action is prima facie evidence of authority, and a finding by the trial court that he had such authority will not be disturbed where the parties for whom he appeared fail to show lack of authority by "cogent and strong evidence."

6. In an action on an official bond it is not a valid objection by sureties to judgment against them that judgment had previously been taken in the case against their codefendants.

Department 1. Appeal from superior court, city and county of San Francisco, J. C. B. Hebbard, Judge.

Action by David Hunter against A. J. Bryant, L. Koster, and H. Plagemann and others on the official bond of one Hubert, treasurer of the city and county of San Francisco. From a judgment for plaintiff, and from an order denying a motion to set aside the default and judgment against Koster and Plagemann, the latter appeal. Affirmed.

Daniel Titus, for appellants. Tilden & Tilden, for respondent.

GAROUTTE, J. This is an appeal from the judgment, and also from the order of the trial court denying a motion to set aside the default and judgment taken against the appellants, John L. Koster and H. Plagemann.

1. The appeal from the judgment is based upon the contention that the original complaint did not state a cause of action. Conceding, for the purposes of the case, that the original complaint was lacking in essentials, still the amended complaint is unobjectionable, and that is the pleading upon which the judgment was rendered. Admitting that material matters are set out in the amended complaint which should have been alleged by supplemental pleading, such an irregularity cannot be questioned for the first time in this court upon the claim of the failure of the plaintiff to state a cause of action. Neither can the plea of the statute of limitations avail appellants upon an appeal on a judgment roll containing neither answer nor demurrer.

2. It is insisted that the judgment should be set aside because appellants were not served with summons. The evidence upon this point is full and conflicting, and upon that evidence the trial court denied the motion to set aside. The contentions of the respective parties in this regard created a pure issue of fact, and upon that conflict of evidence the court found that service of summons had been made; and, there being sufficient evidence to support the finding, we will not disturb it. While it is said in Buell v. Emerich, 85 Cal. 116, 24 Pac. Rep. 644: "The power of the court should be freely and liberally exercised, * * * so as to dispose of cases upon their substantial merits,"—that language of the court has no reference to the question here involved. This is not a matter of discretion in the lower court, but a matter of pure legal right, and does not arise under the pro-

visions of section 473 of the Code of Civil Procedure. See Norton v. Railroad Co., (filed Feb. 25, 1893,) (Cal.) 32 Pac. Rep. 452.

3. It is insisted that the judgment is void because the amended complaint upon which the judgment was based was never served upon appellants. This objection to the validity of the judgment involves the authority of one W. C. Burnett, an attorney at law, to represent appellants in the litigation; for subsequently to the filing of the amended complaint Burnett appeared in the court claiming to represent appellants, and attacked the pleading, both by motion and demurrer, and his appearance for such purpose was a waiver of personal service thereof, either upon him or his clients. Was Burnett authorized to represent appellants in this litigation? The trial court has so found the fact, and it is only upon a clear case to the contrary that we would disturb that finding. If the original complaint stated a cause of action, which is a matter we do not find it necessary to decide, the summons being served upon appellants, as the court has found, then, under no aspect of the case, can they complain, for, as said in Fitzgerald v. Fernandez, 71 Cal. 509, 12 Pac. Rep. 562: "In such a case, if there had been no appearance for her, the plaintiff would have been entitled to a default and decree against her, and his position should not be held worse by an appearance with which he had no connection." Aside from the foregoing conditions, the appearance in court of a regularly licensed practitioner, claiming to represent a litigant, is prima facie evidence of his authorization to act, and to defeat the results of a protracted and important litigation by reason of a want of authority in the attorney to represent the unsuccessful litigant can only be done upon a showing entirely clear and convincing. Without entering into a detailed review of the evidence bearing upon this question, we conclude the subject by saying we are well satisfied that the history of the litigation, as disclosed by the record, does not make a satisfactory showing of want of authority in the attorney to represent appellants throughout the many years in which this litigation has been pending. They have not established their claim of lack of authority in the attorney to represent them by "cogent and strong evidence," and it was said in Garrison v. McGowan, 48 Cal. 600: "But the act of the attorney in entering the appearance of a defendant carries with it a presumption of due authority upon his part to do so. Therefore if, after an appearance entered, judgment be rendered against the defendant, and the latter seeks relief against the judgment on the ground of want of authority of the attorney to enter his appearance, it is incumbent upon the party 'to make out a clear and unmixed case.' He is required to show merit, to take prompt action and to establish his right by 'cogent and strong evidence.' There would, indeed, be little security afforded by judicial proceedings had, if a party who had been unsuccessful in litigation could overthrow or defeat them upon the simple sugges-

tion of want of authority in his attorney to appear for him, or to conduct the controversy on his behalf."

4. Appellants and others were sureties upon the official bond of one Huber, treasurer of the city and county of San Francisco. The obligation of the sureties was joint and several, and the fact that judgment had been previously taken against appellants' codefendants in no way invalidates respondent's right to have judgment entered against them. For the foregoing reasons the judgment and order are affirmed, and this order is directed to be entered as of date May 1, 1893.

We concur: HARRISON, J.; PATERSON, J.

98 Cal. 210

SMITH v. LOS ANGELES & P. RY. CO.
(No. 19,132.)

(Supreme Court of California. May 4, 1893.)

DAMAGES—BREACH OF CONTRACT.

1. A railroad company entered on land under an agreement with the owner that it would build its road from a point near the center of a city through such owner's land. The company built a portion of its road, including the part through the land in question, but failed to build the portion running near the center of the city, which portion, if built, would have greatly increased the value of such land. *Held*, that the landowner was entitled to recover from the company the amount it would cost to place his land in the same condition as before entry by the company.

2. Such damages can be recovered in an action for breach of contract, and are not founded on tort.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinney, Judge.

Action by George H. Smith against the Los Angeles & Pacific Railway Company for an injunction and damages. Judgment was rendered for plaintiff, granting the injunction, without damages. Plaintiff appeals from so much of judgment as refuses damages. Reversed.

Smith & Winder, for appellant. Anderson & Anderson and Wilson & Lamme, for respondent.

SEARLS, C. This is an appeal from a final judgment entered in favor of appellant, who was plaintiff in the court below, decreeing the plaintiff to be the owner of certain land, and enjoining defendant from entering upon or interfering therewith. The cause comes up on the judgment roll, and the sole question involved relates to the right of appellant to damages in addition to the relief afforded him. In November, 1866, the Los Angeles & Ostrich Farm Railway Company, a corporation, procured, by ordinance of the council of the city of Los Angeles, a franchise to construct a street railroad from point A, near the center of the city, to point C, near its northern boundary. From point A to an intermediate point on the line, which we will designate as point B, the road, when constructed, was to be operated with horse power, and from B to C, by steam power. One M. L. Wicks proposed to the

company holding the franchise that on certain conditions to be performed by the company, and satisfactory to it, and upon the further condition that parties owning land along the line of the proposed route would pay certain sums of money, he would construct the road. This was agreed to by the landowners, and appellant, who owned a tract of land between points B and C, in December, 1886, made to Wicks his note for \$750, payable at four months, provided the road should be constructed, equipped, and put in operation, by the maturity of the note, from point A to point C. A bond with sureties was executed by Wicks for the benefit of appellant, and other parties who had given notes or made donations conditional for the construction of the road, as specified in the promissory notes. Afterwards the Los Angeles Ostrich Farm Railway Company sold and conveyed all its rights, title, and interest in the road, franchise, etc., to the Los Angeles County Railway Company, a corporation. Wicks, who had been but an agent for the grantor, also assigned all his interest, and the notes of appellant and others were assigned at the same time. Wicks, before the sale and assignment to the Los Angeles County Railway Company, had constructed the road from point B to point C, had entered upon the land of appellant, and constructed the roadway over the same, and in doing so made deep cuts and high embankments, in such manner as greatly to injure the land. The road from point A to point B has never been constructed. The Los Angeles County Railway Company, on the 3d day of October, 1887, entered into an agreement with the appellant and other donors by which, in consideration of the payment of the notes of appellant and others, "and in further consideration of the grants of right of way made by the said parties of the second part," it agreed to do certain things, and, among them, that the conditions of the notes as to constructing the road should be carried out, except as to time, and it was to be relieved from the consequences of the delay. The note of appellant, as well as those of the others due at four months, were thereupon paid. In consideration of the payment of his note, the company agreed with appellant that it would perform the obligations specified therein. Afterwards the Los Angeles County Railway Company sold, assigned, and conveyed the said railway, etc., to the Los Angeles & Pacific Railway Company, a corporation, the respondent herein. On the 8th day of September, 1887, the three corporations hereinbefore named were duly consolidated under the name of the Los Angeles & Pacific Railway Company. Each of the three corporations, according to the findings of the court, assumed all the obligations of Wicks, and the second and third corporation, the obligations of their predecessors, to plaintiff, including the obligation on account of damages in the premises. Appellant never gave any license or granted any right of way over his land, except such license as may be inferred from the language used in his promissory note or

agreement of December, 1886. The excavations and embankments on appellant's land, made by Wicks and the Los Angeles & Ostrich Farm Railway Company, detracted from the value thereof in the sum of \$8,000, and such damage or deterioration can be obviated, and the value of the land restored, only by filling up the excavations and spreading out the embankments, to effect which will cost \$6,000. Had the road been constructed from point A to point C, this damage would have been compensated by the increased value of the land, and by the convenience afforded thereby in communication with the center of the city. Appellant, according to the findings, has suffered damages, in all, aggregating \$8,000. Respondent, as well as its predecessors in interest, refused to construct the road from point A to point B.

The appeal being upon the judgment roll, we must regard the findings as conclusive in favor of the assumption that the defendant is in the position of, and subject to all the liabilities which would have attached to, its predecessor, the Los Angeles & Ostrich Farm Railway Company, and its agent, Wicks, had that corporation remained the owner of the property, and failed to execute the contract. To put it more broadly, the defendant has assumed the responsibility of all its predecessors in interest.

For the breach of an obligation arising from contract, the measure of damages, save in excepted cases, "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civil Code, § 3300. The detriment must be "proximately caused" by the breach; that is, it must be the efficient cause,—the one that necessarily sets the other causes in operation. The causes which are merely incidental, or instruments of some other controlling agency, are not proximate, within the purview of the law. "Proximate" is also defined as immediate; nearest; next in order. "The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation. The causes that are merely incidental are instruments of a superior or controlling agency; are not the proximate causes, and the responsible ones, though they may be nearer in time to the result." *Insurance Co. v. Boon*, 95 U. S. 130. Was the refusal of defendant to construct its road from point A to point B, thus making a harmonious whole of its line from A to C, whereby plaintiff would have been compensated by the increased value of his land for the detriment caused thereto by the cuts and fills upon it, the proximate and efficient cause of the injury complained of? Respondent contends that, when the construction was completed across appellant's land, the act was legal and proper, under an implied license of a contract for its construction; that the injury to appellant was then complete; and as the breach of the contract did not occur until afterwards in point of time, until respondent refused to complete the road, the damage cannot be said to

have been caused by the breach. Suppose A., a farmer, and the owner of broad acres in need of irrigation, contracts with B., the sole proprietor of water which can be used for such purpose, whereby the latter agrees with the former to construct an irrigating ditch from the center of his land to the source of supply, through which to conduct water. He constructs the ditch across the land of A., and then refuses to complete the contract, and in consequence the ditch is a detriment to the land, and must be filled up to restore it to its primary condition. In such a case, is not the expense a direct and immediate effect of the breach of the contract? A. contracts with B. for the purchase and delivery of goods from the latter, and pays in advance a part of the agreed purchase price. B. refuses to deliver the goods. May not A., in effect, recover the money so paid? It is believed there can be no doubt as to this last proposition, and yet the money was paid, in point of time, before the breach of the contract to deliver. A mechanic agrees to make and deliver, at a time specified, a carriage, from materials furnished by his customer. Through ignorance, or by design, he ruins the materials, and fails to deliver the vehicle. The value of the materials furnished is an element in the estimate of damages, though the breach occurred upon the subsequent failure to deliver.

In justice to counsel for respondent, it must be said, however, that their objection to the recovery of the damages by appellant, while it involves the consideration above referred to, goes a step further, and may be thus stated: (1) The original contract with appellant was to construct the railroad from point A to point C. Wicks and his principal built it from B to C, and caused all the injury to appellant's land now complained of, for which, but for the consent of the owner, an action might have been at once sustained. (2) The contract of October 3, 1887, by the Los Angeles County Railway Company, being subsequent to the injury, was, in fact and effect, a contract to finish the road, or, in other words, to construct it from A to B, and therefore a breach of this last contract cannot be made the basis of the damages demanded.

This position, on its face, seems entirely logical. But when we refer to the contract of October 3, 1887, and to the finding, it appears: (1) That by the contract the Los Angeles County Railway Company expressly agreed to perform all the conditions contained in the notes to appellant and others, as well as those of a bond given by Wicks and others for constructing the road, except that it was not to be held liable for the delay which had occurred in the completion of the work. (2) When appellant thereupon paid his note the new company gave him an agreement, binding itself to perform the obligations incurred by the contract of October 3, 1887. (3) The defendant is a corporation resulting from a consolidation with the two corporations which preceded it in interest, and hereinbefore mentioned. (4) The defendant, according to the pleadings, found by the court to be true,

assumed all the obligations of its predecessors and of M. L. Wicks to the appellant, "including all obligations on account of damages to the plaintiff [appellant] on account of the premises." Two or more railroad corporations may legally consolidate, under the provisions of section 473 of the Civil Code. True, such consolidation does not relieve either of the consolidating corporations from its liabilities. The consolidated corporation may, however, assume and make itself liable for the antecedent liabilities of such consolidating companies, (Spelling, Corp. § 108, and cases cited;) and while such agreement does not, without their assent, bind creditors, yet suit brought by a creditor, upon a demand so assumed, against the corporation which has agreed to pay, is of itself sufficient evidence of acceptance of the new debtor in lieu of the old. *Morgan v. Mining Co.* 37 Cal. 534. Viewed from this standpoint, the case is presented in a different aspect from that assumed by counsel for respondent.

The present defendant has absorbed into its corporate entity, and stands as the embodiment of, all the factors in the problem,—is the representative of all the corporations. Coupled with this, it has, in express terms, succeeded to all their responsibilities to appellant. Having, of its own volition, assumed this position, it cannot be permitted to divide up the obligation, and thereby reduce the responsibility. It must be held to be liable precisely as though it had been the sole actor from the outset.

The court below found, as beforestated, that the damage to appellant's land can only be obviated by filling up the excavations, and spreading out the embankments, to effect which would cost not less than \$6,000. For this amount, appellant was entitled to judgment. The action, so far as it sounds in damages, is not for a tort, in which plaintiff recovers for the injury done to his land as such, but upon a contract; and the question is, what is the condition of plaintiff, as a direct consequence of the breach, compared with what he would have occupied, had the contract been carried out? The difference between the value of the land with the contract consummated, and the same contract broken, is regarded as the true criterion. If, in the partial performance of the agreement, injury has been done to the land, which can be, in whole or in part, remedied by the expenditure of money, to that extent it becomes an element in the deterioration of value, and as such is to be considered in determining the depreciation; yet, after all, the last analysis brings the whole subject to the question of the difference in value between the contract executed or broken. Upon this basis the court finds, generally, that plaintiff has been damaged in the sum of \$8,000. Did the findings stop there, a judgment for that sum would be regarded as the true measure of damages, but they do not. There is an additional finding as to the balance of damages, showing the basis upon which it is placed, and which, being in the nature of a special finding, must control the general statement. Hence the

conclusion is reached that as to this residue of damages found by the court, viz. \$2,000, made up, wholly or in part, by appellant's deprivation of the "convenience of communication between the said land and the center of the city," it cannot be determined from the judgment roll that the court below erred. Without determining the question whether or not, in an action upon a contract, a recovery can, in any case, be had for such cause, it is sufficient to say that if it can, being in the nature of special damage, it can only be had upon a more full and specific statement of facts than appears in the complaint in this cause. I am of opinion the judgment should be reversed, and the court below directed to enter judgment in favor of the appellant for \$6,000, in addition to the relief heretofore granted.

We concur: HAYNES, C.; VANCILIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to enter judgment in favor of the appellant for \$6,000 in addition to the relief heretofore granted.

PATTON et al. v. LOS ANGELES & P. RY. CO. (No. 19,133.)

(Supreme Court of California. May 4, 1893.)

Department 2. Appeal from superior court, Los Angeles county; J. M. McKinney, Judge.

Action by George S. Patton and others against the Los Angeles & Pacific Railway Company for an injunction and damages. Judgment was rendered for plaintiffs, granting the injunction, and without damages. Plaintiffs appeal from so much of judgment as refuses damages. Reversed.

Smith & Winder, for appellants. Anderson & Anderson and Wilson & Lamme, for respondent.

PER CURIAM. This cause embraces precisely the same question as that involved in *Smith v. Railway Co.*, (No. 19,132,) 33 Pac. Rep. 53, submitted on the same briefs. For the reasons given in the opinion in that case the judgment is reversed, and the court below directed to enter judgment in favor of plaintiffs, and against defendant, for \$6,000.

98 Cal. 252

HUNTER v. BRYANT et al. (No. 15,036.) (Supreme Court of California. May 12, 1893.)

JUDGMENT BY DEFAULT—UNAUTHORIZED APPEARANCE OF ATTORNEY—MATERIALITY.

Where defendants were served with summons it is immaterial, as affecting a judgment by default against them, whether or not an attorney who appeared for them was authorized to do so, since in either event the judgment was proper.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by David Hunter against A. J. Bryant and others on the official bond of one Hubert, treasurer of the city and county of San Francisco. From a judgment for plaintiff, and from an order denying a

motion to set such judgment aside, defendants appeal. Affirmed.

Daniel Titus, for appellants. Tilden & Tilden, for respondent.

GAROUTTE, J. This is an appeal from a judgment, and also from an order denying a motion to set aside said judgment. The appeal is taken by certain sureties upon the official bond of one Hubert, formerly treasurer of the city and county of San Francisco. Appellants have presented no reason why the appeal from the judgment should be sustained, and we therefore pass to a consideration of the order denying the motion to set aside and vacate the judgment. The grounds relied upon to set aside the judgment are: (1) The summons was not served upon appellants. (2) W. C. Burnett, an attorney at law, appeared and represented appellants in the litigation without any authority or knowledge upon their part. The evidence relied upon to support the first ground stated is very similar to, and certainly no stronger for appellants than, that which was presented in *Hunter v. Bryant*, (No. 15,151,) 33 Pac. Rep. 51, (this day decided,) and for the reasons there stated we hold against their contention in this regard. Having decided that appellants were served with summons, it becomes immaterial to determine whether or not Burnett was authorized to appear for them in the litigation. If he was not their attorney in the litigation, then they had no attorney, and made no appearance, and their default was therefore properly entered under either set of circumstances. As was said in *Fitzgerald v. Fernandez*, 71 Cal. 509, 12 Pac. Rep. 562: "In such a case, if there had been no appearance for her, the plaintiff would have been entitled to a default and decree against her, and his position should not be held worse by an appearance with which he had no connection." For the foregoing reasons the judgment and order are affirmed, and this order is directed to be entered as of date May 1, 1893.

We concur: HARRISON, J.; PATERSON, J.

(98 Cal. 259)

CITY AND COUNTY OF SAN FRANCISCO
v. COLLINS et al. (No. 15,060.)
(Supreme Court of California. May 12, 1893.)

CONDEMNATION PROCEEDINGS—COSTS.

Since Const. art. 1, § 14, declares that private property shall not be taken for public use without just compensation to the owner, where land is condemned for a street at the suit of a city, the owner is entitled to recover his necessary costs incurred in making a bona fide defense, though Code Civil Proc. § 1255, provides that in such proceedings "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Condemnation proceedings by the city and county of San Francisco against

Sophie E. Collins and others. Plaintiff had judgment, and, from an order apportioning the costs between the parties, defendants appeal. Reversed.

Henry E. Highton, for appellants. John H. Durst, for respondent.

VANCLIEF, C. This was a special proceeding in the superior court to condemn lands of the defendants for the widening of Mission street, in said city, in which judgment passed for plaintiff. The appeal by the defendants is from an order apportioning the costs between the parties. Each party claimed costs, and filed a verified memorandum of the items thereof. The items of plaintiff's memorandum are as follows:

Sheriff's fees	\$ 9 00
Clerk's fees	7 50
Jury fees	312 00
Reporter's fees	140 00
Notary's fees	2 00
Entering judgment	4 00
Constable's fees, serving 14 subpoenas	5 00
Sheriff in charge of jury	3 00
2 meals for sheriff and jury	13 00
	\$405 50

Witness Fees.

Dr. Confell, 2 dates of attendance	4 00
Mertens, 2 dates of attendance	4 00
Lewis, 15 dates of attendance	30 00
Von Rhein, 2 dates of attendance	4 00
Magee, 1 date of attendance	2 00
Chester, 6 dates of attendance	12 00
Robinson, 4 dates of attendance	8 00
J. J. Haley, 4 dates of attendance	8 00
Quinn, 4 dates of attendance	8 00
Russell, 2 dates of attendance	4 00
Cody, 15 dates of attendance	30 00
Stern, 1 date of attendance	2 00
Lowell, 2 dates of attendance	4 00
Baldwin, 2 dates of attendance	4 00
	124 00
	\$619 50

The items claimed by defendants are the following:

Sheriff's fees	\$ 3 00
Clerk's fees, trial fees	4 00
Jury fees, 13 days at \$24 per day	312 00
Reporter's fees, 14 days at \$10 per day	140 00
Notary's fees	3 00
Clerk's fees, entry of judgment	4 00
Serving subpoenas, 12	6 00
2 meals for jury on Oct. 3, '91	13 00

Witness Fees.

A. T. Penebsky	4 00
Dr. C. A. Clinton	2 00
John Grabolle	2 00
J. W. Fish	4 00
J. C. Zignago	2 00
Wm. Byrnes	2 00
P. Isola	4 00
Fred'k W. Deiling	2 00
Thos. Moran	2 00
John McCarthy	2 00
Michael Fay	2 00
Daniel I. Newkirk	2 00
	\$515 00

Besides objecting generally to plaintiff's cost bill, on the ground that plaintiff was not entitled to recover any cost, the defendants filed special written objections to

each item thereof on various other grounds. But no objection appears to have been made by plaintiff to any item of defendants' bill, on the ground that it had not been necessarily expended or incurred by defendants in the proceeding. It appears that, on the morning of each day during the trial, each party, in obedience to a rule of court, deposited with the clerk the full amount of the fees of the reporter and the jury for one day, viz., \$34; and, at the close of the trial, occupying 13 days, the deposits of each party amounted to \$442. The order of the court appealed from was, in effect, that each party pay one-half of the fees of the jury and reporter, (\$221,) and, with this exception, that neither party recover any cost from the other. The effect of the order upon the appellants is to compel them to pay one-half of the jury and reporter's fees, and the whole of all other costs incurred solely by them, which amount to \$267, composed of the following items: One-half of jury and reporter's fees, \$221; sheriff's fees, \$3; clerk's fees, \$4; notary's fees, \$3; serving subpoenas on 12 witnesses, \$6; fees of 12 witnesses for defendants, \$30. All other costs to be borne by the plaintiff. Counsel for appellants contend that respondent should have been required to pay not only its own costs, but all proper costs of the defendants; because, to subject the defendants to payment of any portion of the costs is an infringement of their constitutional right to full and just compensation for the taking and damaging of their lands. As a general proposition, applied to proper costs incurred in good faith, I think this point should be sustained. Section 1255 of the Code of Civil Procedure, however, provides that, in proceedings to condemn property for public use, "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court;" and it is claimed by respondent that the order of the court below, allowing and apportioning the costs, was a proper exercise of the discretionary power conferred by this section. But this power must be limited by section 14, art. 1, of the constitution, which provides that "private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." In proceedings to condemn, the burden of proving the compensation to which they are entitled is cast upon the defendants, who are also entitled to contest the material allegations of the complaint. To require the defendants in this case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs. As a result of the authorities upon this point, Mr. Lewis, in his work on Eminent Domain, section 559, says: "It seems to us that courts should be guided by the following principles and considerations in the matter: By the constitution the owner is entitled to just compensation for his property taken for public use. He is enti-

tled to receive this compensation before his property is taken or his possession disturbed. If parties cannot agree upon the amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void." In *Re New York, W. S. & E. R. Co.*, 94 N. Y. 287, the question was whether the company was entitled to recover costs from the owners of the land condemned, and upon this point the court of appeals, by Rapallo, J., said: "In such a case, to compel the landowners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation * * * would conflict with the constitutional right of the landowners to just compensation. They are entitled to the full amount of their damages when finally ascertained, and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it, or in endeavoring to reduce it; * * * and a case may be supposed where the costs and expenses of the company would absorb a large part, or even the whole, of the award. There is no warrant in the statute for awarding such costs, and, if there were, it would be a violation of the constitutional right of the landowner." See, also, *Railroad Co. v. Bull*, 20 Ill. 218. No doubt the court has power to determine what are proper and what are improper items of cost in proceedings of this kind, and to disallow such as are improper, as in other cases. For example, unnecessary expenditures, made in bad faith, for the purpose of increasing the costs or obstructing the proceeding, are not properly taxable as costs, and may be disallowed; and cases may possibly arise in which a portion of the expense of the party seeking to condemn may be properly charged and apportioned to the landowner, on the ground that such expense was caused and incurred only by reason of unnecessary obstructive proceedings of the latter, interposed in bad faith; but no question as to these matters is involved in this appeal. The verified bill of costs filed by the appellant was prima facie evidence that the items thereof had been necessarily incurred; and since no objection was made in the trial court, nor here, on the ground that they were not proper costs necessarily incurred, the prima facie evidence must be taken as conclusive for the purpose of this appeal. I think appellants are entitled to recover their costs, amounting to \$267, composed of the items as above stated; that the order appealed from should be reversed, and the court below directed to enter an order in accordance with this opinion.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order ap-

pealed from is reversed, and the court below is directed to enter an order in accordance with this opinion.

3 Cal. Unrep. 864

GERMAN v. BROWN. (No. 15,073.)

(Supreme Court of California. May 13, 1893.)

REVIEW ON APPEAL—FINDINGS.

Where the court's findings support the judgment, and are on all material issues, the judgment will be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, San Benito county; N. A. Dorn, Judge.

Action by Pedro German against H. Brown. Judgment for plaintiff. Defendant appeals. Affirmed.

Montgomery & Hill, for appellant. Briggs & Hudner, for respondent.

VANCLIEF, C. This action was commenced in the court of a justice of the peace to recover damages for an alleged trespass by defendant upon plaintiff's land. The alleged title and possession of the plaintiff being denied, the case was transferred to the superior court, wherein the cause was tried without a jury, and judgment rendered in favor of plaintiff for \$80 damages, and costs taxed at \$50.35. The defendant appeals from the judgment, and from an order denying his motion for a new trial. The only grounds upon which appellant's counsel ask a reversal of the judgment or order are expressed in their brief as follows: "The findings of facts do not support the judgment, and the judgment is against law. The uncontradicted evidence is that appellant had possession of the land in question at the time of entry of respondent." The court found upon all the material issues, and the finding supports the judgment. The statement on motion for a new trial contains no sufficient specification of any particular in which it is claimed that the decision is not justified by the evidence. I think the order and judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

98 Cal. 218

PEOPLE v. SMITH. (No. 20,977.)

(Supreme Court of California. May 5, 1893.)

CRIMINAL LAW—TESTIMONY OF ACCOMPLICE.

Under Pen. Code, § 1111, providing that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence, which of itself tends to connect defendant with the offense, and that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, a conviction of murder cannot be sustained, where there is no evidence aside from that of the accomplice on which even a well-grounded suspicion of defendant's guilt can be founded.

In bank. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge.

Smith was convicted of murder in the first degree, and from a judgment sentencing him to life imprisonment, and from an order denying a new trial, he appeals. Reversed.

A. J. & Elwood Bruner, for appellant. Atty. Gen. Hart, for the People.

DE HAVEN, J. The defendant and four other persons were jointly indicted and charged with the murder of one Robert Allen, alleged to have been committed in the county of Sacramento, in the month of May, 1891. The defendant was convicted of murder in the first degree, and sentenced to imprisonment for life, and from this judgment, and an order denying his motion for a new trial, he has appealed to this court. The only evidence in the record before us which tends in any degree to connect the defendant with the commission of the crime of which he has been convicted is the testimony of his co-defendants, Gordon and Casey, and whose testimony, if true, shows them to have been his accomplices. This evidence, being uncorroborated, is not sufficient to sustain the verdict in this case. This is the explicit declaration of section 1111 of the Penal Code, which declares: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." It was held in *People v. Thompson*, 50 Cal. 480, that, where the evidence relied upon as corroborative of that of the accomplice was only such as to raise a suspicion of the guilt of a defendant, it was not sufficient; but this case is still weaker upon its facts. There is here absolutely no evidence whatever, aside from that of the accomplice, upon which to found even a well-grounded suspicion of the guilt of defendant.

Judgment and order reversed.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; FITZGERALD, J.; McFARLAND, J.

98 Cal. 227

SANDERS, County Recorder, v. SEHORN, County Auditor. (No. 18,072.)

(Supreme Court of California. May 9, 1893.)

COUNTIES—CLASSIFICATION—REPEAL OF STATUTE.

1. Act March 11, 1891, conditionally creating the county of Glenn, provided, (section 14,) with reference to county officers, that they should receive the same compensation then provided by general law in counties of the same class, and that until otherwise provided the county should belong to the thirty-seventh class. Under Const. art. 11, § 5, the classification of counties is required to be made according to population. On March 11, 1891, Glenn county had a population of between 6,500 and 6,600, which was the population of a county of the

thirty-seventh class. On March 31, 1891, a county government act was passed, placing counties of from 6,400 to 7,000 population in the forty-first class. Glenn county was organized May 11th. Held a county of the forty-first class; the act of March 11th not having been intended to fix its class irrespective of any future changes in the law, but only to determine its population.

2. The act of March 11th was not repealed for inconsistency with the latter act in classifying Glenn county.

Department 1.

Application by H. B. Sanders for writ of mandate against A. W. Sehorn to compel the latter, as county auditor, to draw a warrant. Judgment, from which applicant appeals. Affirmed.

C. L. Donohoe and M. J. Keys, for appellant. Ben. F. Geis, R. A. Long, and Geo. D. Dudley, for respondent.

GAROUTTE, J. This was an application for a writ of mandate brought by appellant, recorder of the county of Glenn, against Sehorn, the auditor of said county, to compel said auditor to draw his warrant in appellant's favor for the sum of \$108.33, as salary for the month of January, 1892. The merits of the litigation are fully disposed of by a determination of the class of counties to which Glenn county belonged in January, 1892. The act of March 11, 1891, conditionally creating the county of Glenn, provided, (section 14, p. 101, St. 1891:) "The officers elected and appointed under the provisions of this act shall each perform the duties, and receive the compensation, now provided by general law for the office to which he has been elected or appointed in counties of the class to which the said county of Glenn belongs, under the general classification of counties in this state; and, until otherwise provided by law, said county shall be classified as a county of the thirty-seventh class." The power of the legislature to classify counties for the purpose of regulating the compensation of county officers is limited by section 5, art. 11, of the constitution, which section requires such classification to be made according to the population of the various counties. It is apparent that the legislature has no power to arbitrarily place any particular county in any particular class. Classes of counties are arranged according to a graduated scale of population, and, when the population of a county is determined by the legislature, its classification is arrived at without trouble. Upon March 11, 1891, when the legislature declared that Glenn county should be a county of the thirty-seventh class, it was but a declaration that Glenn county had a population over 6,500 and under 6,600, for at that time counties of the thirty-seventh class were counties having a population within those limits. According to the county government act, the population of the various counties, for the purposes of the act, is to be determined from the last preceding federal census; but in the case of newly-organized counties, especially where the boundary lines of the new county do not follow township lines, such census would not furnish the data

contemplated, and for that reason the legislature, for the purposes of classification, could well declare the population of Glenn county to be over 6,500 and under 6,600, receiving its information for such declaration from whatever source it saw fit. It would have been the better course for the legislature to have directly determined the population of Glenn county, rather than have enacted that it should belong to the thirty-seventh class. Under such circumstances it would have clearly stood forth in company with its sister counties, having its numbers settled and ascertained for all the purposes of the county government act. It certainly was not contemplated by the legislature that when it declared Glenn county a county of the thirty-seventh class it should remain a county of that class, regardless of any future changes in the law whereby the thirty-seventh class might be composed of counties having populations greatly larger or greatly smaller than when Glenn county was placed therein. If the act of the legislature is to be regarded as fixing the class to which Glenn county should belong when organized, rather than determining its population, then it would require a special act of the legislature to take it from the thirty-seventh class. Undoubtedly, such results were never contemplated or intended. The effect of section 14 of the Glenn county act was to fix its population, and, (in the absence of subsequent legislation,) by operation of law, it would have become a county of the thirty-seventh class by virtue of that fact upon May 11, 1892, the date of final organization of the county, and would have been such when this proceeding was inaugurated.

Section 235 of the county government act of 1891, among other things, provides "that in all newly-created counties for the purpose of fixing the salaries and fees of county and township officers, the board of commissioners appointed to organize said new county, and, if no commission be appointed, then the board of supervisors of said new county, shall classify said new county according to the population classification of this act." By virtue of this provision the commissioners appointed under the Glenn county act, upon the 11th day of May, 1891, the date of its organization, declared Glenn county to be a county of the forty-first class. It is not necessary to enter into a discussion of the constitutionality of this provision of the county government act, as being a delegation of power to a board of commissioners or supervisors, for, conceding the declaration of such board of commissioners in declaring Glenn county to be a county of the forty-first class to be void, as ultra vires, which we do not decide, still the final result of the litigation will not be changed. Upon March 31, 1891, a county government act was passed, providing that counties having a population of over 6,400 and under 7,000 shall belong to, and be known as, counties of the forty-first class. Glenn county came into existence, as a county fully organized and equipped, May 11, 1891. At that time, under the terms of the act creating it, as we have construed that act, it had a population

of more than 6,500 and less than 6,600, and consequently came within the limits prescribed for counties of the forty-first class. In adopting this construction of the foregoing provisions of the various statutes, it is not necessary to hold that the act of March 31, 1891, repealed the act of March 11, 1891. As to the classification of Glenn county, the acts are not even inconsistent. Construing section 14 of the Glenn county act as simply fixing the population of the county, we find nothing in the county government act of March 31st in any way touching upon the question of its population. We conclude that Glenn county is a county of the forty-first class, and for that reason the judgment is affirmed.

We concur: PATERSON, J.; HARRISON, J.

(98 Cal. 205)

CONNOLLY v. ASHWORTH. (No. 15,053.)
(Supreme Court of California. May 3, 1893.)
JUDGMENT—ENTRY OF DECISION AFTER EXPIRATION OF JUDGE'S TERM.

Under Code Civil Proc. § 632, providing that, on trial of a question of fact by the court, its decision must be in writing, and filed with the clerk, and section 633, providing that in giving the decision the facts found and the conclusions of law must be separately stated, and judgment entered on the decision accordingly, the trial of a cause by the court is not concluded until the decision is filed with the clerk; and where the term of office of a judge who tried a cause expires before such decision is filed, the fact that it was signed by him, and filed by the clerk under the order of his successor, is not sufficient to sustain a judgment thereon.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Owen Connolly against Thomas Ashworth. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Mich Mullany and Wm. Grant, for appellant. John H. Durst, for respondent.

FITZGERALD, J. This case was tried by the court without a jury, and its decision given in writing, and signed by the judge, but not filed with the clerk until after the term of office of the judge had expired. Upon the back of the proposed decision, and in the judge's handwriting, appears the following indorsement: "To be left with the clerk, and not filed till further notice or amendment heard by the court from def't [meaning plaintiff.] T. H. Rearden, Judge." The judge thereupon instructed the clerk to deliver the proposed decision so indorsed to plaintiff's attorney, for the purpose of proposing amendments in the event he saw fit to do so, which the clerk accordingly did. No amendments were ever proposed by either party; and so the matter stood on January 5, 1891, when Judge Rearden's term of office expired. Subsequently the court, (Judge Rearden's successor in office presiding,) on motion of defendant, ordered the decision to be filed, and thereupon judgment was accordingly entered thereon

against plaintiff; from which judgment, and the order denying his motion for a new trial, this appeal is taken by plaintiff.

Section 632, Code Civil Proc., provides: "Upon the trial of a question of fact by the court, its decision must be given in writing, and filed with the clerk. * * *" And section 633 provides that, "In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly." In view of these provisions it is clear that the trial of a cause by the court is not concluded until the decision is filed with the clerk. And when the term of office of the judge who tried the case expires before such decision is filed, the fact that it was signed by him, and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment entered thereon. *Hastings v. Hastings*, 31 Cal. 95; *Van Court v. Winterson*, 61 Cal. 615; 2 *Hayne*, New Trials & App. § 237; *Warring v. Freear*, 54 Cal. 56, 28 Pac. Rep. 115; *Comstock Q. Min. Co. v. Superior Court*, 57 Cal. 625; *Polhemus v. Carpenter*, 42 Cal. 384; 2 *Hayne*, New Trials & App. § 246; *Bank v. Mahoney*, (U. S. Cir. Ct.) 2 Pac. Coast Law J. 123; *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. Rep. 721. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; McFARLAND, J.

(93 Cal. 230)

PEOPLE v. FAGAN. (No. 20,940.)
(Supreme Court of California. May 11, 1893.)

LARCENY—EVIDENCE.

On a prosecution for larceny, it appeared that 20 head of cattle were stolen October 2d, and 6 days later 11 of them were found about 30 miles away, with the brands changed and ears cut off, so as to obliterate the marks. On October 17th, the sheriff took possession of those found, and put them in charge of another person. The latter spoke of the cattle to defendant's son, who said that he owned them, and would drive them away, and on October 19th they were driven away by some person not recognized. The sheriff tracked them to defendant's cabin, where he found defendant, his son, and one D., who was seen with the cattle the day after the stealing. Defendant said the cattle were estrays, and made inconsistent statements as to when he first saw them. The evidence showed that on October 3d defendant was at his cabin, 50 miles from the ranch from which the cattle were taken, and then said that his son had gone to buy stock, and would bring back some 20 head of cattle. *Held*, that the evidence did not justify a conviction.

Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Charles Fagan was convicted of grand larceny, and appeals. Reversed.

L. J. Maddux and Jas. H. Budd, for appellant. Atty. Gen. Hart, J. W. Fulkerth, and J. C. Needham, for the People.

PER CURIAM. The defendant, having been convicted of grand larceny, appeals from the judgment, and from an order refusing him a new trial. He claims that

there was no evidence against him, or, if any, none that he had committed the crime of grand larceny. On October 2, 1891, 21 head of cattle were taken from Mr. Weyer's ranch, about 21 miles east of Modesto. The next morning they were seen at Clark's place, about 3 miles west of Modesto. They were driven from there by William Ducker, a codefendant of appellant, and another person not recognized, but who was not appellant. During the night of October 8th, 11 head of them were left or found their way to Howard's ranch, near the Coast range; how far from Modesto cannot be made out from the evidence exactly, but apparently near 15 miles. The brands upon these cattle had then been changed, and the ears cut off, so as to obliterate the marks. Here they were taken in charge by William Grummett, with whose cattle they were found. October 17th, the sheriff of the county, having learned of the larceny from Weyer's place, and of the presence of the cattle at Howard's, came over, took possession, turned them into Howard's inclosure, and asked Grummett to keep watch of them. At the request of the sheriff, Grummett visited defendant's place, and, finding appellant's son, Frost Fagan, informed him in regard to the cattle. Frost said he owned the stock, and would drive them away. On the 19th, about midday, some person who was not recognized drove the stock from the inclosure towards a canon which extends into the Coast range towards the Fagan place. The sheriff was notified, and came over that evening, and with a posse tracked the cattle to Fagan's cabin, in the Coast range. There he found the appellant, his son Frost, William Ducker, who had been seen driving the cattle, and his brother, in bed, and the 11 head which had been driven from Howard's place the day before in a corral about 15 feet from the cabin. Appellant and his son both said the cattle were estrays. At first, appellant said the first time he had seen the cattle was the morning of the 19th, when he discovered them on the range, but didn't know where they came from; then, correcting himself, he said he had seen them there a week before. When the sheriff was questioning appellant's son as to how the cattle got into the corral, the appellant said: "If the cattle were stolen, Billy Ducker and I must have done it, for Frost had nothing to do with putting them into the corral." It does not appear how long Fagan had lived at the cabin, or had been occupying or claiming it. He told the sheriff that he intended to homestead the place for a hog ranch; also that everything belonged to Frost, as he couldn't own anything because of his creditors; and that there were some 30 head of stock on the place. Subsequently some 5 head of the stolen cattle, other than the 11 which had been at the Howard ranch, were found in the Coast range within 5 miles of the Fagan cabin. Upon these the brands and earmarks had been changed in the same way as on the 11 head. There was evidence showing that Fagan and his son were acquainted with the vicinity of Weyer's place, from which the cattle had been taken. The prosecution also proved that

on the morning of the 3d, which was the morning after the cattle were taken from Weyer's place, appellant was at his cabin, which is some 50 miles from Weyer's. He then told the witness that the place belonged to Frost, as he could own nothing; that his son had been working with a machine, had saved his money, and would buy stock for the range. He thought his son was then at Modesto, and might return with 12 or 14 horses. In addition, he thought his son would have on the place some 20 head of cattle. Appellant had been seen working about the cabin hauling lumber, fixing the corral, and a shed. There was no direct evidence connecting the appellant with the property in any way, prior to the time when he was found with it by the sheriff at about 4 o'clock in the morning of October 20th, more than 17 days after they had been taken from Weyer's place. It was admitted by the district attorney at the argument that he was not present when the cattle were taken. The indictment charges the taking to have been from Weyer on the 2d, and at the trial the prosecution stated that this was the taking relied upon, and not the taking on the 19th from Howard. During 9 days of the 17 which had elapsed after the taking, before appellant is shown to have had anything to do with the cattle, they were in the custody of Grummett, who, at least during 2 days of that time, was acting as the bailiff of the sheriff. As Frost Fagan had informed Grummett that he would take the cattle, the last taking could hardly be called furtive. There is no direct evidence connecting Frost Fagan with the taking except this claim made to Grummett. Evidently, appellant did not himself, personally, take the cattle, or assist in such taking. He could therefore only be convicted on the ground that, though not present, he had previously advised and encouraged the theft. There is no direct evidence that he knew that the theft was contemplated, or that he knew, even on the morning of the 20th, when arrested, that a larceny had been committed, much less that he had previously advised and encouraged it. That he had previously to the actual commission of the theft advised and encouraged it is inferred from the circumstances above set out. That the circumstances raise a very strong suspicion against defendant may be admitted. We are not favored with an argument showing how the guilt is inferred, but it is manifest that it is claimed that Fagan was expecting his son to bring in stock, about the number taken from Weyer; that he was preparing for them. He was taken with them, and in the company of his son and Ducker, who, it is claimed, did take them, and drove them from Weyer's, more than 50 miles, to the Fagan cabin. And then when surprised with them, he falsely stated that he had seen them on the range a week before, and the day before; and then stated that, if they were stolen, he and Ducker must have done it. A great deal of importance seems to have been attached to the last statement, but we think it only constituted an admission that appellant had assisted in putting them into the corral. It was evidently made upon

the assumption that the only ground for charging a larceny was the fact that the cattle had been taken from the range, and put into the corral. The old man strove to shield his son. No doubt the false statements that the stock were estrays which had been taken from the range tends very strongly to show that at that time Charles Fagan knew, or at least suspected, that the cattle had been dishonestly come by, but they do not prove that previous to the theft he had advised and encouraged its commission. Not a circumstance is proven which is not entirely consistent with his innocence of the particular offense with which he is charged. To justify a conviction, one must not only be proven to have committed an offense, but the very offense charged in the indictment. All the circumstances are consistent with the supposition that he had advised against the theft or only knew of it after its commission, or that he was simply a receiver of stolen goods, knowing them to have been stolen. Perhaps the evidence would sustain a charge of receiving stolen goods, knowing them to be stolen, but the circumstances are not sufficient to show that he had previously to the commission of the offense advised and encouraged its commission. In view of the conclusion that the evidence does not sustain the verdict, it is not necessary to consider the other assignments of error.

Judgment and order reversed.

98 Cal. 291

ROURKE v. McNALLY et al. (No. 14,964.)

(Supreme Court of California. May 16, 1893.)

PUBLIC LAND — ENTRY ON GOVERNMENT LAND IN POSSESSION OF ANOTHER — RIGHT TO RETAIN POSSESSION.

A person who, in the absence of another, who is in the actual possession of government land which is open to settlement under act of congress, peaceably enters on such land with intent to take it up as a homestead, is not entitled to retain possession as against such prior occupant, in the absence of any right or title acquired from the government.

Commissioners' decision. Department 2. Appeal from superior court, San Benito county; James F. Breen, Judge.

Action by Thomas Rourke against Hannah McNally and Julia McNally to recover possession of certain land. From a judgment for defendants, plaintiff appeals. Reversed.

Briggs & Hudner, for appellant. Scott & Dooling, for respondents.

TEMPLE, C. This appeal is by plaintiff upon the judgment roll, and appellant contends that judgment should have been for plaintiff upon the findings. Suit was brought to recover the possession of land, and it was tried without a jury. The court found that plaintiff, on the 15th day of August, 1891, was, and long prior thereto had been, in the actual possession of the demanded premises; that plaintiff entered in the occupation of the same March 20, 1890, and inclosed the land with a wire and brush fence, which, with nat-

ural barriers, excluded and inclosed stock; that plaintiff did not reside upon the land, but had continued and exclusive possession until ousted by the defendant Julia; that the land was a part of the public domain of the United States, and was open to settlement pursuant to the forfeiture act of congress, approved September 29, 1890; that on August 16, 1891, while plaintiff was so in possession, defendant Julia McNally entered upon the land and made a settlement thereon by building a house, then and now intending to enter the same and the adjoining land, not exceeding 160 acres, as a homestead under the laws of the United States, and is now residing thereon. She made her entry through an opening in plaintiff's fence, not made by her, but by some unknown person. She broke no fence, but her entry was without force or violence. Her entry, however, was without the knowledge or consent of plaintiff and against his will, and she has ever since kept him out of possession. By what course of reasoning the court reached the conclusion that plaintiff could not recover on these facts we are not informed, as respondents have filed no brief. The defendant Julia did not connect herself with the government title through the homestead law or otherwise. Since she entered upon the actual possession of another, it is of no moment that her entry was peaceable, because made in the absence of plaintiff. Nor is it of consequence that she intended to take up the land as a homestead. This did not warrant her entry upon the actual possession of another. But she has not even attempted to enter the land as a homestead, and she has acquired no rights under any act of congress. Until she has acquired some such right, or connected herself in some lawful mode with the true title, she cannot resist the presumption of title in the plaintiff, which arises from the fact of his prior possession. The laws of the United States do not authorize an entry upon the actual possession of another for the purpose of making a settlement, though made by one qualified to purchase from the government, or to acquire a homestead, although such entry is made with the intent to acquire the title in some lawful mode. *Atherton v. Fowler*, 96 U. S. 513; *Durand v. Martin*, 120 U. S. 369, 7 Sup. Ct. Rep. 587; *Quinby v. Conlan*, 104 U. S. 421; *McBrown v. Morris*, 59 Cal. 68; *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. Rep. 705; *Bullock v. Rouse*, 81 Cal. 590, 22 Pac. Rep. 919; *Peterson v. Kinkead*, 92 Cal. 372, 28 Pac. Rep. 568. I think the judgment should be reversed, and the court below directed to enter judgment for the plaintiff on the findings.

We concur: SEARLS, C.; HAYNES, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to enter judgment for the plaintiff on the findings.

DE HAVEN, J. I concur in the judgment.

(93 Cal. 235)

TUNIS et al. v. LAKEPORT AGRICULTURAL PARK ASS'N et al. (No. 14,963.)
(Supreme Court of California. May 16, 1893.)

MECHANICS' LIENS—HOTEL CONSTRUCTED ON FAIR GROUNDS—PROPERTY SUBJECT TO LIENS.

1. Under Code Civil Proc. § 1185, providing that the land on which any building is constructed, "together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof," is subject to mechanics' liens, only such area as is necessary to the enjoyment of the building for the purpose in view in its construction is subject to liens created by the erection of such building.

2. A decree establishing mechanics' liens on the entire premises constituting the fair grounds of an agricultural society, consisting of about 60 acres of land, with race track, grand stand, corrals, stables, and other improvements thereon, in favor of persons who constructed a building on such grounds to be used as an hotel, club house, and saloon, is erroneous.

Department 2. Appeal from superior court, Lake county; S. K. Doherty, Judge.

Two consolidated actions by Frank D. Tunis and P. Christensen against the Lakeport Agricultural Park Association and one Walter to foreclose mechanics' liens. From a decree for plaintiffs, and from an order denying a new trial, the association appeals. Reversed.

J. J. Bruton and F. E. Johnson, for appellants. Woods Crawford, Thos. E. Bond, and Ira C. Jenks, for respondents.

PER CURIAM. Two separate actions were brought, one by Tunis and the other by Christensen, to foreclose separate mechanics' liens upon a building constructed by defendant Walter upon land owned by the Lakeport Agricultural Park Association, a corporation, and one of the defendants herein. The two actions were consolidated and tried together. Judgment was entered foreclosing the liens, declaring their order of priority, and ordering the building and certain lands to be sold, subject to a prior mortgage thereon, to satisfy the liens. The corporation defendant appeals from the judgment, and from an order denying a motion for a new trial.

1. The complaint of Tunis states a cause of action, and the court did not err in overruling the demurrer of the defendant corporation to such complaint.

2. The court found that all the premises described in the complaint were necessary to the convenient use and occupation of the building constructed, and the appellant claims that this finding is not sustained by the evidence. The description of the land is as follows: "Bounded on the east by lands of D. Dunnivan; on the north, by lands of H. C. Boggs; on the west and south, by the county road leading from Lakeport to Kelseyville, * * * and known as the 'Fair Grounds Tract,' upon which race track, grand stand, corrals and stables, and other improvements belonging to the Lakeport Agricultural Park Association, are situate," etc. There is no statement of the area of the land here, but in the statement on motion for a new trial is a declaration that it is "about sixty acres," all of which was well known to

the judge of the court, but that there was no evidence on the question. Section 1185 of the Code of Civil Procedure provides that "the land upon which any building, improvement, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien," etc. The expression, "the land upon which any building * * * is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof," should be construed to mean such space or area of land as is necessary to the enjoyment of the building for the purpose in view in its construction. The uses to which a building is to be put must manifestly, many times, determine the quantity of land necessary to the convenient use and occupation thereof. If erected as a mill for sawing lumber, the space required for a log and lumber yard would be regarded as necessary to its use, while like space around a similar building for a watch factory might not be at all necessary. This thing should be borne in mind: It is for the convenient use and occupation of the building that the land about the same is given by our statute; a flouring mill erected upon a large grain ranch would require a given space around it for the purposes incidental to its operations. It might require the whole ranch to create business for it. But it would not follow, under our statute, that the entire ranch would be subject to a lien for its erection. In the present case it is easy to see that the race track, with its training stables, grand stand, corrals, and other improvements, may be necessary to create business for the hotel, club house, and saloon, for which the building in question was constructed; but it is not at all apparent that they are necessary to the convenient use and occupation of the building for the purposes indicated. Their uses are foreign to its purposes, except as they may tend to bring custom to its doors. It is not the intention here to indicate to the court below the quantity of land necessary to the use and occupation of the building as an hotel, club house, and saloon, but rather to indicate the basis upon which, under our Code, a conclusion is to be reached in consonance with the requirement of the law. The judgment and order appealed from are reversed.

(93 Cal. 233)

BAIRD v. CRANK. (No. 14,719.)

(Supreme Court of California. May 16, 1893.)

ACCOUNT STATED—PAYMENT IN FUTURE—LIMITATIONS.

1. An account stated is none the less such because the debtor agrees to pay the amount which he concedes to be due at a future day after he has done other acts.

2. In an action on an account stated defendant cannot insist that he promised to pay in the future, after performing other acts, and that performance thereof does not appear, unless he interposes such defense.

3. Where a debt is not barred at the time

¹ For opinion on rehearing, see 33 Pac. Rep. 447.

an account is orally stated, the statute begins to run as to the cause of action on the account stated from the date thereof. *Auzerais v. Naglee*, 15 Pac. Rep. 371, 74 Cal. 60; *Kahn v. Edwards*, 16 Pac. Rep. 779, 75 Cal. 192,—followed.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Andrew Baird against J. F. Crank. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

O'Brien & Daingerfield, for appellant. J. M. Haven and C. W. Cross, for respondent.

BELCHER, C. Plaintiff commenced this action on the 18th day of May, 1889, to recover a balance due upon an account stated. It is alleged in the complaint that prior to the 3d day of July, 1888, at the city and county of San Francisco, plaintiff had done and performed for defendant, at his special instance and request, a large amount of services and labor, for which defendant was justly indebted to plaintiff in a large sum of money, and that on the day named it was agreed between the parties that such services were reasonably worth the sum of \$5,000, and defendant agreed to pay plaintiff that sum therefor; and also that on the day named, at San Francisco, an account was stated between the plaintiff and defendant, and upon such statement a balance of \$5,000 was found due to the plaintiff from the defendant, which sum the defendant then and there agreed to pay plaintiff; that defendant had not paid the same, nor any part thereof, except the sum of \$900, which he paid on the 30th of November, 1888. The answer of defendant denies all the averments of the complaint, and as to the \$900 alleges that plaintiff "harassed, pursued, and annoyed this defendant to such an extent that said defendant, to buy his peace, and without consideration, and not at all because he was under any liability to the said plaintiff, paid him the said sum of \$900, in the complaint mentioned." It further alleges that each of the causes of action set up in the complaint is barred by the provisions of section 339, subd. 1, Code Civil Proc. After trial the court found the facts of the case to be as follows: "First. That the plaintiff entered upon the service and employment of the defendant, at his special instance and request, in the month of February, 1885, and continued such service and employment to the 20th day of January, 1887; that said employment was indeterminate as to duration, and a continuous employment to said 20th day of January, 1887; and no right of action accrued to plaintiff against defendant by reason thereof, prior to the 20th day of January, 1887. Second. That on the 3d day of July, 1888, it was agreed between the said plaintiff and said defendant that such services were reasonably worth the sum of five thousand dollars, and the defendant on said day promised to pay to the plaintiff the said sum of five thousand dollars. That on said day two years had not elapsed

since a cause of action accrued in favor of plaintiff against defendant for or on account of said services. Third. That on the 3d day of July, 1888, an account was stated between the plaintiff and defendant, at San Francisco, California, and upon such statement a balance of five thousand dollars was found due to the plaintiff from the defendant for and on account of said labor and services theretofore done and performed by the plaintiff for the defendant; and at said time and place the defendant agreed to pay the plaintiff the said sum of five thousand dollars, and the plaintiff agreed to accept the same in full payment of all services theretofore rendered by him to defendant. That at said time two years had not elapsed since a cause of action accrued in favor of plaintiff against defendant for or on account of said services so rendered by plaintiff to defendant as aforesaid. Fourth. That on the 30th day of November, 1888, the defendant paid to the plaintiff, on account of said sum of \$5,000, the sum of \$900, but that no other sum has been paid by the defendant thereon. Fifth. That the plaintiff did not voluntarily undertake to perform, nor did he voluntarily perform, any services for the defendant. Sixth. That the defendant did not, to buy his peace, and without consideration, pay to plaintiff the sum of \$900, nor any other sum of money; nor did plaintiff receive from defendant any sum of money whereby he became indebted to defendant. Seventh. That plaintiff's causes of action against the defendant were not, nor was any of them, barred by the provisions of section 339, subd. 1, of the Code of Civil Procedure of California, or any other provision of law." Upon these facts the court gave judgment for the plaintiff according to the prayer of his complaint, from which, and from an order denying his motion for a new trial, defendant appeals.

The notice of motion for new trial stated that the motion would be made upon a bill of exceptions to be subsequently prepared, and on the grounds that the evidence was insufficient to justify the decision, that the decision was against law, and errors in law occurring at the trial and excepted to by defendant. The specifications attached to the bill of exceptions subsequently settled and filed were to the effect—First, that there was no evidence that any account was ever stated between the parties, or that there was any agreement between them that plaintiff's services were reasonably worth the sum of \$5,000, or any sum whatever; and, second, that the evidence shows that no acknowledgment or promise in writing was made by defendant, and also shows that at the time of the commencement of the action the plaintiff's cause of action was barred by the statute of limitations, as pleaded in the answer. The specifications do not assail the first, fourth, fifth, and sixth findings, and the facts therein stated must be accepted as true. It follows, therefore, that the plaintiff did perform services for the defendant for nearly two years, and that no right of action, by reason thereof, accrued to the plaintiff prior

to January 20, 1887; and also that in November, 1888, defendant paid to plaintiff on account, and not to buy his peace, or without consideration, the sum of \$900.

It is argued that the evidence did not justify the finding that an account was stated between the parties, because, according to the testimony for the plaintiff, defendant was to pay the \$5,000 upon his return to Los Angeles, and upon making a settlement there with a Mr. Jewett; and it is claimed that this shows that the account was stated conditionally only, and that, in order to recover upon it, it was incumbent upon the plaintiff to allege and prove that the conditions had been performed,—that is, that defendant had returned to Los Angeles, and had settled with Jewett, or, if he had not settled with him, that it was in consequence of his own fault, but that no such allegation was made or proof offered. An "account stated," as defined by Bouvier, is "an agreed balance of accounts; an account which has been examined and accepted by the parties." And in *Chitty on Contracts* (11th Amer. Ed., vol. 2, p. 962) it is said: "It must appear that at the time of the accounting certain claims existed, of and concerning which an account was stated; that a balance was then struck and agreed upon; and that defendant expressly admitted that a certain sum was then due from him as a debt. Hence it follows that an account cannot be stated with reference to a debt payable on a contingency," but that it is not "essential that there should be cross or reciprocal demands between the parties, or that the defendant's acknowledgment that a certain sum was due from him to the plaintiff should relate to more than a single debt or transaction." Here it was proved that plaintiff had presented a much larger claim for his services than was allowed, and that there had been considerable correspondence between the parties in regard to it; "that on the 3d day of July, 1888, the defendant, then being in San Francisco, called at the office of the plaintiff, and a conversation occurred between them relative to a settlement of plaintiff's claim. After some negotiation, defendant offered to pay plaintiff the sum of five thousand dollars in full settlement, the money to be paid by defendant as soon as he should settle matters with a Mr. Jewett, who was the agent of defendant at Los Angeles. Plaintiff accepted this offer, and told defendant that he would settle his account with defendant for that sum; and it was then agreed that defendant should pay plaintiff, and plaintiff would accept from defendant, \$5,000, in extinction of all claims of plaintiff upon defendant." The claim of plaintiff was not a debt payable on a contingency, but was clearly such a one as might be agreed upon and stated by the parties; and the facts proved by plaintiff, if true, clearly show that the transaction constituted a full and complete statement of the account. It is true that the money was to be paid when defendant should settle with Jewett, but that did not affect the statement. If two parties, having accounts between them, examine

the accounts, and a balance is then struck and agreed upon, and admitted to be due from one to the other, the statement is complete, though the debtor reserves the right to pay the balance at some future day. *Tuggle v. Minor*, 76 Cal. 96, 18 Pac. Rep. 131. Whether the defendant had settled with Jewett before the action was commenced does not appear, but, if not, the only defense which could be interposed on this ground would be that the action was prematurely brought. No such defense, however, was interposed, and upon the record presented the question cannot now be considered.

But, conceding this to be so, it is further strenuously urged that the plaintiff's cause of action was barred by the statute of limitations pleaded, and that the finding of the court that it was not barred was contrary to, and not justified by, the evidence. This position is rested upon the theory that the statute began to run against plaintiff's claim when he completed his services on January 20, 1887, and that under section 360 of the Code of Civil Procedure its running was not suspended or affected by the oral statement of the account, and hence that, as more than two years had elapsed when the complaint was filed, the action was barred. It is admitted, however, by the learned counsel, that this theory is in direct conflict with the rulings upon the same question in *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. Rep. 371, and *Kahn v. Edwards*, 75 Cal. 192, 16 Pac. Rep. 779, but it is claimed that these cases were not well considered, and should be overruled. In the first of these cases it is said: "An open account, already barred by the statute of limitations, cannot be relieved from the bar of such statute by an oral statement of such account, for the reason that under our Code (Code Civil Proc. § 360) no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute, unless the same is contained in some writing signed by the party to be charged thereby. Where, however, the demand is not barred at the date of the account stated, although the statement is verbal, the statute begins to run upon the new cause of action thus brought into existence from the date of the settlement and new promise arising thereunder; and, if verbal, an action may, under subdivision 1 of section 339 of the Code of Civil Procedure, be brought within two years after such settlement." And in the second case named this language was quoted and approved. In answer to the claim that these cases should be overruled, so far as they treat upon the subject in hand, it is enough to say that they are supported by many authorities elsewhere, and, in our opinion, should be sustained. It follows that the judgment and order appealed from should be affirmed, and we so advise.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(98 Cal. 219)

WELSH v. BRAMLET. (No. 14,832.)

(Supreme Court of California. May 8, 1893.)

COUNTY OFFICERS — COMPENSATION — INCREASE DURING TERM—CONSTITUTIONAL LAW.

1. The county government act of 1883, as amended in St. 1889, p. 232, fixed the salaries of district attorneys, making them full compensation for all services, including deputies. The county act of 1891 also fixed the salaries of said attorneys, but provided that the deputies should be paid by the counties as other officers. *Held*, that an attorney elected before the act last named took effect was not entitled to have his deputies paid by the county, as this would be an increase in salary during his term, within Const. art. 11, § 9.

2. That part of the act of 1891 segregating counties of the eighth class alone from all others, and conferring on the district attorney therein authority, which is not granted to that officer in other counties, to determine whether he will have deputies or not, is in violation of articles 4 and 11 of the constitution, with reference to local or special laws, and uniformity in county governments.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Petition by one Welsh for writ of mandate to compel Bramlet to draw his warrant as county auditor. Writ denied. Petitioner appeals. Affirmed.

H. H. Welsh, in pro. per. Sayle & Coldwell and E. D. Edwards, for respondent.

HARRISON, J. The appellant was appointed assistant district attorney of Fresno county on the 1st day of April, 1891, by virtue of the provisions of subdivision 21 of section 170 of the county government act, passed March 31, 1891. He entered upon the duties of his office, and on the 3d day of July, 1891, made a demand upon the respondent, as county auditor, that he draw a warrant on the county treasury in his favor for the sum of \$200, as his salary during the month of June. The respondent refused to comply, and the appellant instituted this proceeding for a writ of mandate compelling him to draw the warrant. The superior court denied the writ, and the petitioner has appealed.

1. Under the county government act of 1883, the county of Fresno became a county of the twenty-sixth class, and remained in that class until the act was superseded by the county government act of 1891. In 1889 (St. 1889, p. 232) the legislature revised the compensation of the officers of the several counties of the state, and by section 188 of the county government act, as then amended, the salary of the district attorney in counties of the twenty-sixth class, "for the services required of him by law or by virtue of his office," was fixed at \$3,600; and in section 211 of the same act (page 300) it was declared that the salaries provided in the act should be "in full compensation for all services of every kind and description rendered by the officers therein named, either as officers, or *ex officio* officers, their deputies and assistants; and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided." Under the classi-

fication of counties made by the legislature in the county government act of 1891, according to the census of 1890, Fresno county became a county of the eighth class, and by section 170 of that act the compensation of the district attorney in counties of the eighth class was fixed at \$3,600. The legislature, however, incorporated into this section of the act the following subdivisions: "21. The district attorney may appoint an assistant district attorney at a salary of \$1,800 per annum, an assistant district attorney at a salary of \$2,400 per annum, a deputy district attorney at a salary of \$1,500 per annum." "23. All the provisions herein relating to counties of this class shall take effect from and after the date of the approval of this act, and the compensation of all assistants, deputies, and clerks shall be paid by the county in the same manner in which the salaries of county officers are now paid." Article 11, § 9, of the constitution, declares: "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office." If the effect of the foregoing provisions of the act of 1891 was to increase the compensation of the district attorney of Fresno county beyond the amount at which it was fixed at the time his term of office began, they are in conflict with this section of the constitution, and do not form the basis of a charge against the county. In *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. Rep. 834, 29 Pac. Rep. 1092, the county clerk of Marin county, at the time of his election, and when his term of office began, was entitled to receive a fixed sum for the services to be rendered by virtue of his office. After he had entered upon his term of office, he appointed *Dougherty* as one of his deputies, by virtue of a provision in the county government act authorizing the board of supervisors in certain classes of counties, one of which included Marin, to permit certain officers, whose compensation for all services to be rendered by them had been fixed at a gross sum, to appoint deputies, whose salaries should be a charge upon the county treasury. Upon an application for a writ of mandate to compel such payment by the county, it was held that that provision of the county government act was invalid. That case was very elaborately argued, and was determined upon deliberate consideration, and holds: (1) That under the provisions of section 5, art. 11, of the constitution, the legislature is required to fix the compensation of the county officers, and that it is not competent for that body to delegate the exercise of this authority to the discretion of any other body. (2) That a statute which authorizes the increase of salaries in certain counties, selected arbitrarily, and without reference to any criterion as the basis of such selection, is violative of the constitution, in not being uniform in its operation. (3) That when the legislature has fixed the compensation of an officer at a gross sum, it cannot increase that compensation during his term of office, directly, by legislative act, or indirectly, by providing that the salaries of

his deputies, which by the law as it existed when his term of office began were to be paid by him out of this gross sum, shall be made a county charge, and paid out of the county treasury. In holding that the foregoing provision of the county government act was unconstitutional, it was said: "The salary of this officer was fixed by the legislature with direct reference to the fact that out of it he was to pay his own deputies, and the purpose of this amended section is to authorize the board of supervisors of that county to suspend the operation of this law in so far as he is thereby required to pay such deputies, and to place the burden upon the county. The power thus to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it to the board of supervisors of the county." Page 606, 94 Cal., and page 1093, 29 Pac. Rep. And in the concurring opinion of the chief justice, it was said that the legislature "could not, either by direct enactment, or by authorizing the boards of supervisors to so order, impose upon a county treasury the payment of the salary of any deputy of a county officer elected while the act of 1883 remained in force, and unamended as to the provisions under discussion." Page 613, 94 Cal., and page 1095, 29 Pac. Rep. In the opinion of Mr. Justice Garoute, which was rendered upon the first hearing in the case, and which was also adopted by the court upon the subsequent hearing, it was said with reference to article 11, § 5, of the constitution: "To construe this provision of the constitution so that a county clerk's salary could not be increased during his term of office, but that an act of the legislature would be valid which provided that all of his deputies, men whom he was bound to employ and bound to pay, in the absence of such an act, should be paid by the county, independent of and in addition to the clerk's salary, would be to allow that to be done indirectly which could not be done directly, and would be establishing a medium for the practice of the very abuses which the constitutional provision was inserted to destroy." At the general election in 1890, W. D. Tupper was elected district attorney of Fresno county for the term of two years, and his term of office began on the 1st day of January 1891. At that date the compensation of the district attorney of Fresno county, as provided by the law then in force, was the sum of \$3,600, and this sum was by the same law declared to be in full compensation for all services of every kind and description to be rendered by him and his deputies and assistants, and by virtue of section 9, art. 11, of the constitution, this salary was to remain as his entire compensation during his term of office, or until the 1st day of January, 1893. The provision in subdivision 21, § 170, of the county government act of 1891, authorizing him to appoint assistant district attorneys and a deputy district attorney, conferred no special authority in this respect, for, by section 61 of the act under which he was elected, he was au-

thorized to "appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office." Section 211 of the act which was in force at the time when his term of office began required him, however, to pay the salaries or other compensation of these deputies and assistants out of the salary that had been provided for him in the act, and the foregoing provision in subdivision 23, § 170, of the county government act of 1891, that this compensation should be paid by the county, was to that extent an increase of his salary. There is no difference in principle between a statute authorizing the board of supervisors to permit a county officer to appoint a deputy, whose salary shall be a charge upon the county treasury, and one directly authorizing such officer himself to appoint a deputy, whose salary shall be paid by the county. The result in either case is to increase the compensation of the officer beyond the amount at which it was fixed at the time of his election and at the commencement of his term of office. If there be any difference in principle between the two statutes, the stronger argument is in favor of the one which would subject such appointment to the arbitrament of the legislative body of the county, rather than to leave it to the will of the officer himself to determine whether his salary should be so increased.

2. Section 4, art. 11, of the constitution, provides that "the legislature shall establish a system of county governments which shall be uniform throughout the state." This means that the "system" or plan for the government of the several counties in the state shall be uniform, so that its several parts shall be applicable to each county. The legislature is forbidden by the constitution from passing any local or special law "regulating county or township business," (article 4, § 25, par. 9,) or "prescribing the powers and duties of officers in counties," (Id. par. 28.) Section 5, art. 11, directs that "the legislature by general and uniform laws shall provide for the election or appointment in the several counties of * * * such county, township, and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office." This provision of the constitution is mandatory, and must be construed not only as giving to the legislature the exclusive authority to provide for the officers in the several counties, fix their terms of office, and prescribe their duties, but also as declaring that such provision must be made "by general and uniform laws," and that any law which the legislature may enact upon these subjects must be uniformly applicable to all the counties in the state. The county government act of 1891 purports to be applicable to all the counties of the state. Its title is "an act to establish a uniform system of county and township governments." The first 161 sections of the act are devoted to provisions for the various officers of the counties, authorizing their election, fixing their terms of office, and prescribing their powers and duties. Section 162 makes a classification of all the counties in the state, ac-

cording to their population, "for the purpose of regulating the compensation of all officers hereinbefore provided for," making 53 classes for the 53 counties into which the state was then divided. This classification is criticised in the respondent's brief as being in contravention of the evident purpose of the constitution, but it was held in *Longan v. County of Solano*, 65 Cal. 125, 3 Pac. Rep. 463, that the constitution had conferred upon the legislature authority to make the classification, and that its action therein is not reviewable by the judiciary. Sections 163-215, both inclusive, provide for the compensation of the different county officers in the several classes. In these sections, in addition to providing for the compensation of the various officers in the several classes, are found other provisions prescribing duties for county officers in certain classes, which are not made for all classes, fixing the terms of county officers in some classes at four years, while the section which declares the term of county officers generally limits it to two years, establishing special fee bills for certain classes, fixing the fees of witnesses and jurors in other classes, prescribing rules for the conduct of courts, and fixing penalties for violation of ordinances, which are applicable to only one or more of the several classes. It is, however, unnecessary here to consider the particulars in which the uniformity of the law is destroyed in matters other than those which refer to the office and duties of the district attorney. In counties of the second class the salary of this office is fixed at \$4,000 per annum, and the board of supervisors is authorized to allow him an assistant and five deputies, at salaries to be fixed by the board, which are to constitute a county charge. In counties of the sixth class the legislature has itself created the offices of assistant district attorney and deputy district attorney, "to be appointed by the district attorney of said county, and to remain in office during the pleasure of the district attorney thereof," with fixed salaries to be paid by the county. In counties of the eighth class alone is the district attorney authorized of his own motion to determine whether he will appoint any deputies, and if so, to make the salary of those appointed a county charge. Section 216 of the act enumerates 29 classes in which authority is conferred upon the board of supervisors to authorize the appointment of deputies whose salary shall be made a county charge, and for several of the classes there is no provision, except the general one in section 61, by which this officer can appoint any deputy. The above provision of section 170, by which counties of the eighth class alone are segregated from the others, and authority conferred upon the district attorney therein which is not granted to that officer in other counties, renders the act to that extent local and special, and in violation of the foregoing provision of the constitution. In *Cody v. Murphey*, 89 Cal. 522, 26 Pac. Rep. 1081, we held that an amendment to a section of the county government act fixing the salaries of the county officers in a certain class was a general

law, for the reason that it applied to all counties that were within that class. The logic of that opinion is clear, and embraces all laws falling within the principles of that case. As the legislature is expressly authorized by the constitution to classify the several counties of the state according to their population, for the purpose of fixing the compensation of the county officers, it follows that, when such classification has been made, a statute providing for the compensation of the officers within any class is a general law, and that it is immaterial whether such provision be in a special statute for each class, or in a single act providing for all of the classes, and that an amendment to such statute which affects an entire class is equally a general law as was the original act. The legislature has not the general authority to enact laws for the counties by classes, nor is it authorized to make a classification of counties for any purpose of legislation, except for the purpose of enabling it to regulate the compensation of the county officers for whose election or appointment it shall provide. *San Luis Obispo Co. v. Graves*, 84 Cal. 71, 23 Pac. Rep. 1032. Whenever it attempts to enact a law for one or more of the counties of the state upon subjects that it is directed to provide for by general laws, or which are to form part of a uniform system for the whole state, whether such counties are designated directly by name, or by reference to a class into which they have been placed for other subjects of legislation, it infringes these provisions of the constitution. We must take judicial knowledge that there is only one county in the state whose population places it in the eighth class, and, if an act is passed by the legislature that is applicable to only one county in the state, it does not cease to be a local act by reason of the fact that it purports to be applicable to a class of counties which the legislature is not authorized to create for the purpose of such legislation, and of which that county constitutes the only member.

The judgment is affirmed.

We concur. DE HAVEN, J.; FITZGERALD, J.; GAROUTTE, J.; BEATTY, C. J.

eled in going only, in the discharge of the duties of his office." Under St. 1869-70, p. 148, the law in force when the county government act was passed, constables were entitled to 30 cents per mile for the distance traveled for the purpose of arresting a prisoner, and also for conveying him to the magistrate or to jail after the arrest. *Held*, that the only change in the compensation of constables intended by the later act was to reduce their mileage from 30 cents to 25 cents per mile.

Department 1. Appeal from superior court, Merced county; J. K. Law, Judge.

Action by one Nelson against Breen and others. From the judgment entered, plaintiff appeals. Affirmed.

Breckinbridge & Peck, for appellant
W. A. Nygh, for respondents.

HARRISON, J. The question involved on this appeal is the right of a constable in Merced county to charge mileage for the distance traveled for the purpose of arresting a prisoner, and also for conveying him to jail after his arrest. The question was decided in the affirmative in *Allen v. Napa Co.*, 82 Cal. 187, 23 Pac. Rep. 43, following the decision in *Cunningham v. San Joaquin Co.*, 49 Cal. 323. It is contended, however, that by subdivision 14 of section 201 of the county government act of 1889, (St. 1889, p. 297,) a different rule of compensation has been prescribed. Under that section constables in counties of the thirty-ninth class, (which embraces Merced county) are authorized to receive "such fees as are now or may hereafter be allowed by law, except that the constable's mileage shall not exceed twenty-five cents for each mile traveled in going only, in the discharge of the duties of his office." It is contended that under this provision a constable is entitled to receive mileage "for going only" for the purpose of making the arrest, and not for afterwards conveying him to jail. We are of opinion, however, that the legislature intended by this section to change only the rate of mileage, and not the subjects for which it should be received, and that, if it had intended to make any other change than the rate of mileage, it would have expressed its intention in definite terms. The statute of 1869-70 (page 148) was the law in force for regulating the fees of constables at the time when the county government act was passed, and must be resorted to for the purpose of ascertaining "such fees as are allowed by law;" and the construction which that statute had received at the date of the passage of the latter act must be held to have been intended by the legislature when it was adopted as the measure of compensation for constables. In *Cunningham v. San Joaquin Co.*, *supra*, the court held that the words "in going only," as used in that statute, applied only to executing a warrant of arrest, for the reason that "executing a warrant of arrest" and "taking a prisoner before a magistrate, or to jail," were mentioned as separate and distinct acts to be done by the officer, and therefore that the officer was entitled to mileage for his travel in both directions; and this construction was followed in *Allen v. Napa Co.*, *supra*, in a case in which the right of a constable

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NELSON v. BREEN et al. (No. 18,012.)
(Supreme Court of California. May 12, 1893.)

CONSTABLES—MILEAGE FEES.

St. 1889, p. 297, (County Government Act.) § 201, subd. 14, provides that constables in counties of the thirty-ninth class shall receive "such fees as are now or may hereafter be allowed by law, except that the constable's mileage shall not exceed 25 cents for each mile trav-

to mileage was involved. The proposition that section 201 authorizes the constable to receive only the same "fees," but that for the purpose of estimating "mileage" a new rule is prescribed, is untenable. The act of 1869-70 does not in terms authorize constables to charge any mileage, the provision being, (section 23:) "For all other services the same fees as are allowed to sheriffs for similar services;" and in construing this provision, in *Allen v. Napa Co.*, it was held that by virtue thereof constables were entitled to receive the same mileage, as well as fees, that sheriffs were authorized to receive. "The duties of his office," in the discharge of which the constable is entitled to receive mileage, are the same duties as those which are referred to in the act of 1869-70, and the mileage for which a constable is to be allowed compensation is the same as that for which provision is made in that statute. The construction asked for by the appellant would require us to hold that the provision in that act, that "in serving a subpoena or venire, when two or more jurors or witnesses live in the same direction, but one mileage shall be charged," has also been abrogated. Such a construction would be manifestly inconsistent with the apparent intention of the legislature. We hold, therefore, that the only change in compensation of constables which the legislature intended by the above provision of the county government act was to reduce their mileage from 30 cents to 25 cents per mile, but that the subjects for which they are entitled to such mileage are the same as existed when the act was passed.

The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

98 Cal. 271

BURNS v. SCOOFFY et al. (No. 14,805.)

(Supreme Court of California. May 13, 1893.)

OPENING DEFAULT — PLEADING — STRIKING OUT ANSWER—AMENDMENT.

1. Defendant H. and her attorney resided 600 miles from the place where the action was pending, and several days were required to make the journey between the two places. Six days before the time to answer expired, the attorney, while engaged in drawing the answer, learned that his brother, who was among strangers, had been shot, and he went to his relief. A surgical operation was necessary, and the attorney was compelled to remain with his brother several days, during which time, as he averred on oath, his condition was such that he was unable to complete the answer in time. He sent a request for a short extension, which was refused, of which refusal he learned when too late to answer. Judgment was rendered against his client by default. *Held*, that the case was within Code Civil Proc. § 473, providing that the court may relieve a party from a judgment rendered against him through his "excusable neglect."

2. An answer which is susceptible of be-

ing amended by a statement of facts known to exist, and which constitutes a defense to an action, should not be stricken out except in extreme cases, and the striking out of such an answer can only be justified in the face of facts showing willful neglect, inexcusable carelessness, or irreparable injury to plaintiff.

3. Where an amendment to an answer is allowed, and a delay is caused thereby, the court may impose such terms as will compensate plaintiff for any injury he may suffer from the delay.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; Jas. E. Murphy, Judge.

Action by John Burns against Ida M. Scooffy and others to establish right to purchase school lands. Judgment was rendered for plaintiff, and defendants Lallah S. Highton and Mansfield Lovell appeal. Reversed.

Chas. E. Wilson and R. W. Miller, for appellants. L. F. Cooper, L. F. Coburn, and Walter N. Linforth, for respondent.

SEARLS, C. This is an appeal by Mansfield Lovell and Lallah S. Highton, two of the defendants in the above-entitled cause, from a judgment in favor of the plaintiff. John Burns instituted the action against Ida M. Scooffy, Lallah S. Highton, Edith Cook, Mansfield Lovell, Robert T. Cottingham, Nelson R. Doolittle, and Harry J. Gray, to establish his right to purchase from the state of California the N. ½ of section 35, (school land,) in township 14 N., range 1 E., Humboldt meridian, and to have like applications of the defendants, and each of them, to purchase from said state, declared invalid and of no effect. The time for answer by the defendant Lallah S. Highton expired January 19, 1891, and, no answer having been filed, her default was entered January 20, 1891. A motion to set aside the default with leave to answer was refused by the court, and judgment entered in favor of plaintiff.

I am of opinion the showing on the motion to set aside the default made out a clear case of excusable neglect. Defendant and her attorney resided in San Francisco, some 600 miles from Crescent City, in the county of Del Norte, where the action was pending, and several days are required to make the journey between the two points. On the 13th day of January, and while the attorney of defendant was engaged in drawing her answer, he received a telegram to the effect that his brother had been shot and dangerously wounded. He at once went to his relief. A surgical operation was rendered necessary, and, the brother being among strangers, the attorney stayed at his bedside for several days, during which time, as he avers under oath, his physical and mental condition was such, in consequence of the condition of his brother, that he was unable to complete the answer in time. He did, however, send a request for a short extension of time to answer, which was refused, and

which refusal he learned when too late to answer. If there are in the profession men who, upon learning that a brother has been dangerously wounded by a would-be assassin, and who, upon being called upon to go to his relief "with a carriage and a doctor," fail to do so, and subordinate the duties of humanity and the ties of kinship to the urgency of professional engagements, they are probably few in number, and it is to be hoped their number will decrease. If the case was not one of commendable neglect, it was at least a case of excusable neglect.¹

The affidavit of Henry E. Highton on behalf of defendant shows a state of facts which, if established, constitutes a valid cause of action and defense on the part of the defendant Highton as against plaintiff. Had the application been made at an earlier day, and had it been accompanied by the proposed answer, it would certainly have commended itself more strongly to our sense of justice. The delay did not, however, extend beyond the statutory period of six months, within which the court is authorized to intervene, and the difficulty of communication with the place of trial affords some excuse for a delay which, under other circumstances, might be regarded as fatal to the application for relief.

Defendant Lovell answered in due time, setting out his application to purchase the land in dispute, and showing that his application was filed in the office of the surveyor general March 27, 1889, but failed to aver that within six months thereafter he demanded an approval of his application, or made a demand of an order of reference, or that a reference to a court had been had, as required by section 3498 of the Political Code. On motion of plaintiff's counsel his answer was for this cause stricken out. As the application to purchase became void at the expiration of six months unless the action indicated was taken, it was necessary to aver it to have been so taken, and without it the answer was fatally defective. After the motion to strike out, and before judgment, defendant asked leave to file an amendment to the answer, to be verified by one of the attorneys, then and there averring upon information and belief that Lovell, on the 26th day of September, 1889, did demand of the surveyor general an approval of his application to purchase, etc. Pending the hearing of the motion, attorneys for defendant offered, if the proposed amendment was deemed insufficient by reason of being on information and belief, instead of positive, and as within the knowledge of defendant, to answer in positive form, if given time to send the answer to defendant for verification, who was at San Francisco, and not present in court; all of which was

refused. The affidavits in support of the motion showed that the omission of the allegations from the answer was in all probability an oversight on the part of the attorney who drew the pleading. Experience shows that in the attainment of justice by resort to judicial tribunals amendments to pleadings are of ever recurring necessity; and the tendency of judicial decisions should be, and is, towards liberality in permitting, where it can be done without working great delay, such amendments as facilitate the production of all the facts bearing upon the questions involved. Our Code looks to liberality in this matter, and the action of our courts tends in the same direction. To strike out a pleading, which is susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action or defense to an action, is a harsh proceeding, and should only be resorted to in extreme cases. To refuse permission to answer, with a valid defense in hand, can only be justified in the face of facts showing willful neglect, inexcusable carelessness, or irreparable injury to plaintiff.

The drift of opinion in this court from an early date has favored a broad liberality, rather than severely technical tendencies, on this subject. *Connally v. Peck*, 3 Cal. 75; *Tyron v. Sutton*, 13 Cal. 494; *Peters v. Foss*, 16 Cal. 357; *Lestrade v. Barth*, 19 Cal. 660; *Hooper v. Wells, Fargo & Co.*, 27, Cal. 35; *Pierson v. McCahill*, 22 Cal. 127; *Stringer v. Davis*, 30 Cal. 318; *Kirstein v. Madden*, 38 Cal. 158; *Bank v. Stover*, 60 Cal. 395; *Sharon v. Sharon*, 77 Cal. 105, 19 Pac. Rep. 230; *Railroad Co. v. Purcell*, 77 Cal. 72, 18 Pac. Rep. 886; *McPherson v. Weston*, 85 Cal. 93, 24 Pac. Rep. 733; *Chatfield v. Williams*, 85 Cal. 518, 24 Pac. Rep. 839. The case last cited—*Chatfield v. Williams*—is in most respects similar to this. There, as here, the answer had been on file for months, without demurrer or motion to strike out, and no notice was given until the parties were ready for trial upon the merits. In that case the amendment sought did not necessitate a continuance, while here it would have done so. In commenting upon that point, however, the court said: "It does not appear that any delay would have been caused by the proposed amendment; but, if there had been, the court could have required an immediate amendment, and imposed terms commensurate to the time and expense of the continuance." These remarks of the court are pertinent to the case in hand, and, had the court allowed the amendment upon such terms as would have compensated plaintiff for all the detriment he suffered in consequence thereof, it might properly have been said in response to any objection that the mistakes and misfortunes of defendants or their attorneys should not result in injury to plaintiff. I am of opinion the judgment appealed from should be reversed, and the court below directed to permit the defendant Lallah S. Highton to file her an-

¹Code Civil Proc. § 473, provides that the court may relieve a party from a judgment rendered against him through his excusable neglect.

swer, and the defendant Mansfield Lovell to amend his answer by setting up in positive terms, and not upon information or belief, the allegations set out in his proffered amendment.

We concur: **TEMPLE, C.; BELCHER, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed, and the court below is directed to permit the defendant Lallah S. Highton to file her answer within 30 days after filing remittitur, and the defendant Mansfield Lovell to amend his answer by setting up in positive terms the allegations set out in his proffered amendment.

(98 Cal. xvii)

GRIFFIN v. SCOOFFY et al. (No. 14,866.)
(Supreme Court of California. May 13, 1893.)

Department 1. Appeal from superior court, Del Norte county; **Jas. E. Murphy, Judge.**

Action by David R. Griffin against Ida M. Scooffy and others to establish right to purchase school lands. Judgment was rendered for plaintiff, and defendants Lallah S. Highton and Mansfield Lovell appeal. Reversed.

Chas. E. Wilson and R. W. Miller, for appellants. L. F. Cooper, L. F. Coburn, and Walter N. Linforth, for respondent.

PER CURIAM. This cause is in all respects, except in the name of the plaintiff and the land sought to be purchased, a counterpart of *Burns v. Scooffy*, (No. 14,805,) 33 Pac. Rep. 86, (this day decided on appeal.) Upon the authority of that case, and for the reasons given in the opinion therein, the judgment appealed from herein is reversed, and the court below directed to permit the defendant Lallah S. Highton to file her answer within 30 days after filing remittitur, and the defendant Mansfield Lovell to amend his answer as per his motion therefor, heretofore made in the court below, except that the allegations in such amendment be positive in form, and not on information or belief.

(98 Cal. 253)

WAINSCOTT v. OCCIDENTAL BLDG. & LOAN ASS'N. (No. 18,092.)

(Supreme Court of California. May 12, 1893.)

EQUITY—RESCISSION—FRAUDULENT REPRESENTATIONS.

1. In an action by the vendee to rescind a purchase of land on the ground of fraudulent representations by the vendor, where the findings show facts indicating that, because of the fraud, plaintiff has been injured many thousand dollars, they support a judgment for plaintiff, though no specific amount of damages is found.

2. In an action by the vendee to rescind the purchase of a vineyard because of fraudulent representations by the vendor, where it appears that when plaintiff visited the premises, prior to the purchase, the vines were not sufficiently developed for any person, not an expert, to learn their condition except by a critical examination; that plaintiff was prevented from making such examination by the misrepresentations of defendant's employe, and was prevented from seeking information from a former owner, who was on the premises, by representations that the latter was opposed to leaving the place, and by such inquiry the trade was liable to be broken up,—there is no pre-

sumption that plaintiff relied on his own judgment in making the purchase, instead of on the representations made by defendant.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; **A. P. Catlin, Judge.**

Action by F. S. Wainscott against the Occidental Building & Loan Association to rescind a purchase of land. Plaintiff had judgment, from which, and an order denying a new trial, defendant appeals. Affirmed.

Robt. T. Devlin, for appellant. S. Solon Holl, for respondent.

SEARLS, C. This is an action for the rescission of certain conveyances, and instruments connected therewith, growing out of an exchange of property owned by plaintiff, in the county of Placer, for a tract of land, with vineyard thereon, etc., owned by defendant, situated at Sonoma, in the county of Sonoma. The action is based upon false and fraudulent representations of defendant and its agents, whereby plaintiff is averred to have been defrauded. Plaintiff had judgment, from which, and from an order denying a new trial, defendant prosecutes an appeal.

The first point made by appellant is that the complaint does not allege, and the court does not find, that the plaintiff was damaged, and hence that the findings do not support the judgment. In view of the doctrine enunciated by elementary writers, and fully concurred in by the courts of probably every state of the Union, it will be readily admitted on all hands that courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral, and involving no pecuniary or tangible injury. Falsehood, fraud, and deceit are not to be commended; but, so long as their practice only involves a question of morals, the duty of their extirpation rests elsewhere than in the courts. But when they are made use of in the business transactions of life to accomplish a fraudulent purpose, as against those having a right to rely upon their truthfulness, and who do so rely, and are thereby deceived and injured, courts intervene to redress the wrong and injury. The reproof of the moral delinquency is but an incident, an attending circumstance, of the paramount object, viz. the redress of the injury. It is said in such cases: "If any pecuniary loss is shown to have resulted the court will not inquire into the extent of the injury. It is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable." Pom. Eq. Jur. § 898, and cases cited. Do the complaint and findings of the court show that plaintiff was damaged? Damage is defined to be "loss, injury, or deterioration caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property." Black, Law Dict. tit.

"Damage." The plural of the word "damages" signifies a compensation in money for a loss or damage. This action is not one to recover damages,—a money compensation. Doubtless, if plaintiff has a cause of action, he could have affirmed the contract, and sued for damages. He has, however, elected to seek a cancellation for the injury, the damage, sustained. A reference to a portion, only, of the findings, which follow substantially the allegations of the complaint, but are in some respects more full and explicit, will, it is thought, suffice to settle the question of damage: (1) Defendant was, and since December, 1888, had been, the owner of the property conveyed to plaintiff. (2) In May, 1890, its agent represented to plaintiff that he, as agent, but without disclosing his principal, had authority to dispose of the property for one Pickett, who lived upon the land as a tenant of defendant, and who wished to sell, by reason of his advanced age. (3) That the tract contained 43 acres, when in fact it contained but 37 acres, a street being included in the inclosure. (4) That 38 acres were set out in a vineyard with foreign varieties of grapes. That eight tons per acre was not an uncommon yield of grapes from these vines per annum. That the vines were healthy, and free from phylloxera. That the place had yielded an average income for 10 years of \$2,200 per year over and above all expenses. Whereas the truth was that the vineyard had not produced more than 18 to 20 tons of grapes per annum for several years. The vines had been attacked by phylloxera and other pests until three-fourths of them were dead, and the gross annual income had, for the last five or six years, gradually decreased from \$1,000 to \$600, which was little more than the expense of cultivation. That the vineyard was practically valueless, and had been leased to Pickett for the year 1890, who received the whole crop for taking care of the vineyard. (5) These and other statements were false, and known by defendant to be so when made, and were made with intent to deceive and defraud plaintiff. The latter relied upon their truthfulness, and was deceived and defrauded thereby into agreeing to purchase and in purchasing the property. It is hard to realize, in the face of these facts, that the plaintiff was not injured to the extent of many thousand dollars. The injury is shown to the court by the complaint and findings, and, although the technical word "damages" is not used, the record is replete with apt expressions of like import and significance. We find nothing in the cases cited under this head in conflict with the views expressed. *Wainwright v. Weske*, 82 Cal. 193, 23 Pac. Rep. 12, passed off upon the sufficiency of the complaint, and the court held, in substance, (1) that, treated as an action to rescind a contract, it was fatally defective, in not

showing an offer on the part of plaintiff to return certain money received by the plaintiff from defendant; (2) that, viewed as an action to recover damages, it was lacking in several elements essential to a recovery. He who would recover damages in a court of law must set forth in an orderly manner the facts showing his right to recover, and the amount to which he is entitled, to the exclusion of every presumption to the contrary. In such an action the damages are the essential thing. In an action to rescind upon the ground of fraud, the fraud is the essential thing; and while it must be coupled with loss, injury, damage, the precise amount of such damage is of secondary importance. Had plaintiff, in *Wainwright v. Weske*, averred a tender of the money received by him, and demanded the return of his notes and property, his complaint would have contained sufficient to entitle him to a rescission of the agreement. *Morrison v. Lods*, 39 Cal. 385; *Bailey v. Fox*, 78 Cal. 398, 20 Pac. Rep. 868; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. Rep. 386. *Purdy v. Bullard*, 41 Cal. 444, differed in essential particulars from the case in hand.

The second position taken by appellant is that, no matter what representations are made in reference to the character and value of the property by a vendor, if the purchaser visit the property itself, it being land, prior to the sale, and makes a personal examination of it touching those representations, he will be presumed to rely, not upon the representations, but upon his own judgment in making the purchase. *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. Rep. 771, sustains the proposition contended for; but in the same connection it is proper to say that this rule must be taken subject to the proviso that the vendor does nothing to prevent his investigation from being as full as he chooses. *Development Co. v. Silva*, 125 U. S. 259, 8 Sup. Ct. Rep. 881. The findings show that on May 5, 1890, plaintiff, with an employe of defendant's agent, visited the vineyard, but that at that time the vines, except a few acres of Tokays, were not sufficiently developed for any person not an expert vineyardist to learn their condition, except by close and critical examination, or by inquiring of those who knew their condition; that plaintiff was prevented by the deceit and misrepresentations of the employes from making a critical or close examination of the vineyard, and from speaking to or inquiring of the former owner, who was on the premises at the time, and who well knew the facts, it being represented that the former owner's wife was opposed to leaving the place, and if the plaintiff talked to her she was liable to break up the trade; and much more, tending to satisfy and prevent any examination. At a later period and before the deeds were executed, similar artifices were resorted to, with good effect, to prevent plaintiff from

again visiting the vineyard, as he desired to do, and that, too, when an examination would have demonstrated the worthless condition of the vines. Taken all in all, it is not made to appear that defendant should escape from the effect of the judgment. The offer to rescind was full and complete, and included a return of everything to which the defendant was entitled. The rules applicable to cases of this character are succinctly stated by Lamar, J., in *Development Co. v. Silva*, 125 U. S., at page 250, 8 Sup. Ct. Rep. 881, as follows: "(1) That defendant has made a representation in regard to a material fact; (2) that such representation is false; (3) that such representation was not actually believed by the defendant, on reasonable grounds, to be true; (4) that it was made with intent that it should be acted on; (5) that it was acted on by complainant, to his damage; and (6) that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true." These rules, properly construed, exclude such statements as consist merely of the expression of opinions, or judgment honestly entertained, and save in exceptional cases, also opinions and statements of vendor in respect to value. Tested in the light of these propositions, the judgment and order appealed from are correct, and should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

3 Cal. Unrep. 862

KELLENBERGER et al. v. MARKET ST. CABLE RY. CO. (No. 15,020.)

(Supreme Court of California. May 3, 1893.)

APPEAL—DISCRETION OF TRIAL COURT.

Where the evidence is dubious and conflicting, the court on appeal will not, although it may differ in opinion with the lower court, revise the action of the court below in granting or refusing a new trial, unless an abuse of discretion is shown.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Ida Kellenberger and husband against the Market Street Cable Railway Company to recover damages for personal injuries. From an order granting a new trial, defendant appeals. Affirmed.

E. L. Craig, Frank Shay, and R. B. Carpenter, for appellant. W. H. H. Hart, A. R. Cotton, and J. C. McKee, for respondents.

SEARLS, C. This is an appeal from an order granting a new trial. The action was brought to recover damages for injuries al-

leged to have been received by Ida Kellenberger, wife of her coplaintiff, on the 8th day of April, 1890, while a passenger on the cablecar of the defendant. Plaintiff was on a Hayes street car, the gripman of which, as he approached the crossing of the Sutter street cable road on Larkin street, should, it appears, have "let go," or released the cable, but was diverted from doing so by the perilous situation of a pedestrian on the track, and as a result did not let go until he went over the pulley, and then could not do so, and the grip struck the bumper in the Sutter street track, producing a concussion by which, as is alleged, plaintiff was thrown from her seat and against one of the seats on the opposite side of the car, and thereby injured.

Two issues only of importance are made by the pleadings: (1) Was defendant guilty of negligence? (2) Was plaintiff injured thereby? Manifestly both of these issues needed to be answered in the affirmative, to entitle plaintiff to recover. For if defendant was not negligent, or if, being negligent, plaintiff was not injured thereby, there is no cause of action. The court below must have concluded that there was evidence sufficient to establish the affirmative of both the propositions. Looking at the case as presented here upon the cold record, and it must be said: (1) That plaintiffs made a case entitling them to a verdict. (2) The case made by the defense on its face was sufficient to fully justify the jury in the belief that the injuries of plaintiff were simulated, and to uphold the verdict in favor of defendant. The opportunity of the court below to determine as to the credibility of witnesses, the bias and prejudice, if any, exhibited by them, and generally to divine the truth in the conflicting evidence presented, gave him a decided advantage over us when seeking the same object. It has long been held that, where the evidence is dubious and conflicting, the supreme court will not, although it may differ in opinion from the lower court, revise the discretion of the court below in granting or refusing a new trial, unless there is abuse of such discretion. *Taylor v. McKinley*, 4 Cal. 104; *Walton v. Maguire*, 17 Cal. 92; *Low v. McCallan*, 64 Cal. 2, 27 Pac. Rep. 787; *Savage v. Sweeney*, 63 Cal. 340. A large number of cases might be cited to like effect, but these will suffice. The evidence presented a substantial conflict, and we are not prepared to say there was an abuse of discretion by the court below in granting a new trial. The order appealed from should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(3 Cal. Unrep. 865)

JACOBS v. WALKER. (No. 14,976.)

(Supreme Court of California. May 13, 1893.)

**CONTEST OF RIGHT TO PURCHASE STATE LANDS—
NEW TRIAL AFTER REVERSAL ON APPEAL.**

1. The fact that plaintiff's application to purchase state land, of some portion of which he is in possession, has been adjudged invalid, and that it has been determined that he has no right to purchase, makes him none the less a proper party to proceedings to determine a contest inaugurated by a protest in the surveyor general's office against the purchase of the land by defendant. *Garfield v. Wilson*, 15 Pac. Rep. 620, 74 Cal. 175, and *Perri v. Beaumont*, 27 Pac. Rep. 534, 91 Cal. 30, followed.

2. The amendatory act of 1885, which does not require an application to purchase state land, not suitable for cultivation, to state that the applicant is an actual settler, does not cover applications made before its enactment, and render unnecessary proof that one previously applying is an actual settler, as required by the old statute.

3. Where, on appeal, a new trial is ordered without limitation for a specified reason, the new trial should not be limited to the one issue discussed. *Chandler v. Bank*, 61 Cal. 401; 4 Pac. Rep. 502, 65 Cal. 498; 11 Pac. Rep. 791, 14 Pac. Rep. 864, and 73 Cal. 317, —distinguished.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; Robert McGarvey, Judge.

Proceedings by Abner D. Jacobs against J. B. Walker to determine their right to purchase state lands. From a judgment for defendant and order denying a new trial, plaintiff appeals. Reversed.

T. L. Carothers, for appellant. J. A. Cooper, for respondent.

TEMPLE, C. This a contest in regard to the right to purchase state land, and this is the second appeal to this court. 90 Cal. 43, 27 Pac. Rep. 48. On the first trial it was found that plaintiff in his application to purchase had falsely stated that there was no possession of any portion of the land adverse to his possession. It was found that in every other respect the matters stated in his application were true, but because of the one false statement it was adjudged that his application was invalid. This finding was affirmed on the former appeal. As to the defendant it was said that there was no finding that he was an actual resident upon the land, nor did it appear that there might not be some part of the land, equal to a legal subdivision, which was suitable for cultivation. The judgment was therefore affirmed as to plaintiff's claim, and as to the defendant it was reversed, and a new trial ordered. The complaint shows that the land in dispute is a part of a thirty-sixth section. That the defendant applied to purchase on the 23d of February, 1883, which application was approved May 3, 1883, and a certificate of purchase issued to defendant June 16, 1883. That plaintiff made his application May 6, 1884, and at the same time filed with the surveyor general a verified protest in writing

against the issuance of any further evidence of title to the defendant. Attached to the complaint is the certificate of the surveyor general to the fact of the protest, and referring the contest to the courts for determination. Defendant's answer falls to deny that there was a protest, and that there was is found by the court. Yet respondent in his brief claims that plaintiff has not protested, and that the contest was not inaugurated in the state land office. He contends that as it was adjudged that the plaintiff's application to purchase was invalid, and it has been determined that he has no right to purchase, the contest is ended so far as plaintiff is concerned, and he is out of the case. Of course, if this be so, plaintiff is not a party, and cannot appeal. It would seem, also, that, if the contest inaugurated by plaintiff's protest is ended, the courts have no further jurisdiction of the matter. For where there is no contest, the surveyor general must himself determine such questions as arise. As authority for this proposition he cites *Ramsey v. Flournoy*, 58 Cal. 260. But that case was expressly overruled in *Perri v. Beaumont*, 91 Cal. 30, 27 Pac. Rep. 534. So far as this question is concerned, I am unable to find any difference whatever in the last-named case and this. In both, the contest was inaugurated by a protest in the surveyor general's office by one who appeared on the face of the record to have made no valid application to purchase, though both had filed formal applications, and both were found to be in possession of some portion of the land. And in these respects both cases seem to be exactly like *Garfield v. Wilson*, 74 Cal. 175, 15 Pac. Rep. 620. In those cases this point was fully discussed, and the matter need not be again considered. According to those cases, plaintiff is a proper party, and is entitled to be heard.

Respondent further contends that the specifications in the notice of the motion for a new trial, which was made upon the minutes of the court, as to the alleged insufficiency of the evidence, are defective. One is to the effect that there was no evidence tending to show that the defendant was an actual settler upon the land, when he applied to purchase. At the time defendant made his application to purchase, 1883, it was necessary to state in the application that he was an actual settler upon the land. Of course, unless this statement were true, he had no valid application to purchase, and he would be left in the same position as the plaintiff. The statute was amended in 1885, so that this statement was not required when the lands were not suitable for cultivation. This does not cover applications made before that time which were invalid when made. This defect in the findings was noticed on the last appeal, but as it was not important, since a new trial was ordered, the consequences of such failure were not commented on. But this was a material issue on the last trial, and, if there was no evidence upon that issue, the

case must be reversed. This specification is therefore sufficient.

The statement shows that there was no evidence whatever upon this subject, and that there was not because the learned judge concluded that a new trial was ordered only upon the one issue,—whether the land was suitable for cultivation. I see no warrant for such a conclusion. The judgment here ordered a new trial, and there was no hint at any restriction as to the scope of such new trial. The order is in the usual form, and there is no more justification in claiming that the new trial was to be limited than in the numerous cases in which the same language is used, found in every volume of our Reports. It is not uncommon to send back a cause for a new trial because the court has failed to find upon some one material issue. Yet no one ever supposed, because the particular defect was specially pointed out in the opinion, that the new trial was limited thereby to the one issue discussed. The opinion is not the judgment, although it may constitute the law of the case. When a new trial is ordered without limitation, it must be understood, as it always has been, that a new trial is ordered in the whole case. It is said that the court based its action on the case of *Chandler v. Bank*, which was three times appealed to this court. 61 Cal. 401; 65 Cal. 498, 4 Pac. Rep. 502; 73 Cal. 317, 11 Pac. Rep. 791, and 14 Pac. Rep. 864. I see no similarity in the cases, and, if the case cited were authority for the position, it would simply be one case against a thousand others running through the entire Reports. But that case is not authority for the position. On the first appeal the court noticed that the findings sustained the judgment in all respects except as to the matter of interest, and it was adjudged that the case be reversed, and remanded for further proceedings in accordance with the opinion. The doubt as to the meaning of this order arose from the fact that the court did not award a new trial. The lower court did not understand what the further proceedings could be when a new trial was not ordered. It therefore refused to retry the case, but simply struck out certain interest, which the findings did not show could be legally charged, and refused to receive further evidence which would show that the interest was authorized in accordance with the requirements of our statute. A new appeal was taken, and an opinion rendered, which, as I think, was unfortunately worded. The writer of the opinion, Judge Thornton, thought it held that a new trial was awarded in the whole case. But the trial court understood it as holding that a new trial was to be had on one issue only, and that conclusion was sustained by a majority of this court on the third appeal, Judge Thornton dissenting. The case went off upon some unfortunate use of language, but on no possible construction is it authority for the course pursued in this case, where a new trial

was ordered without restriction. No such new trial has been had, and therefore a discussion of other interesting questions suggested would be premature. I think the judgment and order should be reversed, and a new trial had.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

98 Cal. 281

GANCEART v. HENRY. (No. 14,554.)
(Supreme Court of California. May 16, 1893.)
MORTGAGES—REDEMPTION—ABSOLUTE DEED—APPEAL.

1. In an action to have a deed absolute in form declared a mortgage, and to redeem from the same, the complaint must show that the money claimed to have been secured by the deed is payable.

2. Amending a complaint after a demurrer is sustained waives objections to the ruling on the demurrer.

3. An order denying a motion to strike out a pleading, unless made in the absence of the party complaining, is not within Code Civil Proc. § 647, which provides that certain decisions and orders are deemed to have been excepted to.

4. To establish that a deed absolute on its face was given as security for a debt, the testimony, if parol in character, should establish a clear case.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by Frank Ganceart against J. B. Henry to have a deed absolute in form declared a mortgage. Judgment was rendered for defendant, and a motion for a new trial was denied. Defendant appeals. Affirmed.

G. W. Bowie and A. H. Griffith, for appellant. W. S. Tinning, for respondent.

SEARLS, C. Appeal from a judgment in favor of defendant, and from an order denying a motion for a new trial. The action was brought to have an absolute deed executed by plaintiff to defendant October 4, 1886, conveying a lot of land in the town of Alamo, county of Contra Costa, Cal., adjudged to be a mortgage, and to permit the plaintiff to redeem, and to require the defendant to execute a deed of conveyance to the plaintiff. The complaint, in apt language, set out, in substance, that on the 4th day of October, 1886, defendant loaned him \$400, plaintiff to pay interest thereon at 1 per cent. per month, and that as security for the payment thereof to defendant he, the said plaintiff, executed to defendant a deed of bargain and sale, absolute in form, but understood and agreed to be and operate as a mortgage, etc. The complaint failed to show when the \$400 averred to have been loaned fell due, or that it was in fact due and payable. Defendant demurred to the complaint, which de-

murrer was sustained by the court, with leave to plaintiff to amend, and in due time he filed an amendment to his complaint. Defendant answered denying all the allegations of the complaint, averred ownership of the conveyed property in himself. He also filed a cross complaint, showing ownership of the premises in himself, possession in plaintiff under a lease from month to month, a wrongful holding over, etc., and asked for judgment of restitution, etc. Defendant filed his answer and cross complaint on the 5th day of August, 1890, and afterwards, on the 15th of September, 1890, without leave of the court, so far as appears, he served and filed an amended answer and cross complaint. Plaintiff moved to strike out these amended pleadings upon the grounds that they were filed without leave of the court, and that they were sham and irrelevant, etc. The motion to strike out was denied by the court, and the ruling is assigned as error. The cause was tried by the court without the intervention of a jury, and the findings negative the theory of the plaintiff that a loan was made to him by defendant, and the deed given as security therefor, and uphold the position of defendant that the transaction was an absolute sale and conveyance absolute, etc.

The first error assigned by appellant is that the court erred in sustaining the demurrer to the complaint. There are two answers to this contention: (1) The court did not err in sustaining the demurrer. The complaint failed to show that the money averred by plaintiff to have been by him borrowed from the defendant was due and payable, non constat, but that the action was prematurely brought. (2) By amending his complaint after demurrer sustained, plaintiff waived the error, if any, in the ruling by the court. *Gale v. Tuolumne W. Co.*, 14 Cal. 26.

The refusal of the court to strike out the amended answer and cross complaint is assigned as a further error. This assignment of error cannot be considered, for the reason that an order refusing to strike out a pleading is not one of the orders or decisions which are deemed to have been excepted to by section 647 of the Code of Civil Procedure, except when made in the absence of the party complaining. The record fails to show either that appellant excepted to the ruling of the court, or that he was absent when it was made. No bill of exceptions was prepared embodying the action of the court in the premises, without which the notice, motion to strike out, and order of the court refusing such motion, did not become a part of the judgment roll under section 670, Code Civil Proc. In the statement on motion for new trial no allusion is made to the motion to strike out the amended pleadings or the action of the court thereon. In the assignment of errors by counsel, on his motion for a new trial, and which, according to the recital, were "errors of law, duly excepted to,"

is that "the court erred in denying plaintiff's motion to strike out the defendant's amended answer and cross complaint in this case filed and served the 12th day of September, 1890." This, considered as an assignment or specification of error, is sufficient, but it affords no proof that any such action was ever had. It may be likened to an indictment or information in a criminal case, which fills an important office in the proceedings, but which, in the absence of proof, is impotent to convict.

The other specifications of error go to the sufficiency of the evidence to authorize the decision in favor of the defendant. The evidence was quite full as to the nature of the transaction, and whether it was a loan of money by the defendant, and the taking of a deed, absolute on its face, merely as security, or an absolute sale, was one upon which there was a sharp and substantial conflict in the testimony. The court below found in favor of defendant, and we are not authorized, under such circumstances, in disturbing the findings. A deed of conveyance absolute on its face is certainly some evidence that the transaction is what it purports to be, viz. a sale. To establish an equity superior to the deed, and authorize a determination that the deed was given as security for an existing debt, the testimony, if parol in character, should establish a clear case. *Hopper v. Janes*, 29 Cal. 19; *Henley v. Hotaling*, 41 Cal. 22. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(98 Cal. 268)

GALVIN v. GUALALA MILL CO. (No. 14,404.)

(Supreme Court of California. May 13, 1893.)

NEGLECT—SETTING OUT FIRES—PRESUMPTIONS.

Under Pol. Code, § 3344, providing that every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, shall be liable in treble damages to the party injured, negligence will not be presumed because the fire started on defendant's land.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; Robert McGarvey, Judge.

Action by M. J. C. Galvin against the Gualala Mill Company for damages for setting out a fire. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

J. A. Cooper, for appellant. H. A. Powell and T. L. Carothers, for respondent.

HAYNES, C. Appeal from the judgment, and from an order denying defendant's mo-

tion for a new trial. The complaint states two causes of action for the destruction of tan bark, cord wood, etc., by fires alleged to have been negligently set by the defendant upon its own land, and for its own convenience, and which it negligently permitted to escape and to extend to plaintiff's land; the first occurring October, 1887, and the second, July 30, 1889. The value of the property destroyed by the first fire is alleged to be \$198, and, by the second, \$800, and treble damages are prayed for. The jury returned a verdict for the plaintiff, and fixed the damages at \$775. At the close of plaintiff's evidence, defendant moved for a nonsuit upon several specific grounds, the substance of which is that the evidence failed to show that the defendant negligently, or otherwise, set fire to its own, or any, woods, or that it negligently, or otherwise, permitted the fires to escape from its land. The motion was denied, and defendant excepted.

There was some evidence tending to show that the fires originated on defendant's land, but none that they were started by the defendant, unless it could be inferred from the fact (itself doubtful) that they originated on its land. But, however that may be, there was not a scintilla of evidence that the fires were started negligently, or for an unnecessary purpose, or that due care was not exercised to prevent the fires from spreading to other lands; and without negligence, either in starting the fires, or in permitting them to escape or get beyond defendant's lands, no recovery can be had. Section 3344 of the Political Code provides: "Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured." This action was brought under the above section of the Code, and the burden of proof was upon the plaintiff. Under it the actual damages sustained are trebled, not as a compensation to the plaintiff, but as a punishment to the defendant for his negligence; not for doing a lawful act in a careful and proper manner, which, without his fault, inflicts an injury upon another. Negligence is the essential fact, and must be proved. For a construction of section 3344 of the Political Code, and of the other statutes cited by respondent, and hereinafter noticed, see *Garnier v. Porter*, 90 Cal. 105, 27 Pac. Rep. 55. Respondent contends, however, that "proof of setting the fire is sufficient, and is itself proof of negligence," and cites section 384 of the Penal Code: "Every person who willfully or negligently sets on fire, or causes or procures to be set on fire, any woods, prairies, grasses, or grain on any lands, is guilty of a misdemeanor." This section will bear no such construction. It is penal, and in such statutes the word "willfully" means with evil intent, or with legal malice, or with a bad purpose. Counsel for respondent also cites the act of February 13, 1872, for

the purpose of showing that it is unlawful to set fires in woods. But that act relates only to public lands belonging to this state or the United States, and is also penal, and applies to those who "shall willfully and deliberately set fire," etc. It is quite true, as counsel say, that where damage is caused by an unlawful act no negligence need be proven. But the complaint does not allege that defendant "unlawfully" set the fire, or unlawfully permitted it to spread to plaintiff's land, while his argument seems to concede that he has not proven negligence, unless it can be inferred from the fact of the fire having originated upon defendant's land, non constat that the fire may have been purely accidental, or occurred through the negligence of a hunter, or been maliciously set by a third person, for whose acts defendant is not responsible. A plaintiff must prove every material fact which goes to constitute his cause of action. Proving loss alone is not sufficient. The evidence introduced by defendant after the motion for nonsuit was denied did not supply the defects in plaintiff's evidence, and the verdict was therefore not justified. The judgment and order appealed from should be reversed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

3 Cal. Unrep. 869

GALVIN v. GUALALA MILL CO. (No. 14,414.)

(Supreme Court of California. May 13, 1893.)

NEGLIGENCE—SETTING OUT FIRES—TREBLE DAMAGES—MANNER OF FIXING.

Since Pol. Code, § 3344, providing for treble damages to the party injured by the negligent setting out of fires, is silent as to whether the jury shall find such damages, or whether they shall find the actual damage, and the court shall enter judgment for three times such amount, it is immaterial which course is pursued, provided absolute certainty is attained, and this can be secured by preparing the form of verdict.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; Robert McGarvey, Judge.

Action by M. J. C. Galvin against the Gualala Mill Company for damages for setting out a fire. From an order denying his motion that judgment be entered for three times the amount named in the verdict, plaintiff appeals. Appeal dismissed.

J. A. Cooper, for appellant. H. A. Powell and T. L. Carothers, for respondent.

HAYNES, C. This appeal is from a judgment rendered in favor of appellant, because of the refusal of the court to treble the damages found by the jury in his favor. The action is based on section 3344 of the Political Code, and the complaint charges that cer-

tain property of the plaintiff, consisting of tan bark, cord wood, etc., was destroyed by a forest fire negligently started by the defendant on its own land, and which defendant negligently permitted to spread to other lands, whereby said property was destroyed. The jury returned the following verdict: "We, the jury in this cause, find a verdict for the plaintiff, and fix the damages at \$775." Plaintiff, before judgment had been entered, moved the court for an order directing judgment to be entered for three times the amount named in the verdict, which motion was denied, and plaintiff took a bill of exceptions. The question presented on this appeal is of no importance, so far as the action of the court, complained of, affects the parties, inasmuch as the defendant appealed from the same judgment, and from an order denying its motion for a new trial, and upon that appeal the judgment and order have been reversed. See *Galvin v. Mill Co.*, 33 Pac. Rep. 93 (No. 14,404, this day filed.) However, in view of the possibility of a new trial, it may be said that the Code is silent as to whether the jury shall find treble damages, or whether they shall find the actual loss or damage, and the court enter judgment for three times that amount. We think it immaterial which course is pursued, provided absolute certainty is attained, and this can be secured by preparing the form of the verdict. Respondent, on this appeal, contends that an instruction given to the jury at plaintiff's request, together with the form of the verdict, left it uncertain whether the jury had trebled the damages or not, and if that were true the motion was properly denied. As the judgment has already been reversed upon defendant's appeal, this appeal should be dismissed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

98 Cal. 264

JORDAN v. FAY. (No. 15,087.)

(Supreme Court of California. May 13, 1893.)

QUIETING TITLE—WHO MAY SUE—HUSBAND AND WIFE—COMMUNITY PROPERTY—INTEREST OF SURVIVING HUSBAND—DEEDS—CONSTRUCTION AND EFFECT.

1. Code Civil Proc. § 1452, provides that devisees may themselves, or jointly with the executor or administrator, maintain an action to quiet title against any one except the executor or administrator. *Held*, that the grantee of a devisee could maintain such action. Page v. Tucker, 54 Cal. 121, distinguished.

2. Hittell's Gen. Laws, §§ 3564, 3573, providing that property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property, and on the dissolution of the community by the death of the wife the entire common property shall, without administration, go to the surviving husband,—declared a rule of property, and titles already

vested were not disturbed by Civil Code, § 164, as amended in 1889, providing that all other property acquired after marriage by both husband and wife is community property, but, in case the conveyance is to a married woman and her husband, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument.

3. Where an undivided quarter interest in land was conveyed to a man and his wife, and on her decease he took the community property, his deed for an undivided half interest in the land should not be construed to mean the undivided half of the quarter interest, but conveyed all his interest, since, as the greater includes the less, the undivided half necessarily included the undivided quarter.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by John Jordan against Thomas J. Fay to quiet title. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

James Gartlan, for appellant. Lippitt & Lippitt, for respondent.

BELCHER, C. The plaintiff commenced this action on the 19th day of January, 1891, to quiet his title to 547 acres of land in Sonoma county. In the complaint filed Philip S. Fay was named as a party defendant, but as to him the action was subsequently dismissed. The complaint alleged that the plaintiff was the owner in fee simple absolute, and in possession of the property described, and the answer of defendant, Thomas J. Fay, only denied this allegation. The facts of the case may be briefly stated as follows: Edward P. Fay, being the owner of the undivided three-fourths of the property described, died in January, 1872, leaving a last will and testament, by which he devised to Maria Kate Fay, his wife, all of his estate. The will was admitted to probate, and Mrs. Fay was duly appointed executrix thereof. By the will no power was conferred on the executrix to sell any property of the estate, nor was she ever authorized by the court to make any sale thereof, nor was any sale made by her ever confirmed by the court. And when this action was commenced the administration of the estate had not been settled or closed. Prior to the time of Edward P. Fay's death, the other undivided one-fourth of the said property was conveyed to William Fay and Bridget Fay, his wife, for the expressed consideration of \$500. In December, 1872, Bridget Fay died intestate, leaving surviving her her husband and three sons, of whom the defendant, Thomas J. Fay, was one. It does not appear from the record what was done with her estate, except that "the proceedings and record in the matter of the estate" show that she died intestate, "leaving an undivided interest in real estate in Sonoma county, California, and admitted to refer to the lands in controversy, and that her estate had not been settled or

distributed." On December 11, 1880, William Fay and Jeremiah G. Fay, one of the sons, conveyed "their undivided half interest in said lands" to Maria Kate Fay, and on September 27, 1883, the latter executed to Charles F. McDermott a deed purporting to convey to him the whole property described in the complaint, and on the same day McDermott executed a like deed to the plaintiff. Ever since the plaintiff purchased the said lands in 1883 he has been in the open and undisputed possession thereof, and has paid all taxes and assessments thereon, and the defendant and heirs of Bridget Fay have never lived on the land, nor demanded possession of the same, or any part thereof, from the plaintiff. The court found the facts to be substantially as above stated, and gave judgment for the plaintiff, from which, and from an order denying his motion for a new trial, defendant appeals.

In support of the appeal it is contended that, as the plaintiff alleged that he was the owner in fee simple absolute of the premises in controversy, the burden was upon him to prove that fact before he could recover, and that his proofs were insufficient to establish such ownership, as to the undivided three-fourths interest owned by Edward P. Fay at the time of his death, for the reason that it appeared that the estate was never settled, nor the property distributed. This contention cannot be sustained. When Fay died his title to the property at once vested in Mrs. Fay, who was made sole legatee by the will, subject only to the payment of the claims of creditors against the estate and the expenses of administration. Section 1452 of the Code of Civil Procedure provides that "the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator." Unquestionably, therefore, Mrs. Fay, if she had not conveyed away the property, could, as devisee, have maintained an action to quiet her title to it; and the plaintiff, having acquired her title, must be held to have the same right. Besides, it does not appear that there were any unpaid claims or expenses when Mrs. Fay made the conveyance in 1883, and presumably there were none. The case of *Page v. Tucker*, 54 Cal. 121, cited by appellant, is not in point. In that case the action was brought by the administratrix of an estate to recover possession of real property which the grantee of a devisee had taken possession of; and it was held that during the administration, and until distributed, partial or final, the executor or administrator is entitled to have the possession of the property left by the deceased.

It is also contended that when Bridget Fay died she and her husband, William Fay, were the owners as tenants in common of the undivided one-fourth of the property in con-

troversy, and that when she died intestate her interest descended to her heirs, of whom defendant was one. This position is rested upon section 164 of the Civil Code, as amended in 1889. The section referred to, before the amendment of 1889, simply provided that "all other property acquired after marriage by either husband or wife or both is community property." The amendment added: "But whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument." The one-fourth interest in the property was conveyed to William and Bridget Fay, and the latter died before the Codes took effect. At that time the statute provided that "all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property;" and also that, "upon the dissolution of the community by the death of the wife, the entire common property shall, without administration, go to the surviving husband." Hittell's Gen. Laws Cal. §§ 3564, 3573. Under this statute it was many times held by this court that there is a legal presumption that all property acquired by husband or wife after marriage was community property, in the absence of clear and convincing proofs that it was acquired in one of the ways specified in the statute, or was taken in exchange for separate property. It is argued, however, that this presumption was only a rule of evidence, which cast the burden of proof upon the party claiming under the wife, and that the legislature had power to change it at any time, and did change it by the amendment of the Code above referred to, so as to shift the burden upon the other side. But the rule declared by the statute was more than a rule of evidence; it was a rule of property as well; and we do not think the legislature intended or had the power to change it so that it would be retroactive in effect, and disturb titles already vested. To hold otherwise would probably upset many titles in this state, and in some cases work out great wrong and injustice. We conclude, therefore, that William Fay was the owner of the one-fourth interest after his wife's death, and had the power to convey it as he did.

But, conceding this to be so, it is further claimed that the deed executed by William Fay to Maria Kate Fay on December 11, 1880, only purported to convey an undivided half interest in the property, and that this should be construed to mean the undivided half of the quarter interest which was conveyed to him and his wife. It appears, however, as we have seen, that when he made

the dead, the title to the whole quarter interest was vested in him, and, as the greater includes the less, the undivided half must necessarily include the undivided quarter.

The other points made by appellant do not require special notice. In our opinion, the findings were sufficient, and were justified by the evidence, and we therefore advise that the judgment and order be affirmed.

I concur: SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

3 Cal. Unrep. 871

PATTON et al. v. THOMSON. (No. 15,019.) (Supreme Court of California. May 13, 1893.)

FORECLOSURE OF MORTGAGE—RECOVERY OF PROCEEDS OF VOID SALE—SUFFICIENCY OF COMPLAINT.

A complaint in an action by a mortgagor to recover, under Code Civil Proc. § 957, the proceeds of a foreclosure sale set aside on appeal, alleged that foreclosure proceedings were commenced against plaintiff, in which defendant, a second mortgagee, was joined as a party, and filed a cross complaint asking a foreclosure of his mortgage; that an order of sale on the judgment foreclosing both mortgages "was duly issued by the clerk, * * * and was thereupon delivered to the sheriff," who sold the land to defendant, and after paying the first mortgage "there remained the sum of \$3,080." Held, that the complaint was demurrable, as it did not show that the sheriff had applied any part of the proceeds of such sale to the satisfaction of defendant's debt.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; Robert McGarvey, Judge.

Action by Milo Patton and James A. Foster, administrators of James H. Patton, deceased, against David Thomson, to recover the proceeds of a void foreclosure sale. From a judgment for defendant, plaintiffs appeal. Affirmed.

T. L. Carothers, for appellants. J. A. Cooper, for respondent.

VANCLIEF, C. In this case a demurrer to the complaint was sustained by the court below, and, as plaintiffs declined to amend, judgment passed for defendant. Plaintiffs bring this appeal from the judgment on the judgment roll, and contend that the court erred in sustaining the demurrer. The material substance of the complaint may be briefly stated as follows: In May, 1887, George E. White commenced an action to foreclose a mortgage executed by Milo Patton and J. H. Patton on a tract of land owned by them, to which action the defendant herein, David Thomson, was made a party defendant on the ground that he claimed a subsequent lien upon the mortgaged land. Thomson appeared, and filed a cross complaint setting up his subsequent mortgage executed by Milo and J. H. Patton on the same land, and pray-

ing that it be foreclosed, but failed to serve his cross complaint on the Pattons, his codefendants, against whom he prayed for such relief. In October, 1887, the Pattons having failed to answer or appear, the court decreed a foreclosure of each mortgage, ordered a sale of the land, and directed the proceeds of the sale to be applied—First, to the payment of \$5,127 found due on White's prior mortgage; and, second, to the payment of \$4,500.34 found due on Thomson's subsequent mortgage; and further ordered the docketing of a judgment in favor of Thomson against the mortgagors for any deficiency, etc. On November 28, 1887, in pursuance of the order of sale, the sheriff sold the mortgaged land to Thomson for the sum of \$8,400, and, no redemption having been made within the time limited by law, conveyed the land to Thomson. In September, 1888, the mortgagors (the Pattons) appealed from the judgment of foreclosure, whereupon, in December, 1890, so much of the decree as pertained to the foreclosure of Thomson's mortgage, and the docketing of a judgment in his favor, was reversed, and "the cause remanded," for the reason that Thomson's cross complaint had not been served on the mortgagors. 87 Cal. 151, 25 Pac. Rep. 270. The remittitur was filed in the lower court January 17, 1891, but it is not alleged whether or not there has been any further proceeding in the case since the filing of the remittitur. The proceeds of the sale of the mortgaged property (\$8,400) exceeded the amount necessary to satisfy White's prior mortgage and costs by the sum of \$3,080.32, but what disposition was made of this excess is not alleged. J. H. Patton having died December 1, 1890, letters of administration upon his estate were issued to James A. Foster May 26, 1891. Upon these facts the plaintiffs demand judgment against the defendant for \$3,080.32, the excess of the proceeds of the foreclosure sale after payment of White's prior mortgage and costs.

The appellants found their right of action upon the second clause of section 957 of the Code of Civil Procedure, which provides that in cases of reversal or modification of a judgment "the appellant may have his action against the respondent enforcing [who may have enforced] the judgment, for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale." The words in brackets are inserted in the above quotation as expressive of the intended meaning of the word "enforcing," immediately preceding, and for the same purpose a comma is inserted after the word "judgment;" for it could not have been intended that the "relief" which the appellant may have under this clause is the "enforcing" of the judgment which had been reversed or modified. The complaint shows that there were two judgments of foreclosure,—one in favor of the plaintiff White, foreclosing his prior mortgage, and the other in favor of the defendant, Thomson, on his cross complaint,

foreclosing his junior mortgage; but it is not alleged that Thomson ever enforced his judgment, nor that it ever was enforced. The allegation is that "an order of sale upon the judgment so rendered in said action of George E. White against Milo Patton, J. H. Patton, David Thomson, and Henry Marks was duly issued by the clerk of said court, and was thereupon delivered to the sheriff." Not even the substance of the order of sale, or any part thereof, is stated. In all this there is no implication that the sheriff was ordered to sell, or did sell, by virtue of the decree in favor of Thomson in his cross action, nor that the sheriff applied any part of the proceeds of the sale to the satisfaction of Thomson's mortgage. From the allegations that the sheriff sold the land to Thomson for \$8,400, and, after satisfying the decree in favor of White, "there remained the sum of \$3,080.32," the presumption is that Thomson paid to the sheriff the full sum of the purchase money, and that the excess of \$3,080.32 "remained" with the sheriff, who, for aught that is alleged, may have held it for the use, and subject to the order of, the plaintiffs herein. I think the court did not err in sustaining the demurrer, and that the judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

98 Cal. 278

PEOPLE v. BONNEY. (No. 20,964.)

(Supreme Court of California. May 13, 1893.)

BURGLARY—INSTRUCTIONS.

On a trial for burglary, where the only evidence for the prosecution is the testimony of an admitted accomplice and that of another as to defendant's oral admissions, it is error to refuse an instruction "that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution," as such is a proper occasion, within Code Civil Proc. § 2061, authorizing such instruction to be given "on all proper occasions." *People v. O'Brien*, 31 Pac. Rep. 45, 96 Cal. 171, distinguished.

Department 1. Appeal from superior court, Nevada county; John Caldwell, Judge.

Charles Bonney was convicted of burglary, and appeals. Reversed.

H. McCormack and J. M. Walling, for appellant. Wm. H. H. Hart, Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of the crime of burglary in the second degree, and has appealed from the judgment entered against him, and from an order denying his motion for a new trial. At the trial the only witnesses for the prosecution were Joseph A. Sargent and George F. Seibert. Sargent testified that he owned a cabin, in which he lived alone, and that

in his absence some one entered it through a window, and took and carried away a few articles of small value; that subsequently defendant admitted to him that he and the witness Seibert entered the cabin, and took and carried away the said articles. Seibert testified that he was a boy 12 years old, and, in effect, that he and defendant together committed the offense charged. Defendant, as a witness in his own behalf, denied that he went into Sargent's cabin at all, or took away any of the missing articles, or broke or opened the window for the boy to go in, or knew of his going in, until afterwards; and also denied that he ever told Sargent that he had been through his place. Sargent was again called as a witness in rebuttal, and, among other things, testified that he did not tell the father of defendant that defendant denied being in his house, and told him he was not in it. The father was then called as a witness, and testified that he went to the house of Sargent, and had a talk with him about the matter, and "he told me that he did not know that my boy had been in the house; that the boy told him he was not in the house."

The defendant asked the court to give to the jury, among others, an instruction reading as follows: "The jury are instructed that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution." The court refused to give the instruction, and the defendant duly excepted. The instruction asked is in the exact language of subdivision 4 of section 2061 of the Code of Civil Procedure, and the section provides that such an instruction should be given to the jury "on all proper occasions." It is urged for the appellant that the refusal to give the instruction was a prejudicial error, and the only answer to this point by the attorney general is that the provision of the Code authorizing such an instruction is unconstitutional, because it requires the court to charge "with respect to matters of fact," which, by article 6, § 19, of the constitution, it is forbidden to do; citing *Kauffman v. Maier*, 94 Cal. 282-284, 29 Pac. Rep. 481; and *People v. O'Brien*, 96 Cal. 171, 31 Pac. Rep. 45. In the case first cited a long and rambling instruction about oral admissions was given to the jury, and this court held it to be improper, saying: "The instruction above quoted is, in substance, an argument to the jury 'with respect to matters of fact' that had been presented at the trial, and a comment by the court upon the weight which they should give to that testimony." In the case last cited, an instruction identically the same as that asked here was given at the request of the prosecution, and this court said: "The Code authorizes this instruction to be given to the jury on all proper occasions. Code Civil Proc. § 2061. But we do not think

that this was a proper case for such an instruction, although it may be proper to give it in a case where the witness has been called by the people;" citing section 1111 of the Penal Code. The principle upon which it was held in that case that the court erred in giving the instruction made it error for the court to refuse the instruction in the present case. In that case the accomplice had been called as a witness on behalf of the defendant, and it was held that for that reason it was not a "proper occasion" to give the jury this instruction, since it told the jury in effect to discredit one of the defendant's witnesses. For the court, however, to discredit one of the defendant's witnesses before the jury is very different from giving them an instruction in his favor. One of the chief principles in criminal jurisprudence wherever the common law prevails is not only that the accused shall be presumed innocent until the moment of his conviction, but also that every fact necessary to constitute the crime of which he is accused shall be established by the prosecution by evidence competent therefor, before he shall be called upon to establish his innocence. The state is interested in seeing that none of its citizens are unjustly convicted, and it is the duty of the court before whom the trial is had to protect the accused against a conviction by incompetent testimony, both in excluding such testimony and in giving to the jury proper instructions upon the evidence before them. If, however, the court assumes to discredit a witness which the defendant has called in support of his defense, it deprives him of the constitutional guaranty of an impartial trial. And when the crime with which the accused is charged can be established only by means of the testimony of an accomplice, it is a "proper occasion" for the court, in the discharge of its duty to protect the accused, to call the attention of the jury to the well-known fact "that the testimony of an accomplice ought to be viewed with distrust." In this case there was no evidence to justify the verdict except the testimony of an admitted accomplice, and the testimony of Sargent as to the defendant's oral admissions. If, therefore, there could be any proper occasion for the giving of an instruction like that asked, this certainly was such an occasion, and the court erred in refusing to give the instruction.

The judgment and order are reversed.

mandamus to compel Hale McCowen, as county auditor, to issue two warrants upon the county treasurer. The writ was granted, and defendant appeals. Affirmed.

J. G. White, for appellant. J. A. Cooper, for respondent.

SEARLES, C. This was an application in the court below by William McFarland, the respondent here, for a writ of mandate to compel appellant, auditor of the county of Mendocino, to issue two warrants to respondent upon the county treasurer for \$149.25 and \$244.85, respectively. The respondent was a constable of Mendocino county, and as such presented two claims for fees against the county to the board of supervisors for the above several amounts. The bills or claims presented were itemized accounts for constable fees for arresting criminals under warrants, and for serving subpoenas in criminal cases, and, so far as appears, were regular as to form, and duly verified. The board of supervisors allowed the claims, and ordered the auditor, Hale McCowen, the appellant, to draw his warrants on the county treasurer therefor, which he refused to do. Respondent procured an alternative writ of mandate to issue against appellant as such auditor, commanding him to draw his warrants as auditor on the county treasurer for the several amounts specified, and to deliver the same to respondent by a day certain, therein named, and, failing to do so, that he appear and show cause, if any, etc. Appellant appeared, and for cause showed to the court, and averred, in substance, that none of the warrants or subpoenas were placed in the hands of respondent for service, and that he never served them; denied that his fees amounted to the sums specified, or any sum of money whatever, or that anything was due him. The other allegations of the petition were admitted. At the hearing the respondent's attorney moved the court for a judgment that a final writ of mandate issue upon the pleadings, upon the ground that the matters set forth in the return constituted no defense to the matters set out and alleged in the application and writ, and on the further ground that the board of supervisors, having passed upon the facts as to the services rendered and the amount due to respondent, their judgment thereon was final in regard to such facts, and not subject to review in the pending proceeding. The court granted the motion, and ordered a peremptory writ of mandate to issue. At the time and place of the hearing of said motion the district attorney, on behalf of appellant, asked leave to prove, and offered to prove, the facts set up in his return or answer, as above specified, which leave was refused by the court; and to the ruling appellant then and there excepted, in due form, and such ruling is assigned as error on this appeal.

(98 Cal. 329)

McFARLAND v. McCOWEN, County Auditor. (No. 15,008.)

(Supreme Court of California. May 22, 1893.)

COUNTY BOARD — JURISDICTION — CONSTABLES — CLAIMS FOR FEES — POWERS OF AUDITOR — RES JUDICATA — MANDAMUS.

1. Under St. 1891, p. 301, § 25, subd. 12, which gives the board of supervisors jurisdiction "to examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and order warrants to be drawn on the county treasurer therefor," the board has jurisdiction to "examine, settle, and allow" a constable's claim for fees.

2. St. 1891, p. 322, § 113, provides that the auditor must draw warrants on the county treasurer, in favor of all persons entitled thereto, in payment of all claims against the county which have been allowed, and ordered paid, by the supervisors. *Held* that, after a constable's claim for fees had been examined and allowed by the county board, the auditor could not refuse to draw warrants for the payment thereof on the ground that the services for which the fees were charged were never rendered.

3. Where the board of supervisors hears and determines the facts involved in a claim, and orders the allowance thereof, it becomes res judicata, and, in the absence of fraud, is conclusive.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county: Robert McGarvey, Judge.

Application by William McFarland for a

The appeal involves this single proposition: Where a claim for services which, if performed, is a legal charge against the county, has been duly presented to the board of supervisors, regularly considered, allowed, and ordered paid, can the auditor lawfully refuse to draw his warrant therefor upon the treasurer, upon the ground that such services were never rendered? "The auditor must draw warrants on the county treasurer, in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county, which have been legally examined, allowed, and ordered paid by the board of supervisors." St. 1891, p. 322, § 113. It is the privilege and duty of the auditor to refuse to draw his warrants upon the treasurer for claims which, although sanctioned, and ordered paid, by the board of supervisors, are void upon their face for want of jurisdiction in the board of supervisors, or showing an excess of jurisdiction, or other plain and palpable violation of law. *Linden v. Case*, 46 Cal. 172; *Merriam v. Supervisors*, 72 Cal. 518, 14 Pac. Rep. 137; *Carroll v. Siebenthaler*, 37 Cal. 193. By subdivision 12, § 25, of the county government act, so called, (St. 1891, p. 301,) jurisdiction is conferred upon the board of supervisors "to examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and order warrants to be drawn on the county treasurer therefor." The claim of the respondent for fees in payment of services as a constable was one which the board of supervisors had jurisdiction to hear and determine. There is no suggestion of a failure to present a duly-itemized account, verified as by law required, or in fact of any irregularity, except that the services were not rendered. This amounts simply to a charge that the board decided the case wrongly. The jurisdiction to hear and determine a case involves, from a jurisdictional standpoint, the abstract right to determine it wrong, as well as right. In other words, the jurisdiction to determine, being given, is not divested by an error of judgment in reaching a result. When the board of supervisors heard and determined the facts involved in the claim, and made their order of allowance thereof, it became *res adjudicata*, and, in the absence of fraud, conclusive. As was said in *Colusa Co. v. De Jarnett*, 55 Cal. 375: "When the board of supervisors of the county allowed it, they acted as a quasi judicial body, and their allowance and settlement was an adjudication of the claim which is conclusive." If the auditor may attack the conclusion of the board of supervisors for the reason and in the manner attempted here, there is no good reason why the treasurer, or any taxpayer, may not make a similar attack for like cause, and thus defeat the manifest object of the legislature in conferring the power of determination upon the local body. There should be an end of litigation in every case, and

when a case has once been heard upon its merits, and fully determined, it should be held conclusive until reversed, modified, or set aside in the mode prescribed by law. To this rule there is the exception hereinbefore stated, of proceedings which are void, and therefore of no efficacy or binding force anywhere, or upon any person. The judgment appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

98 Cal. 320

MUDD v. MUDD. (No. 18,081.)

(Supreme Court of California. May 20, 1893.)
DIVORCE—TEMPORARY ALIMONY—COUNSEL FEES.

1. Under Civil Code, § 137, providing that the court may, in its discretion, require the husband to pay alimony pending proceedings, the court may, on application of a wife, make an order requiring the husband to appear, and show cause why it should not be granted, and no notice of the application to the husband is required previous to the making of such order.

2. Such wife is not entitled to an order requiring her husband to pay her a sum of money for counsel fees, where counsel have agreed to render her their services gratuitously.

Department 1. Appeal from superior court, Glenn county; Seth Millington, Judge.

Action by George Mudd against Martha A. L. Mudd to obtain a divorce. From an order requiring plaintiff to pay defendant a certain sum monthly pending the action, and another sum for counsel fees and costs, plaintiff appeals. Order reversed as to counsel fees and costs; affirmed as to the rest.

H. M. Alberry, for appellant. Donohue & Keys, for respondent.

HARRISON, J. The appellant brought this action for a divorce from the defendant, and on the 19th of March, 1892, after the defendant had appeared in the action, but before she had answered the complaint, she made an application to the court for an order directing the appellant to pay to her temporary alimony pending the suit, and also a certain amount of money "as counsel fees and court costs." The court thereupon made an order directing the appellant to appear before it on the 22d day of March, and show cause why the defendant's application should not be granted. On that day the plaintiff appeared, and objected to the hearing of the application for the reason that a notice of five days had not been given him, and, upon this objection being overruled, asked for a postponement of the hearing on account of the necessary absence of his attorney, in support of which he filed the affidavits of himself, and also of his attorney. The court denied this motion, and thereupon, under his objection, proceeded to a hearing of the application, and at its close made an

order directing him to pay to the defendant "the sum of seventy-five dollars per month during the pendency of this action, as temporary alimony, and the further sum of three hundred dollars as counsel fees and costs for the defense of said action." From this order the plaintiff has appealed.

1. It was not necessary for the court to give to the appellant any notice of the defendant's application. Section 137, Civil Code, provides that "the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." This order may be made without any previous notice, and in practice is usually made *ex parte*. It is to be presumed that the court will exercise a wise discretion in determining the amount to be paid, fixing it according to the needs of the wife, and having also due regard to the ability of the husband to comply with the order it may make. *Turner v. Turner*, 80 Cal. 141, 22 Pac. Rep. 72. If for any reason the order is made improvidently the court will listen to any application of the husband to set it aside, or for its modification. Presumptively, the community property is under the control, and in the hands of, the husband, and the court needs only to be advised of his ability to pay such an amount as may be needed for a proper defense by the wife, in order that, for the purposes of the litigation, the parties may be upon an equal footing. The giving notice to the appellant in the present case was a favor on the part of the court, and the court could make the notice of such length as it chose. As the defendant did not have a right to any notice, the provisions of section 1005, Code Civil Proc., have no application.

2. Upon the hearing of the application the appellant sought to prove that the defendant had an agreement with her attorneys whereby they were to charge and receive nothing for their services in this action. The defendant objected to any evidence of this fact, on the ground that it was irrelevant, incompetent, and immaterial, and the objection was sustained. The object of the above section of the Code is to enable the wife to properly present her cause of action or defense to the court, and, if she can do this, either by reason of the fact that she has a sufficient separate estate, or has the custody and management of a sufficient portion of the community property, the court would not exercise a proper discretion in directing the husband to defray her expenses in the action. So, too, if her attorney has made an agreement with her that he will take charge of her case in court for a definite amount of money, or gratuitously, the necessity of calling upon the husband for money therefor is removed. In *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. Rep. 345, it was held that, when it was shown that an attorney had made an agreement to prosecute an action for divorce for

a definite amount of money, it was error for the court, in the absence of any testimony showing that he was not able or willing to properly conduct the suit, to make an order for the payment of any counsel fees. In that case it was said, (page 42, 75 Cal., and page 363, 16 Pac. Rep.) "If it had appeared at the hearing of the motion that Mr. Tyler, actuated solely by a desire to vindicate justice and the good name of the plaintiff, had promised to prosecute the action without compensation; that he was fully competent, and had prosecuted it,—the circumstances would show that she had no necessity for money to pay counsel. The question is not whether, as between the parties, counsel ought to be paid, but whether the wife has need of money to prosecute her action." Although the court could have made the order *ex parte*, yet after it had directed a notice to be given to the plaintiff of the defendant's application, and he had appeared in pursuance thereof, he had a right to be heard upon all matters pertaining thereto. It would be unseemly, and inconsistent with judicial propriety, to direct him to show cause why the application should not be granted, and upon his offer, in response thereto, to show matters which, if true, would be a sufficient cause, refuse to hear him. The evidence offered on behalf of the plaintiff was relevant to the issue pending before the court, and should have been received. That portion of the order directing that the plaintiff pay to the defendant the sum of \$300 as counsel fees and costs is reversed, and the other portions of the order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(3 Cal. Unrep. 874)

COLEGROVE et al. v. SMITH et al. (No. 14,922.)¹

(Supreme Court of California. May 20, 1893.)

NEGLIGENCE OF INDEPENDENT CONTRACTORS.

Where a person obtains from a city, by ordinance, license to lay pipes along its streets, he will be liable for injuries resulting from the negligent manner in which such work is done, even though the work is not done by himself, but by an independent contractor employed by him for that purpose.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Margaret H. Colegrove and H. H. Colegrove against Fred J. Smith and others to recover for injuries received by Margaret Colegrove through defendants' alleged negligence. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

Joy & Sumner, C. E. Sumner, and Edwin E. Meserve, for appellants. A. W. Hutton, P. C. Tonner, and J. W. Swanwick, for respondents.

¹ Rehearing granted.

BAYNES, C. Action for personal injuries. Appeal by defendants from the judgment, and an order denying a new trial. Appellants, as copartners doing business under the name of the Citizens' Water Company of Pomona, obtained from the city of Pomona, by ordinance, a grant or franchise to dig trenches and lay pipes in the streets of the city for the purpose of selling to and supplying its inhabitants with water. Afterwards, on June 1, 1889, appellants contracted with M. O'Neill and Frank Osler to dig and fill the trenches for the pipe at a specified price per 100 feet, a part to be 2 feet wide, and part 20 inches wide, and all 30 inches deep. The contract contained the following clause: "Said ditches to be filled as required by city ordinance; all road crossings to be properly tamped, and kept in repair for sixty days after completion of the work; parties digging ditch to be responsible for all damages resulting by reason of injury to or breaking of any pipes owned by other persons." The ordinance required the grantees (appellants) or their assigns, immediately after laying the pipes, to restore the streets to their former condition, and have the same in as good repair as before; the work to be done under the direction, and to the satisfaction, of the superintendent of streets. Plaintiff, Margaret H. Colegrove, (wife of her coplaintiff), on June 15, 1889, was driving along Garey avenue, where defendants' pipe had been laid, and the trench improperly filled with loose dirt, in which her buggy wheels sank, whereby she was thrown out and injured. There were no guards along the line of the trench, nor any notice of its unsafe condition. Several exceptions were taken to evidence, and to the refusal of the court to give to the jury certain instructions requested by defendants; but all these exceptions present a single question, arising upon the issue raised by defendants' answer, to the effect that O'Neill and Osler were independent contractors, in the exclusive control of the work of filling up the ditch, and for whose negligence, defendants claim, they are not liable.

It is commonly said—and, in a large class of cases, correctly—that the principle of respondeat superior does not apply where the negligent or wrongful act is that of an independent contractor, or of his servant or employe, unless the superior has been guilty of negligence in contracting with an unfit person. For a full discussion of the general doctrine above stated, see *Boswell v. Laird*, 8 Cal. 469. But there are exceptions to the general doctrine, and this case, I think, is one of them. The board of trustees of the city was charged by the law with the care and maintenance of the streets in a safe and proper condition for the use of the public. Appellants could not lawfully dig trenches and lay water pipes without express authority from the city. If they had undertaken to do so, and had contracted with another to do the work, they would not by such

contract have relieved themselves from liability to the city for the trespass, nor to individuals who might have sustained special injury. Nor does the fact that they obtained from the city a franchise or permission to dig up the street, and lay their pipes, relieve them from more than the unlawful character of the work. They stand in a contract relation to the public, represented by the city authorities, to do the work in the manner required by the ordinance, and cannot relieve themselves of the duty imposed by that contract by contracting with another to do the work. These trenches could not be dug in the street without danger to the public. If done without authority, a nuisance would necessarily be created, and, if not done in the manner required by the ordinance, the departure creates a nuisance. It is very different from the erection of a building, or the doing of other work upon private property, which does not constitute a nuisance, and which causes no danger to the public unless negligently performed. The owner, in such case, is under no contract relation to the public. He owes a duty, however,—that of care to prevent accidents; but when he selects a competent workman, and intrusts the whole work to him, he discharges that duty. But if I am under a duty to another, created by contract or by statute, it is obvious that I cannot relieve myself of any of its obligations by contracting with another to do the same work; or, if a work which I may lawfully do creates a danger to others, I cannot escape liability by contracting with another to do it; for by contracting with another I authorize him to create the danger. But where the work is unattended with danger, except from negligence, a contract to do the work excludes negligence, and the contractor is liable. Attention is not called by counsel to any case in this court where the question here presented appears to have been considered, but authorities elsewhere are abundant, and quite generally uniform in support of the views above expressed. In *Gray v. Pullen*, 5 Best & S. 970, A. was empowered, under the metropolis local management act, (18 & 19 Vict.,) to make a drain from his premises to a sewer by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B. Held, that A. was responsible in an action by B. In *Bower v. Peate*, 1 Q. B. Div. 321, 326, Cockburn, C. J., said: "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he

has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done, from which mischievous consequences will arise unless preventive measures are adopted." In *Pickard v. Smith*, 10 C. B. (N. S.) 470, the defendant, having employed a coal merchant to put coals into his cellar, was held liable for injury suffered by the plaintiff from his falling through the cellar opening, which had been left open by the negligence of the coal merchant's servants. In this case, after referring to the general rule placing the liability upon an independent contractor, the court said: "That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned."

Appellants contend that in this state municipal corporations are not liable for injuries resulting from imperfections in the streets, and upon this ground attempt to distinguish this case from a large number of cases where the city was primarily liable, and also from other cases where the person or corporation which had obtained permission to do the work had agreed with the city to be answerable for all damages that might be sustained. Whether or not the city of Pomona was liable for the injury to respondent is immaterial. The contractors, O'Neill and Osler, were undoubtedly liable, and, if so, appellants would have been liable, had they done the work themselves; and the question here is whether they did or could relieve themselves from responsibility by letting the work to independent contractors. Nor does the fact that there was not an express contract between appellants and the city to answer all damages at all affect the question, since the implied obligation arising from the franchise and the character of the work imposed upon them a liability for injuries caused by their negligence, in every respect as conclusive as an express contract. *Chicago City v. Robbins*, 2 Black, 418, *Robbins v. Chicago*, 4 Wall. 657, and *Water Co. v. Ware*, 16 Wall. 566, all sustain the view we have taken. *Woodman v. Railroad Co.*, 149 Mass. 335, 21 N. E. Rep. 432, and *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. Rep. 421, on appellants' brief, are directly against them. The first of these cases was that of a street-railway corporation which employed a contractor to lay a new track in a city street, and through whose negligence in not properly guarding the work the injury happened. The railway company was held liable. The court said: "If the performance of a lawful contract necessarily will bring wrongful consequences to pass, unless guarded against, and if, as in

the present case, the contract cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer, at his peril, to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs." In the American cases above referred to will be found cases cited from many of the states sustaining the same doctrine. Appellants, however, seem to rely principally upon the case of *Railroad Co. v. Kimberly*, 87 Ga. 161, 13 S. E. Rep. 277, and *Railroad Co. v. McConnell*, 87 Ga. 756, 13 S. E. Rep. 828. In the first of these cases the court recognizes and enumerates the exceptions to respondeat superior, but concludes that the facts do not bring it within any of the exceptions. The correctness of its conclusion in that case may well be doubted, though whether correct or not need not be considered here, since the case at bar comes clearly within the second exception to the general rule there stated, and to which the learned justice cites *Bower v. Peate*, and *Pickard v. Smith*, supra. The broad distinction between that case and the case at bar is apparent, since the trenches could not be dug in the streets of Pomona without danger to those having occasion to use the street, while a railroad embankment could be constructed without danger of creating a nuisance by impounding water which by stagnation produced malaria, and thereby became a nuisance. The second case (*Railroad Co. v. McConnell*) supports appellants' contention, but the court clearly came to a wrong conclusion. But three cases are cited in support of the conclusions reached by the court. One of these (*Overton v. Freeman*, 11 C. B. 867) was a "common pleas" decision made in 1852, and which is in direct conflict with *Gray v. Pullen*, 5 Best & S. 970, (decided in 1864, in exchequer chamber, on appeal from queen's bench) and upon the appeal *Overton v. Freeman* was not only cited in the argument, but quoted from, and, though it is not referred to in the opinion, it was clearly overruled. Another of the cases there cited is *Hackett v. Telegraph Co.*, 80 Wis. 187, 49 N. W. Rep. 822. There the defendant contracted with a railroad company to erect for it a line of telegraph. A hole was left unguarded overnight, into which a child fell, and was injured. A clear distinction between that case and the one at bar is stated by the court as follows: "The railroad company was not required, by its contract, to dig any hole in a traveled public street;" while here the work was required to be done in a public street in a city, and the negligence was in doing improperly that which the contract required to be done, and not in some matter collateral to, and not required to be done in the performance of, the contract. The other case referred to in the case of *Railroad Co. v. McConnell* is that of *Railroad Co. v. Kimberly*, above noticed.

The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

98 Cal. 315

PACKER et al. v. DORAY et al. (No. 18,033.)

(Supreme Court of California. May 20, 1893.)

NEW TRIAL—NOTICE—AMENDMENT.

Code Civil Proc. § 659, providing that where a motion for a new trial is made on the minutes of the court, and on the ground of errors in law occurring at the trial, the notice of intention to move for a new trial must specify the particular errors relied on, otherwise the motion must be dismissed, does not allow a party who has inadvertently omitted the specification of errors from the notice to amend.

Department 1. Appeal from superior court, Sierra county; John Caldwell, Judge.

Action by W. S. Packer and others against Philip Doray and others. Defendants had judgment, after which plaintiffs served notice of their intention to move for a new trial. Afterwards, plaintiffs moved to amend their notice, and, from an order granting the motion, defendants appeal. Reversed.

T. D. Soward and Frank R. Wehe, for appellants. J. M. Walling, T. L. Ford, and Goodwin & Goodwin, for respondents.

PER CURIAM. This case was tried by the court without a jury in June, 1891; and, the 18th of September following, findings were filed, and judgment entered in favor of the defendants. Written notice of the decision was served on the plaintiffs by the defendants on the day the findings were filed. Thereafter, on the 28th of the same month, the plaintiffs served and filed written notice of their intention to move for a new trial. The notice stated that the motion would be made upon the minutes of the court, and upon the grounds of insufficiency of the evidence to justify the decision; that the decision was against law; and of errors in law which occurred at the trial, and were excepted to by the plaintiffs. Attached to the notice were numerous specifications of the particulars wherein the evidence was alleged to be insufficient to justify the decision, but there were no specifications of any errors in law. Thereafter, on the 7th of December, 1891, plaintiffs served on defendants, and filed in court, a notice that they would apply to the court for permission to amend their "notice of intention to move for a new trial" by adding thereto a specification of "errors in law." Accompanying this notice was a copy of the proposed specification of errors, and an affi-

davit made by one of the plaintiffs' attorneys. The affidavit stated, among other things, that the notice of the decision was served on the affiant on the 18th of September, 1891, and that from the 19th to the 25th of that month he was actively engaged in attending to other legal business; that on the 28th of the same month he served and filed for plaintiffs their notice of intention to move for a new trial, and that in drafting the notice, through stress of other business, he inadvertently omitted to specify therein the particular errors of law upon which plaintiffs would rely on their motion; "that this affiant fully intended that said motion for new trial should be based in part upon errors of law occurring at the trial, and excepted to by plaintiffs, as stated in said notice of intention, and the omission to specify the particular errors of law upon which plaintiffs would rely was wholly the result of inadvertence and oversight of this affiant." The motion to amend was heard by the court, and granted, on the 17th of December, 1891, and from that order this appeal is prosecuted by defendants.

Section 659 of the Code of Civil Procedure provides that the party intending to move for a new trial must, within 10 days after notice of the decision of the court, file, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the minutes of the court, etc., and that "when the motion is to be made upon the minutes of the court, * * * if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court the motion must be denied." It is evident from the language above quoted that in order to give the court jurisdiction to grant a new trial, when the motion is made upon the minutes of the court, and upon the ground of errors in law occurring at the trial, the notice of motion must specify the particular errors relied upon, and if it does not the motion must be denied. The notice here under review contained no such specifications, and was in that respect radically defective. The only question, then, is, could it be amended by adding the required specifications after the statutory time for giving notice had expired? In *Little v. Jacks*, 67 Cal. 165, 7 Pac. Rep. 449, the appeal was from an order allowing the defendant to amend his notice of intention to move for a new trial, and the court, reversing the order, said: "To allow a notice filed within statutory time, but which was radically defective, to be amended after the expiration of that time, would be, in effect, to extend the time allowed by statute for the giving of such notices, which

the courts have no power to do." And see *Cooney v. Furlong*, 66 Cal. 521, 6 Pac. Rep. 388. It must be held, therefore, that the plaintiffs had no right to amend their notice at the time and in the manner they asked leave to do so, and that the order of the court allowing the amendment was erroneous. The order appealed from is reversed.

(98 Cal. 309.)

HAGER v. SOUTHERN PAC. CO. (No. 14,982.)

(Supreme Court of California. May 18, 1893.)

RAILROADS—ACCIDENTS AT CROSSING.

1. One who approaches a railway crossing in a city at a jog trot, without slackening speed, or adopting any precautions, although he knows a train is about due, which by reason of obstructions he will be unable to see until within a few feet of the crossing, is guilty of negligence such as to preclude recovery for injuries to his team and harness, although the train was running 30 or 35 miles an hour, and no signal was given.

2. The fact that after the accident the railway placed an automatic bell at the crossing was not competent as evidence of prior negligence.

Department 1. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by Lewis N. Hager against the Southern Pacific Company. Judgment of nonsuit. Plaintiff appeals. Affirmed.

D. L. Smoot, for appellant. J. C. Martin and A. A. Moore, for respondent.

GAROUTTE, J. This is an action to recover damages for injuries to property, (horses and harness,) resulting from a collision with a train of cars at a railroad crossing in the city of Oakland. A nonsuit was ordered by the trial court, and the plaintiff has appealed.

The accident occurred in the settled portion of the city. The train was going at the rate of 30 or 35 miles an hour, and the engineer was neither ringing the bell nor blowing the whistle, as required by the statute. The team injured consisted of six horses attached to a band wagon containing sixteen men. The train was a regular train, and known to be due at that point by the driver of the horses at about the time of the injury. The view of the track towards the point from which the train was approaching was obstructed until the driver arrived within about 40 feet of the crossing, when he would be able to see an approaching train for a distance of 250 yards. The bill of exceptions contains further recitals of the evidence as follows: "The driver approached Short street crossing at a jog trot, and without stopping or checking the speed of his team, and, before the crossing was reached by the train, one or two of the passengers jumped from the wagon while it was in motion, because nervous about riding over railroad tracks. The driver of the team did not check the speed of his team and listen for approaching trains before driving upon the

crossing, although he knew the train was due about that time, and although he knew that by reason of the intervening houses he could not see the approaching train until his team would be within a few feet of the crossing, yet he drove on at the jog trot at which he had been previously driving, without stopping or checking his speed or lessening the noise of his team, or adopting any precaution, or making any effort to listen for the approaching train while his vision was obstructed, or observing the precaution of looking after reaching a point where his vision was unobstructed."

No comment by the court upon this state of facts is demanded. The conduct of the driver indicates a degree of negligence closely allied to recklessness. His negligence would have been but one degree more culpable if he had driven his team upon the track, and there awaited the coming train and the inevitable collision. The conduct of both plaintiff and defendant clearly indicates an absence of the exercise of the most ordinary care, and under those circumstances the defendant is not liable, unless the acts which resulted in the injury were willfully and deliberately done, and the evidence does not go to that extent. This is the established doctrine, and is supported in this state by an unbroken line of authority. We are satisfied with the construction of section 486 of the Civil Code announced in *Meeks v. Railroad Co.*, 52 Cal. 604; also that the offer of evidence that subsequent to the accident the defendant placed an automatic bell at the crossing where the collision occurred was properly rejected. *Sappenfield v. Railroad Co.*, 91 Cal. 61, 27 Pac. Rep. 590. For the foregoing reasons let the judgment be affirmed.

We concur: **HARRISON, J.; PATERSON, J.**

(98 Cal. 332)

JACOB v. LORENZ et al. (No. 18,075.)

(Supreme Court of California. May 18, 1893.)

PUBLIC LANDS—DITCHES—SUPPLEMENTAL COMPLAINT—DEMURRER—JOINDER OF CAUSE OF ACTION—INJUNCTION—RESTRAINING DESTRUCTION OF DITCH—EVIDENCE.

1. Under Act Cong. July 26, 1866, § 9, relating to public land, which provides that whenever, by priority of possession, water rights have vested, and are recognized by the local customs, laws, and the decisions of courts, such vested rights shall be protected, and the right of way for the construction of ditches and canals for the purposes specified is acknowledged and conferred, it is not necessary that the right should have vested before the passage of the act.

2. In a suit to enjoin defendants from destroying plaintiff's ditch, where the answer sets up that, since the commencement of the suit, defendants had destroyed part of the ditch, and that it could not be specifically replaced, a supplemental complaint which alleges the facts stated in the answer, and asks damages, does not state an independent cause of action.

3. A cause of action for damages for a

trespass and a cause of action for an injunction to restrain a threatened additional trespass may be joined, and an objection that they are not separately stated cannot be reached by a demurrer, upon the ground of misjoinder, but can only be reached by motion, unless the failure to state them separately renders the complaint ambiguous, unintelligible, or uncertain.

4. In an action for destroying a ditch, deeds and receiver's receipts for mineral entries are competent to show ownership in plaintiff, and the use to which he could put the water; and the fact that he was not sole owner of some of the parcels did not affect their admissibility.

5. In an action for destroying plaintiff's ditch, which crossed defendants' mine, the fact that there had been locations covering part of the mine before the ditch was constructed is immaterial, when defendants' title was not connected with them, but was based upon a survey and location made after the construction of the ditch.

6. Where plaintiff owned a right to a quantity of water, it is immaterial in what ditch the water was taken when he acquired the right, if the change of ditches did not injure defendants.

Commissioners' decision. Department 1. Appeal from superior court, Trinity county; T. E. Jones, Judge.

Action by Henry Jacob against Henry Lorenz and Jacob Liebrandt to enjoin defendants from destroying a certain ditch, and for damages for the injury already done. An injunction was refused, and the damages were assessed at \$650. Defendants appeal. Affirmed.

James W. Bartlett, for appellants. John W. Turner, for respondent.

HAYNES, C. This action was originally brought by the plaintiff to enjoin the defendants, who are owners of the Mammoth placer mine, and who are working the same by hydraulic process, from injuring or washing away a certain water ditch, known as the "East Branch of the Jacob Ditch," owned by plaintiff, and which crosses defendants' mine. Several ditches, among them the Jacob ditch and the Butcher ditch, take water from Connor's creek. Plaintiff acquired the ownership of the Butcher ditch in 1863, and commenced the construction of the Jacob ditch in 1868, and completed the east branch and turned water into it in October, 1870. This east branch of the Jacob ditch connects with and conveys water into the lower part of the Butcher ditch and to a reservoir used by plaintiff in working a mine. The amended complaint alleged the ownership and right to the 20 inches of the "first flow" of the waters of Connor's creek through the Jacob's ditch and branches; that a portion of this water had been used through this ditch since 1868, and later all of it; and that the ditches above-named, "united, formed one complete system." It was further alleged that, at the time said east branch was constructed, the ground over which it passed was vacant and unappropriated mineral land of the United States, but which was afterwards, on December 31, 1877, patented to defendants; that

the patent reserved the water rights and ditches mentioned in section 2339¹ of the United States Revised Statutes; that plaintiff had a prior vested right of way for the same; that defendants denied his title to said ditch and water, and had washed away the earth to within 80 feet of his ditch, and threatened and intended to wash away and destroy the same; and prayed for a perpetual injunction. Defendants' demurrer to this complaint was overruled, and this ruling is assigned as error. But one cause of action is stated in the complaint. The Butcher ditch was doubtless mentioned because of its relation to the east branch of the Jacob ditch. Some, if not all, of these allegations, were not material, but surplusage does not vitiate. As to a further ground of demurrer, appellants contend that sufficient facts are not stated, because the complaint does not allege "that plaintiff owned a vested and accrued water right appurtenant to the Jacob ditch, or that he did in 1868 or in 1870." It is not necessary to use the language of the act of congress. Facts are alleged which show that he had such vested right. Whether this right must be appurtenant to a particular ditch will be noticed hereafter. As to the date at which the right must have accrued, defendants contend that the right must have vested and accrued prior to the passage of the act of congress of July 26, 1866, and that only water and ditch rights which had accrued and vested prior to that act are protected by sections 2339 and 2340 of the Revised Statutes. Such contention cannot be sustained. Section 9 of the act of July 26, 1866, (14 Stat. 253,) after acknowledging and confirming water and ditch rights then existing, contains the following proviso: "Provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." Any doubt which may have existed as to the meaning of the act of 1866 was removed by the amendatory act of July 9, 1870, (16 Stat. p. 218, § 17,) which provided that "all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the ninth section of the act of which this is amendatory." That *Jennison v. Kirk*, 98

¹Section 2339 provides: "Whenever, by priority of possession, rights to the use of water, for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

U. S. 453, cited by appellants, does not sustain their contention, is apparent from the fact that the ditch there in controversy was constructed in 1873, and its validity was not questioned, except as to a conflict with an older ditch. The language used in the opinion in *Broder v. Water Co.*, 101 U. S. 274, also cited by appellants, would appear to support their contention, but the question here raised was not before the court. The ditch there in question was completed in 1853, and the opinion must be read in the light of that fact. The case of *Vansickle v. Haines*, 7 Nev. 249, also arose before the act of 1866, and was not applicable to the question here. *Lewis, C. J.*, who wrote the opinion in *Vansickle v. Haines*, also wrote the opinion in *Hobart v. Ford*, 6 Nev. 77. In construing section 9 of the act of 1866, the court said: "In its adoption there appears to have been three distinct objects in view: First, the confirmation of all existing water rights; second, to grant the right of way over the public land to all who may desire to construct flumes or canals for mining or manufacturing purposes; and, third, to authorize the recovery of damages by settlers on such land," etc. See, also, *Barnes v. Sabron*, 10 Nev. 217. The demurrer to the amended complaint was properly overruled.

Defendants then answered, denying specifically the allegations of the complaint, and, for a further and separate answer, alleged "that since the commencement of this action the defendants, in the ordinary course and manner of working the Mammoth placer mine by the hydraulic process, have mined and washed away about seventy feet of the ditch described in the complaint as the 'East Branch of the Jacob Ditch;' that it is destroyed, and cannot be specifically replaced." Plaintiff thereupon, by leave of court, filed a supplemental complaint, alleging the facts stated in defendants' additional answer above quoted, and further alleging that it was done wrongfully and maliciously, and with intent to destroy said ditch, and that he was thereby damaged in the sum of \$5,000. Defendants moved to strike out the supplemental complaint, and also demurred thereto. An amended supplemental complaint was afterwards regularly filed, alleging more fully the damage sustained, and that at that time defendants had washed away 627 feet of his ditch, and prayed, as before, for a judgment for damages, and an injunction to restrain further injury to his ditch, and for general relief. The motion being denied, and the demurrer overruled, these rulings are assigned as error, and present the most important questions in the case.

1. The motion to strike out was properly denied. Permission to file a supplemental complaint is in the discretion of the court. Code Civil Proc. § 464; *Harding v. Minear*, 54 Cal. 504; *Greenwood v. Adams*, 80 Cal. 77, 21 Pac. Rep. 1134. This discretion, how-

ever, is not an arbitrary one. In *Gleason v. Gleason*, 54 Cal. 135, it was said: "As a general rule, the right to file a supplemental complaint can be exercised only with reference to matters which may be consistent with and in aid of the case made by the original complaint, and it is not allowable to substitute a new and independent cause of action by way of a supplemental complaint." But the court violated none of these limitations upon its discretion. Plaintiff came into a court of equity seeking only preventive relief. His property had not been invaded, and he could then have only preventive relief. He alleged that defendants threatened and intended to destroy his ditch, and deprive him of the substance of his property. They did not deny that they threatened and intended to destroy plaintiff's ditch, but defiantly answered that since the commencement of the suit they had executed their threats; had destroyed the ditch; that it could not be specifically replaced; and upon that ground, as a separate defense, asked a court of equity that plaintiff take nothing by his action, and that they recover costs. Assuming plaintiff's ownership of the ditch, preventive relief was not all that he was then entitled to. He had suffered damage. The facts alleged in his complaint showing his ownership and title were appropriate to an action for damages, and he was still entitled to an injunction to restrain further injury. The jurisdiction of a court of equity had been properly invoked and acquired. The defendants, by their own act, made different or additional relief necessary. The subject of the action was plaintiff's property, and his right to convey water in his ditch across defendants' mine. That right was not destroyed, and was still the subject of litigation. Damages for the injury to that property—the ditch—was incident to that right, and consistent with it. It was not an "Independent cause of action." It does not appear but that a new ditch might then have been dug around the part washed away, or that a flume or pipe might not have been used to cross the break. It is no objection to a supplemental complaint that different or additional relief is asked for. *Baker v. Bartol*, 6 Cal. 483. Indeed, the object of the supplemental complaint is to obtain additional or different relief without resort to a new action. Not only did the court not err in refusing to strike out the supplemental complaint, but appellants should not be heard to complain that their efforts to defeat plaintiff's action, by making the relief he sought inadequate, had not proved successful.

2. The demurrer was upon several grounds. The first and second grounds need not be noticed. The third ground is that there is a misjoinder of causes of action, and that they are not separately stated. Treating it as two causes of action, it is too well settled to require discussion that a

cause of action for damages for a trespass and a cause of action for injunction to restrain further or additional trespass threatened to be committed upon the same property may be joined. The objection that they are not separately stated cannot be reached by a demurrer upon that ground. It can only be reached by motion, unless the failure to state them separately renders the complaint ambiguous, unintelligible, or uncertain. That ground was also assigned, but I think the objection was not well taken.

Several other objections are urged under this head, the chief of which is that the complaint does not apportion the damages, or state how much each particular mine or other property owned by plaintiff was damaged by the destruction of the ditch. It is true that damages which, though the natural, are not the necessary, consequence of defendants' acts, are special, and should be specially alleged. But the references in the complaint, amended and supplemental, to the mines and reservoir of the plaintiff, and the use to which he applied the water conveyed through the ditch, were pertinent, for the purpose of showing the permanent and continued use and value of the ditch. If there were no useful purposes to which plaintiff could apply the water, or if the use were but a temporary one, it is manifest that the value of the ditch would be greatly diminished. Plaintiff's failure to allege special damage by the depreciation of the value of his mines could not make his complaint obnoxious to this form of demurrer. It simply eliminated the question of special damages from the case, but left the allegations pertinent for the purpose of showing a useful and continued purpose to which the water could be applied; for, without such showing, he could not recover more than nominal damages. The demurrer was properly overruled.

Defendants' answer put in issue all the material allegations of the complaint, and the cause was tried by the court, without a jury, and resulted in findings and judgment for the plaintiff for \$650 damages; but the injunction was denied. In their motion for new trial, defendants specify numerous errors of law, and many particulars in which they claim the findings are not justified by the evidence. The several deeds and receiver's receipts for mineral entries, offered by plaintiff, were properly received to show ownership in the plaintiff, and a use to which the water was and could be applied. That, as to some of these parcels, he was not the sole owner, did not affect their admissibility.

The objection to the deed of Barthol Jacob and wife, on the ground that it was defectively executed by the wife, is without merit.

It is not perceived why surface water from rains and melting snow, which natu-

rally drained into this ditch, (though not the subject of appropriation,) to the extent to which it adds to the quantity of water which was received into the ditch from Connor's creek, does not add to the value of the ditch, nor why its loss does not cause injury.

Defendants' motion for a nonsuit was properly denied. Two points specially are urged in support of this motion:

(1) That a part of the Mammoth mine was located before the ditch was constructed. That there had been some prior locations covering a portion of the Mammoth mine, made or attempted appears in the evidence. Defendants' title to the mine was not, however, connected with any prior location, but was based upon a survey and location made after the ditch was constructed. While the patent relates back to the location, it only relates to the location which is the inception of the title perfected by the patent, and not to any prior location which does not appear in the chain of title resulting in the patent. It is therefore immaterial whether there had been prior locations; and, besides, the use of the ditch had been permitted without objection up to about the time this action was commenced, a period of nearly 18 years.

(2) It is urged that plaintiff's right to the 20 inches of water was not appurtenant to the Jacob ditch. It is not disputed that plaintiff owned the right to that quantity of water to be diverted from Connor's creek. It is immaterial in what ditch this water was taken when he acquired the right. The place of diversion, or of use, or of the purpose to which the use was applied, could be changed. Civil Code, § 1412; *Ramell v. Irish*, 96 Cal., at page 217, 31 Pac. Rep. 41. The restriction imposed by section 1412, Civil Code, is a matter of defense, and defendants could not be injured by its being taken in a ditch above theirs, it being the first right on the stream, as in any event it could not be taken in their ditch, and therefore did not diminish the water to which they were entitled. The testimony of the witness Schoppl, that plaintiff, by taking these 20 inches in the Jacob ditch, left that much less to come to defendants' ditch below, does not tend to show injury; for, if plaintiff's ditch were below, they would be required to let that amount pass and reach plaintiff's ditch. Appellants' contention that the water right must be appurtenant to a certain ditch is not sound. The water right is the principal thing, and, if either is appurtenant to the other, the ditch is appurtenant to the water right, and, as the water may be used through any ditch, the question becomes unimportant.

3. The date at which plaintiff acquired title to the several parcels of mining property is wholly immaterial, nor was it material that plaintiff's title to the 20 inches of water was not conveyed to him until 1887. Title to this water originated prior to June

8, 1852, and it could not affect defendants' liability whether they were the owners, though without legal title, or were the lessees of the water right, or conveyed it in their ditch for the owner prior to 1887.

4. The evidence as to the amount of damages sustained by plaintiff was conflicting, both as to the amount and the grounds upon which it should be estimated; but the finding placing plaintiff's damages at \$650 is fully justified by the evidence, upon grounds to which no exception could properly be taken. There was evidence tending to show that the market value of the ditch was \$2,000, and that its rental value was \$125 per annum. While defendants' testimony tended to show very little injury, as there was an unauthorized invasion of plaintiff's property he was entitled to some damages; and, as the court could have found upon unobjectionable testimony the amount awarded, we are not justified in holding that this finding is not justified by the evidence.

Other questions are made upon the introduction of evidence and as to other findings, which need not be specially noticed. We have examined each of them, and find no material error prejudicial to defendants. The right of the plaintiff is clear, and we see no ground upon which a judgment for defendants could be properly based, and advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; VAN-CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

98 Cal. 304

DULIN v. PACIFIC WOOD & COAL
et al. (No. 19,251.)

(Supreme Court of California. May 16, 1893.)

APPEAL—SUPERSEDEAS.

1. Where, in an action to determine whether plaintiff or defendant was elected a director of a corporation, the judgment declares plaintiff elected and defendant not elected, and grants no other relief, and an appeal is taken, plaintiff will not be restrained, pending appeal, from performing his duties as such director, since his assuming to act as a director, while it may be in consequence of the judgment, is not a proceeding on it.

2. Where a case is one within Code Civil Proc. § 949, providing for a stay of proceedings on appeal, a writ of supersedeas will not be issued until an appeal has been perfected as provided in said section, and then only in a case where the lower court seeks to enforce its judgment notwithstanding such appeal.

3. A writ of supersedeas will not be issued to restrain a party to an action in the assertion of his rights as established by a judgment therein, other than to prevent him from using the process of the court below to enforce such judgment.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by E. G. Dulin against the Pacific Wood & Coal Company and B. D. Clugston to determine whether plaintiff or defendant Clugston was elected a director of the defendant the Pacific Wood & Coal Company. Judgment was rendered for plaintiff, and defendant Clugston moves for an order restraining plaintiff from acting as director pending appeal. Motion denied.

D. L. Withington and Works & Works, for appellants. Mr. Palmer, for respondent.

HARRISON, J. At a meeting of the stockholders of the Pacific Wood & Coal Company, a corporation, held at San Diego, November 17, 1892, for the election of five directors for the year then next ensuing, the appellant Clugston was declared elected as one of the directors. The respondent herein claimed that certain votes offered to be cast for himself at the election should have been received, and that, if they had been received, the result of the election would have been shown that he was elected instead of Clugston. On the 10th of December, 1892, Dulin filed his petition in the superior court of the county of San Diego, under the provisions of section 315 of the Civil Code, making the corporation and Clugston defendants, and praying the court to set aside the election of Clugston as a director, and to confirm the election of himself as such director, and for such other relief in the premises as might seem proper. The matter was heard by the court, and on the 25th of January, 1893, it rendered its judgment that, at the said election, Dulin was elected one of the directors of the corporation, and that his election be confirmed, and that Clugston was not elected, and had not, since the 17th day of November, 1892, been a director in said corporation. On the same day the defendants appealed from the judgment, and now ask for an order "staying the proceedings in this action, and restraining the respondent Dulin from doing any act as director, president, or manager of the appellant the Pacific Wood & Coal Company, or interfering with the management of the business of said company by the appellant Clugston as director and president, and the other directors thereof." Each of the contestants herein states in his affidavit filed upon this motion that after the election in November he was duly elected president of the corporation,—the respondent Dulin stating that he "was by said board of directors duly elected president of said corporation," and the appellant Clugston that he "was duly elected president of said corporation by the votes of himself, James Wells, and L. Clugston, being a majority of said board,"—from which it would appear that, after the election, two of the directors recognized the appellant as having been elected one of their number, while two others recognized the respondent,

and that each of the contestants thereafter assumed to act as such president. It also appears from the affidavits that, after judgment had been entered herein, the corporation brought an action against the appellant Clugston for the purpose of preventing him from trespassing upon its property or interfering with its business, and that, by virtue of the process issued therein, Clugston was ejected from certain premises belonging to the corporation, and Dulin took possession thereof, and assumed to act as a director and its president, and that Clugston was excluded from the management thereof. The appellants contend that by virtue of their appeal the respondent is prohibited from doing these acts, and they now ask for this order in support of their contention.

The writ of supersedeas is "an auxiliary process designed to supersede the enforcement of the judgment of the court below, brought up by writ of error for review." *Williams v. Bruffy*, 102 U. S. 249. Originally it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come into his hands. In modern times the term is often used synonymously with a "stay of proceedings," and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment. In this state the writ is frequently granted by this court for the purpose of staying proceedings in the superior court, when a review of the action of that court is sought in this court, either upon direct proceeding or on appeal, and is directed to the court whose action is under review, or to an officer of that court who may be about to enforce its judgment. Section 949, Code Civil Proc., declares that in cases like the present the perfecting of an appeal "stays proceedings in the court below upon the judgment or order appealed from," thus creating a statutory supersedeas, or "a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or, if a writ of execution is issued, a prohibition against the execution of the writ." *Hovey v. McDonald*, 109 U. S. 159, 3 Sup. Ct. Rep. 136. If, after such appeal, the court below seeks to enforce its judgment, this court will grant a special order or writ restraining its action. The writ itself is directed to the court whose action is sought to be restrained, or to some one of its officers, and is limited to restraining any action upon the judgment appealed from. It cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment, nor can the writ be employed for any purpose upon persons not parties to the judgment. Its effect is merely to leave the parties to

the judgment in the same position as they were prior to its entry, and to prevent the appellant from being prejudiced by its enforcement. There are many judgments, however, which are self-executing, or which have an intrinsic effect, upon which there are no proceedings to be stayed, and which will not be affected by an appeal therefrom. A judgment granting or dissolving an injunction, or determining the status of an individual, granting or denying a divorce or an annulment of marriage, quieting title to a tract of land, setting aside the execution of a deed, are instances of such judgments. In *Walls v. Palmer*, 64 Ind. 496, a judgment had been rendered suspending the petitioner from practicing as an attorney, and it was urged that an appeal therefrom had the effect of restoring him to his right to practice during the pendency of the appeal. The court, however, held that to give that effect to the appeal would be to reverse the judgment of the suspension before the appeal was judicially decided; saying: "The effect of the appeal and supersedeas is to stay the judgment of suspension as it is, and prevent further proceedings against the petitioner. It does not reverse, suspend, or supersede the force of the judgment. That remains in all respects the same. The judgment itself requires no further execution than its own terms. It executes itself except as to the collection of costs, which is stayed by the appeal and supersedeas. The only effect of an appeal to a court of error, when perfected and while pending, is to stay execution upon the judgment from which it is taken." And herein should be observed the distinction between the effect of an appeal from a judgment in staying further proceedings thereon, and its effect in depriving the judgment itself of any efficacy as evidence of the fact determined. The appeal suspends its force as a conclusive determination of the rights of the parties, but the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment itself, and does not destroy or impair its character.

The purpose of the present application is not to prevent the court from taking any action to enforce its judgment, but to prevent Dulin from acting as one of the directors of the corporation. His assuming to be such director, while it may be in consequence of the judgment, is not a proceeding upon the judgment. The acts done and threatened by him were not done by virtue of the judgment, but in consequence of the recognition by his fellow directors of his right to co-operate with them. The fact that the judgment was rendered in his favor may have been a motive governing the other directors in recognizing him as a fellow director, and in admitting him to their counsels and excluding Clugston therefrom, but such action is independent of the proceeding in court. The stay of proceedings upon the enforcement of the judgment resulting

from the appeal cannot prevent the moral support which the rendition of the judgment may give to the other directors, or form the basis of an injunction against them, nor can it be invoked to prevent the respondent from committing a trespass against the appellant. Its only effect is to leave the parties in the same situation, with reference to the rights involved in the action, as they were prior to the rendition of the judgment. They still have, notwithstanding the appeal, the same right to assert, outside of the court, or in any other proceeding, their respective rights, as they had prior thereto. While this proceeding was pending in the court below, that court had no authority, by virtue thereof, to enjoin Dulin from assuming to act as a director, and, after it had adjudged that he had been duly elected one of the directors, there would have been a manifest inconsistency in enjoining him from acting as such director. The appeal from that judgment cannot confer upon Clugston any greater right to an injunction against Dulin than he had prior to its rendition. The court limited its action to ascertaining the result of the election, and did not grant any relief in the premises other than to confirm the election of Dulin, and to declare that Clugston was not elected. No other proceedings have been had or attempted in the court below upon this judgment, and the judgment itself does not contemplate or authorize any other proceedings, or any process to enforce it. The motion is denied.

We concur: McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.

(3 Cal. Unrep. 883)

GREENBERG v. CALIFORNIA BITUMINOUS ROCK CO., (JOHNSON, Intervener.
No. 19,146.)

(Supreme Court of California. May 26, 1893.)
VENDOR'S LIEN—ACTION TO FORECLOSE—INTERVENTION—DECREE.

In an action to foreclose a vendor's lien, a third party intervened, and asked a fore-

closure of an interest claimed by him. Plaintiff denied the allegations of intervenor's complaint, and thereupon dismissed his action. Defendant made default. *Held*, that a decree finding intervenor had the interest claimed, but denying him a foreclosure as to such interest, was erroneous.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Meyer Greenberg against the California Bituminous Rock Company to recover the price of, and enforce a vendor's lien on, certain land, in which C. B. Johnson intervened, and claimed an interest. Plaintiff answered intervenor's complaint, and thereupon dismissed his action, while defendant made default. From the judgment entered, and from an order denying a new trial, intervenor appeals. Reversed.

Luis Laney, for plaintiff. T. C. Van Ness, for intervenor. Graves & Graves, for respondent.

SEARLS, C. This is an appeal from a final judgment, and from an order denying a new trial. The action was brought to recover \$25,000, the purchase price of certain land conveyed by the plaintiff to the defendant, and to enforce a vendor's lien upon the land conveyed. C. B. Johnson, the intervenor, filed his complaint of intervention, in which he set out that the plaintiff held the property in part as a trustee for intervenor and one L. M. Warden; that the interest of intervenor was a one-fourth share or interest therein. He denies, on information and belief, that the purchase price of the land was \$25,000, but avers that defendant, (a corporation,) as the consideration for the sale of the land, was to deliver 1,250 shares of the capital stock of the corporation defendant, (being the whole capital stock,) as follows: 300 shares each to plaintiff, Warden, intervenor, and Underhill, and 50 shares to Ernest Graves; that defendant never delivered any of the shares or other consideration; and that no security was given. Intervenor prays that, if it shall appear that the sum of \$25,000 shall appear to have been the consideration, a decree in favor of plaintiff be entered as prayed for in the complaint; that, if it shall appear that the stock was to be delivered, a decree of foreclosure be entered in favor of plaintiff in consonance with the facts stated in the complaint of intervention; and that in either case intervenor's interest in the judgment be established to the extent of his interest in the land, etc. The complaint of intervention was served upon the plaintiff and defendant, the latter of whom made default. Plaintiff denied all the allegations of the complaint, and thereupon dismissed his action. The cause was tried by the court, and written findings filed upon which judgment was entered, whereby it was decreed that, at the date of the sale of the land to defendant, plaintiff held one-quarter of the property in trust for inter-

vener, and that the latter, upon the payment of one-third of the amount due on a promissory note for \$2,937.50, executed by plaintiff, Greenberg, L. M. Warden, and the intervenor, as found in the findings, will be entitled to have issued to him by defendant 300 shares of the capital stock of the defendant corporation.

The judgment and order appealed from are erroneous, in this: The defendant being in default, intervenor was entitled to a decree of foreclosure, as prayed for against it. Whether the stock was to be delivered only upon the payment of the promissory note as found by the court was not an issue as between intervenor and defendant, and, as the plaintiff did not set it up as against intervenor, it is hard to see how it had any place in the evidence. The case is a peculiar one in some respects, and the pleadings should be so amended as to make plaintiff, who dismissed his case, a defendant, or by such further statements as, in the light of the proceedings and affidavits on file, will enable the court below to glean all the facts, and do complete justice to all the parties. The judgment and order appealed from should be reversed, and a new trial had, with leave to the parties intervenor and plaintiff to amend their pleadings as they may be advised.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered, with leave to the parties intervenor and plaintiff to amend their pleadings as they may be advised.

98 Cal. 355

BULLARD v. McCARDLE et al. (No. 18,011.)

(Supreme Court of California. May 26, 1893.)

JUSTICE'S JUDGMENT—EXECUTION SALE AFTER APPEAL — TITLE OF PURCHASER — ORDERS OF SUPERIOR COURT—NOTICE.

1. Where execution is issued on a judgment in justice's court after an appeal has been taken therefrom to the superior court, a purchaser at constable's sale under such execution acquires no title to the property purchased.

2. The facts that such appeal was dismissed by the superior court, and the order of dismissal filed in the justice's court, and that a subsequent order of the superior court vacating the order of dismissal was not filed in the justice's court, will not afford such purchaser protection, since he purchased at his peril.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action of claim and delivery by W. P. Bullard against James McCardle and others, in which plaintiff had judgment. From an order granting defendants' motion for a new trial, plaintiff appeals. Reversed.

Frank H. Short and D. M. Seaton, for appellant. Church & Cory, for respondents.

HARRISON, J. A money judgment was recovered in the justice's court against the plaintiff herein on the 19th of July, 1889, from which, on the same day, he appealed to the superior court upon questions of law and fact, giving a sufficient undertaking for the appeal, and to stay execution upon the judgment. The record on the appeal was filed in the superior court September 5, 1889, but on the 21st of October the plaintiff in the action, evidently not knowing that fact, obtained an order dismissing the appeal, upon the ground that the papers on appeal had not been filed. The appeal, when filed, had been numbered 2,820 on the register of actions in the superior court, and the motion to dismiss the appeal, as well as the order of dismissal, was entitled as of a case No. 2,909 on that register. On the next day after this order was made a certified copy thereof was filed in the justice's court, and an execution upon the judgment appealed from was issued and placed in the hands of the officer for service. On the 29th of October the superior court made an order vacating its previous order dismissing the appeal, and recalling the execution that had been issued out of the justice's court, but no copy of this order was filed in the justice's court. On the 7th of November the constable, by virtue of the execution, sold certain cattle of the plaintiff to the defendants herein, and immediately after the sale the plaintiff herein demanded the property from the defendants, and upon their refusal brought this action of claim and delivery. The property was delivered to him pending the action, and the court rendered judgment in his favor. The defendants moved for a new trial, which was granted, and the plaintiff has appealed from that order.

One who derails title to property through a sale under an execution must show not only the execution and the sale, but also a valid judgment in support of the execution. *Blood v. Light*, 38 Cal. 654; *Quirk v. Falk*, 47 Cal. 453; *Schuyler v. Broughton*, 65 Cal. 252, 3 Pac. Rep. 870. The sheriff, in making the sale, acts under a naked, statutory power, dependent for its existence upon the existence of the judgment which he is attempting to execute, and, if there is no judgment in support of the writ of execution under which he makes the sale, the power to make the sale is wanting. By obtaining his judgment the plaintiff has become authorized to satisfy the amount therein named out of the defendant's property, and the law designates the sheriff as his agent to effect this result. The sheriff is, however, but the agent of the plaintiff in making the satisfaction, and can exercise no greater power therefor than could the plaintiff himself. Unless there is a valid judgment in existence, neither the plaintiff himself nor the sheriff has any authority to deprive the defendant of his property. Even though there was a judgment in existence at the time the writ of

execution was issued, yet, if it has been vacated or satisfied before any sale is made under the execution, the power to make the sale has also been destroyed; and it is immaterial whether the judgment was directly satisfied or vacated, as by payment, or an order of court, or indirectly, as by granting a new trial in the action, or by an appeal whose effect is to prevent the execution of the judgment. A different rule obtains when the judgment is vacated or appealed from after a sale of property under its authority. In such a case the bona fide purchaser is not affected even by a reversal of the judgment. It is, however, always incumbent upon the purchaser to see at his peril that there is a valid judgment in existence at the time he makes his purchase. *Herm. Ex'ns*, § 255; *Wood v. Colvin*, 2 Hill, 566; *Frost v. Yonkers Bank*, 70 N. Y. 553; *McClure v. Logan*, 59 Mo. 234. "The sheriff, in making sale of property under process of the court, acts under a power; and, if the power does not exist, no title passes, even to an innocent purchaser. He who buys under a power buys at his peril, and acquires no title without showing a valid, subsisting power." *Carpenter v. Stilwell*, 11 N. Y. 71. "The judgment was the sole foundation of the sheriff's power to sell and convey the premises, and, if the judgment was paid when he undertook to sell and convey, his power was at an end, and all his acts were without authority and void. The purchaser under a power is chargeable with notice if the power does not exist, and purchases at his peril." *Craft v. Merrill*, 14 N. Y. 461.

By perfecting the appeal from the justice's court, the case was entirely removed from that court, and only the superior court had thereafter jurisdiction in the matter. The judgment in the justice's court was not merely suspended, but by the removal of the record was vacated and set aside. *Thornton v. Mahoney*, 24 Cal. 569; *People v. Treadwell*, 66 Cal. 400, 5 Pac. Rep. 686. When the effect of an appeal is to transfer the entire record to the appellate court, and to cause the action to be retried in that court, as if originally brought therein, as is the case when appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and is not thereafter available for any purpose. *Bank of North America v. Wheeler*, 28 Conn. 441; *Campbell v. Howard*, 5 Mass. 376; *Levi v. Karrick*, 15 Iowa, 444; *Keyser v. Farr*, 105 U. S. 265. The order made by the superior court vacating its previous order of dismissal took from the execution that had been issued by the justice its entire vigor, and rendered the acts of the officer thereunder nugatory. The judgment upon which it was issued had been vacated by an appeal therefrom, which was sufficient both in form and substance to divest the justice's court of any further

jurisdiction over the case. The case was thereafter in the superior court, and the rights of the parties were to be determined by the action of that court. Being a court of general jurisdiction, all its orders are attended with the presumption of regularity. (*Sherer v. Superior Court*, 94 Cal. 354, 29 Pac. Rep. 716,) and its order vacating its previous order of dismissal, and recalling the execution, left the cause undetermined, and pending before it, as it was when the appeal was first perfected. It was not essential to the validity of this order that it should be filed in the justice's court. It was effective as soon as it was made. The defendant had done all that was required of him in taking the appeal, and it was not necessary for him to take any steps to protect himself from further proceedings in the justice's court. It was, however, incumbent upon the purchasers at the sale, under the execution issued out of the justice's court, to see that such execution was supported by a valid judgment, and they were charged with notice of the proceedings in that court, and that the judgment had been appealed from prior to the issuance of the execution. They were also charged with notice that the cause was thereafter pending in the superior court, and they were required to examine the proceedings of that court to find support for the issuance of the execution. They could not rely upon the fact that a copy of the order dismissing the appeal had been filed in the justice's court. They assumed at their risk the regularity of that order, as well as any subsequent proceedings in the superior court, and their ignorance of the subsequent order vacating it is not available to them in their attempt to retain the property of the plaintiff herein, which they purchased in reliance upon the order of dismissal. Inasmuch as, upon the uncontroverted facts in the case, the decision could not have been different from that which was given at the trial, the order for a new trial cannot be sustained, and it is therefore reversed.

We concur: GAROUTTE, J.; McFARLAND, J.

(98 Cal. 241)

GREISS v. STATE INVEST. & INS. CO.
(No. 14,301.)

(Supreme Court of California. May 11, 1893.)

FIRE INSURANCE—ACTION ON POLICY—ANSWER—ARBITRATION AND AWARD—AGREEMENT—WHAT CONSTITUTES.

1. In an action on a fire insurance policy providing that immediate notice of loss should be given, with full statement and particulars and amount of loss, and that any fraud should work a forfeiture, an answer alleging that defendant specifically excepts "to plaintiff's notice of loss or proof of loss, because it is false and untrue in respect to quality, quantity, and value of the property insured, and in respect to the amount of the loss," does not give plaintiff notice that fraud was charged, or that a forfeiture would be claimed.

2. In such action, the answer not having raised the question of fraud, the court properly refused to charge that plaintiff could not recover if the proof of loss was fraudulent, even though evidence was admitted in proving amount of loss, which was relevant whether there was an issue as to fraud or not.

3. A stipulation for a submission to arbitration, which does not provide for the number of arbitrators, nor the mode of their selection, is too indefinite to be enforced.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by George Greiss against the State Investment & Insurance Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Fisher Ames, for appellant. O'Brien, Morrison & Daingerfield and Morrison, Stratton & Foerster, for respondent Greiss. F. A. Meyer and Wm. B. Haskell, for respondent Meyer.

TEMPLE, C. This action is upon a fire insurance policy, and this appeal is taken by the insurance company from the judgment, and from an order refusing a new trial. Only two points are made here: (1) That the court erred in refusing to instruct the jury that, in case they find that the proof of loss furnished by plaintiff to the company was false and fraudulent, their verdict should be for the defendant; and (2) in refusing to instruct the jury that plaintiff could not recover if he refused to submit the matter of loss to arbitration, but, on the other hand, instructed the jury that arbitration was not a condition precedent to plaintiff's right to recover.

Respondent contends that the answer raises no issue as to false statements or fraud, and that a forfeiture is not claimed. The instruction asked, therefore, was not pertinent to any matter involved in the trial, and was rejected for that reason. I think this contention must be sustained.

The policy was attached to, and made a part of, the complaint. It provided that immediate notice of any loss should be given, with a full statement of particulars and amount of loss, etc., and that "any false swearing, fraud, or attempt at fraud on the part of the assured shall cause a forfeiture of all claims under this policy." The complaint avers due proof of loss, and a compliance with the conditions of the policy in other respects. The answer denies this allegation, sets out the proof of loss made, and points out several alleged defects in it, but does not charge that it is either false or fraudulent. It does state, however, that "thereafter, on or about the 21st day of March, A. D. 1887, defendant presented to and served upon plaintiff its objections and exceptions to said proof of loss, a full, true, and correct copy of which said objections and exceptions is hereto annexed, marked 'Exhibit B,' and is hereby expressly referred

to, and made a part thereof; and that said objections and exceptions to said proof of loss, and each of them, are and is, in all respects, true and correct, as therein stated, and the same are hereby expressly referred to and made a part hereof." The matter is not otherwise alluded to in the answer, and, as already said, it charges no fraud, nor does it claim a forfeiture. No facts are stated which could amount to fraud. It is provided in section 2635 of the Civil Code: "All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him without unnecessary delay, as ground of objection, are waived." The notice of objection specifies many other objections, and was doubtless served that the company might not be precluded from making any objection to the sufficiency of the proof; and plaintiff had a right to suppose that it was pleaded simply to show that no objections were waived. It gave him no notice that by such reference defendant intended to plead a forfeiture, especially as even in the notice no fraud is charged, and no forfeiture claimed. But, conceding that by such reference the statements in the notice can be converted into substantial averments of the answer, it states no facts tending to show fraud. By it plaintiff was notified that the company specifically excepts to "said notice of loss or proof of loss," on the ground that "it is false and untrue in respect to quality, quantity, and value of the property insured, and in respect to the amount of loss." It does not charge that it was willfully false or untrue, states no facts constituting fraud, and does not claim a forfeiture has been incurred. As there was another apparent reason for giving the notice and for pleading it, I think the answer did not inform the plaintiff that fraud was charged, or that a forfeiture would be claimed. The general rule is that a defense should be so pleaded that, being admitted as pleaded, judgment must go for defendant, and this rule is especially rigid in pleading fraud or a forfeiture. The pleading here considered would not stand this test.

But it is contended that it is now too late to make this point, because proof was admitted on the trial, without objection, that the answer was insufficient in this respect, or that no issue was raised as to fraud by this plea. A careful reading of the voluminous record has convinced me that this position is untenable. The policy being a contract of indemnity, it was incumbent upon the plaintiff to prove the amount of his loss. Upon this issue, evidence was produced by both parties, and was, of course, relevant, whether there was an issue as to fraud or not. Therefore the plaintiff could not object to such evidence when offered by defendant, nor did such offer convey any information to plaintiff that defendant was attempting to prove fraud or claimed a forfeiture. The first opportunity he had of objecting to such

an issue being made was when the rejected instruction was presented. The doctrine invoked is founded partly upon a sort of estoppel. It is unfair for a party to withhold an objection founded upon a defect which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient, in order that he may have a fatal objection. Such course is a fraud upon justice, and prevents a fair trial. It is therefore not tolerated. Sometimes, perhaps, the rule has been enforced, on the ground that the issue has been fairly tried, and neither party has been prejudiced by the want of a good pleading. Neither reason exists here. Defendant was not misled by the conduct of plaintiff, and no one can say that plaintiff could not have proven his good faith in his estimate of his loss by other testimony than the mere proof of the extent of his loss. The stipulation for an arbitration was too indefinite to be enforced, and a submission to arbitration cannot therefore be held to have been a condition precedent to a right of action. It did not provide for the number of the arbitrators, nor the mode of their selection. *Case v. Insurance Co.*, 82 Cal. 263, 21 Pac. Rep. 843, and 22 Pac. Rep. 1083. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

93 Cal. 318

CREDITORS v. CONSUMERS' LUMBER CO. (No. 14,933.)

(Supreme Court of California. May 20, 1893.)

INSOLVENCY — PETITION — BOND — PLACE OF BUSINESS OF CORPORATION — WHAT CONSTITUTES — PAROL EVIDENCE.

1. St. 1880, c. 87, (Insolvency Act,) § 8, provides that a petition in insolvency "shall be accompanied by a bond, with two sureties," in a certain sum. *Held*, that a failure to file such bond was not jurisdictional.

2. St. 1880, c. 87, § 8, requires that a petition in insolvency shall be filed "in the superior court of the county, or city and county, in which the debtor resides or has his place of business." *Held*, that a corporation whose residence was in the county of S., but whose mill was located in the county of H., where all its operations were carried on, where it contracted its liabilities, and where its creditors lived, had its place of business in the county of H. for the purposes of the above statute.

3. In proceedings by creditors of a corporation to have the same declared insolvent, the creditors may prove by parol evidence in what county the corporation has its place of business.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Petition by the creditors of the Consumers' Lumber Company to have the corporation declared insolvent. From an order adjudging the same insolvent, it appeals. Affirmed.

John W. Turner, for appellant, J. F. Coonan and Denver Sevier, for respondent.

GAROUTTE, J. This is an appeal from an order of adjudication of insolvency, based upon a petition of creditors. The demurrer to the petition was properly overruled. Section 8 of the insolvency act requires the petition to be filed in the superior court of the county, or city and county, in which the debtor resides or has his place of business. The allegation of the petition is that the lumber company has its place of business at Humboldt county, Cal. Even conceding that an allegation of residence or place of business is essential to the sufficiency of the petition, then the allegation in this case comes squarely within the statute. Section 8 of the act provides that "the petition shall be accompanied by a bond, with two sureties, in the penal sum of five hundred dollars." It is now insisted for the first time that the court had no jurisdiction over the subject-matter of the proceeding, because no bond signed by the petitioning creditors and two sureties accompanied the petition, but an undertaking by sureties alone was filed. It is not necessary to enter into an examination of the law as to the character of the bond or undertaking contemplated by the statute. A provision of law very similar in principle to the one under investigation was before the court in *Dixon v. Allen*, 69 Cal. 528, 11 Pac. Rep. 179, and it was there decided that a failure to file a bond was in no sense jurisdictional. If the undertaking in this case was objectionable, in fairness to the other side the defects should have been pointed out, in order that they might have been remedied. As was said in *Greiss v. Insurance Co.*, 33 Pac. Rep. 195, (decision filed May 11, 1893:) "Such a course is a fraud upon justice, and prevents a fair trial. It is therefore not tolerated."

We know of no rule of evidence denying petitioners the right to prove, by parol, in what county the appellant corporation had its place of business. As we construe this provision of the insolvency act, it would be difficult to prove the fact in any other manner. The petition must be filed in the county where the "debtor resides, or has his place of business." A tradesman's residence and his place of business are often in different counties, and his creditors, under the foregoing provision, would be authorized to force him into insolvency in the county of his residence, or in the county where he has his place of business. A corporation occupies no better or different position. As has been held in *Jenkins v. Stage Co.*, 22 Cal. 538, and *Cohn v. Railroad Co.*, 71 Cal. 488, 12 Pac. Rep. 498, the principal place of business of a corporation, as stated in its articles, is its residence; but, as in the case of an individual, its actual place of business, its scene of operations, the place where it buys and sells, may be a county entirely dif-

ferent from its place of residence. Justice Sanderson said in *Harris v. McGregor*, 29 Cal. 128: "But the operations of a corporation may be carried on in one county, and its principal place of business, within the meaning of the statute, be in another and distinct county." In the present case, conceding the residence, viz. the principal place of business of the appellant, to be in the city and county of San Francisco, its mill was located in Humboldt county; it carried on all its operations there; it contracted its liabilities there; and there its creditors lived. Under the statute, it had its place of business in Humboldt county, as contradistinguished from its residence, and it follows that the petition by the creditors was filed in the proper county. Under this construction of the statute, it becomes immaterial to examine the ruling of the court as to the rejection, as evidence, of a certified copy of the original articles of incorporation. The certified copy was offered to prove residence, but, as we have seen, residence is an immaterial element in the present case. We might suggest that, as a certified copy of the original articles would not prove the existence of a corporation, it is not plain that such evidence would establish residence for a corporation. Let the judgment be affirmed.

We concur: **HARRISON, J.; PATERSON, J.**

(98 Cal. 287)

FIRST NAT. BANK OF SAN LUIS OBISPO v. SIMMONS et al. (No. 19,151.)

(Supreme Court of California. May 16, 1893.)

PARTNERSHIP—PURCHASE OF INTEREST—LIABILITY OF PURCHASER ON PRIOR OBLIGATION OF FIRM.

A person who buys the interest of one of the partners of a firm does not thereby become personally liable on a prior obligation of such firm, in the absence of proof that he in some way assumed such obligation.

Commissioners' decision. Department 2. Appeal from San Luis Obispo county; V. A. Gregg, Judge.

Action by the First National Bank of San Luis Obispo against L. H. Simmons and E. M. Hall, copartners, on a written contract for the payment of money, executed by L. H. Simmons and Charles F. Hall, copartners under the firm name of Simmons & Hall. From a judgment of nonsuit as to defendant E. M. Hall, plaintiff appeals. Affirmed.

Wilcoxon & Boudin, for appellant. H. C. Firebaugh and Graves & Graves, for respondents.

VANCLIEF, C. Action on a promissory note, so called, of which the following is a copy: "\$1,000.00. San Luis Obispo, Cal., March 29, 1890. For value received I promise to pay to the order of the First National Bank of San Luis Obispo, in gold coin of the U. S., any and all sums of money which the said First National Bank of San Luis

Obispo may loan or advance to me on my account, to the amount of one thousand dollars, with interest on such loans and advances from the time the same are made, respectively, at the rate of ten per cent. per annum, payable monthly; said payment to be made by one day after date; and this obligation shall always apply to the balance of my indebtedness with said bank. No. 1,172. L. H. Simmons, for Simmons & Hall." The complaint alleges that the defendants, as copartners, made the note on the day of its date; that plaintiff then and thereafter "loaned and advanced to defendants, as such copartners as aforesaid, the sum of \$1,000, and the same was used by said defendants as such partners, in and about the business of said partnership;" and that only \$300.35 has been paid thereon. The complaint is not verified. The defendant E. M. Hall denied each and every allegation of the complaint, and specifically denied that any partnership ever existed between him and Simmons. At the close of the evidence on the part of the plaintiff the defendant Hall moved for a nonsuit as to him, on the ground that the evidence did not tend to prove that he was one of the makers of the note, or had ever promised to pay the same. The court granted the motion, and judgment of nonsuit was entered in favor of the defendant Hall, from which plaintiff brings this appeal on a bill of exceptions.

The evidence on the part of the plaintiff, as stated in the bill of exceptions, shows that on August 22, 1889, a written agreement of partnership was executed between Simmons and one Charles F. Hall, the son of the defendant E. M. Hall, by the terms of which Charles F. Hall purchased from Simmons an undivided half of the stock in trade of a hardware business theretofore carried on by Simmons at the town of San Luis Obispo, for the sum of \$2,950; that after the payment of this sum, and transfer of one-half of said stock, the parties to the agreement should be partners in the business under the firm name of Simmons & Hall. It appears that the defendant E. M. Hall, who resided in San Francisco, advanced and paid for his son Charles F. Hall the whole sum of the purchase money, but that the son alone took possession of the interest purchased, and with Simmons conducted the business until some time between August 1, and October 8, 1890, when it is claimed by appellant that, being dangerously ill, he sold his interest in the concern to his father, E. M. Hall. Simmons, who was the principal witness for the plaintiff, testified that in August or September, or possibly as late as November 1, 1890, Charles F. Hall, while sick at San Luis Obispo, signed a bill of sale of his interest in the business to his father, E. M. Hall, who was not in San Luis Obispo at that time, and that he (Simmons) con-

sented to such sale, but that E. M. Hall never took possession of the interest, nor claimed any right to it, under that bill of sale, and never, to the knowledge of witness, took any part in the conduct of the business; and, further, that no partnership agreement was ever made between him and E. M. Hall. There is no evidence that the bill of sale signed by Charles F. Hall was ever delivered to E. M. Hall, and it appears that on December 3, 1890, Charles F. Hall executed a bill of sale of his interest in the partnership to one Charles Haskins, and soon after died. Simmons testified that Haskins presented his bill of sale, claiming the interest of Charles F. Hall, and came into possession, and represented that interest. Mr. R. E. Jack, who was president of the plaintiff bank at the time the note was made, and cashier at the time of the trial, testified that on October 8, 1890, he called on E. M. Hall, who was then on a visit to San Luis Obispo, with whom he had not been acquainted before, and procured an introduction to him; that, upon such introduction, "Mr. Hall's first remark that he addressed to me was, 'How is my partner, Simmons?' And then I asked him if he had taken, as I understood, a transfer of that interest, and if he owned it. He said he had, and it was his." Witness further testified that having been informed of the signing of the bill of sale by Charles F. Hall to his father, as testified by Simmons, his object in calling on E. M. Hall was to ascertain whether he had purchased Charles F. Hall's interest. The evidence does not fix the date of the alleged bill of sale from Charles F. Hall to E. M. Hall, but appellant claims it to have been about October 1, 1890.

Assuming, for the purpose of this appeal, that the evidence tends to prove a transfer of the interest of Charles F. to E. M. Hall between August 1, and October 1, 1890, and also that Simmons accepted E. M. Hall as a partner at the time of the transfer, yet these facts alone did not make E. M. Hall responsible on the note upon which this action is brought, which had been made by the firm composed of Simmons and Charles F. Hall a year before E. M. Hall came into the firm. In order to make E. M. Hall liable on that note it must have been proved that in some way he assumed the obligation created by it. *Smith v. Millard*, 77 Cal. 440, 19 Pac. Rep. 824; *Lindl. Partn.* (2d Amer. Ed.) marg. p. 205 et seq. Of this, however, there is no evidence whatever. I think the nonsuit was properly granted, (*Stoddart v. Van Dyke*, 12 Cal. 438,) and that the judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

98 Cal. 327

GUTZEIT v. PENNIE et al. (No. 15,004.)
(Supreme Court of California. May 20, 1893.)

MORTGAGES—FORECLOSURE.

A judgment for plaintiff in an action to foreclose a mortgage on land, where the mortgagor has parted with his interest in the land, and the only relief sought by plaintiff is the sale of the mortgaged premises, is valid against the grantees of the mortgagor, though the personal representative of the mortgagor is not a party to the action.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action originally brought by Henry Gutzeit against James C. Pennie, administrator, etc., Bozo Radovich, and Henry Plageman. During the pendency of the action James C. Pennie was removed as administrator, and the action was continued against the other defendants. Judgment was rendered for plaintiff, and defendants Radovich and Plageman appeal. Affirmed.

Eugene N. Deuprey, W. L. Gill, and J. R. Patton, for appellants. S. A. Barker and S. F. Leib, for respondent.

McFARLAND, J. The only question in the case at bar requiring special notice is this: Is a judgment foreclosing a mortgage valid as against grantees of the mortgagor and subsequent incumbrancers although a representative of the deceased mortgagor is not before the court at the time of the judgment, the plaintiff waiving all recourse against any of the property of the estate except the mortgaged premises? The facts necessary to be stated are these: On the 25th of July, 1884, W. C. Palmer, since deceased, executed the note and mortgage sued on to one Nils Sjöholm, and immediately thereafter conveyed the mortgaged premises, and all his right, title, and interest therein, to his wife, Mattie A. Palmer, who was made a defendant in this action. Sjöholm assigned the note and mortgage to plaintiff. Bozo Radovich and Henry Plageman claim an interest in the mortgaged premises under said Mattie A. Palmer, and they were also made defendants, and appeared and defended. The mortgagor, W. C. Palmer, died before the commencement of the suit, and one Pennie had been appointed and was acting as the administrator of said Palmer, deceased. Pennie, as such administrator, was made a party defendant; but before the trial and judgment said Pennie was removed as administrator, and no other administrator was appointed. The plaintiff, in his complaint, waived all recourse against any other property of the estate; and the decree of foreclosure was entered without the estate of Palmer being before the court in any other way than as above stated. Judgment and decree was rendered for plaintiff, and the said Radovich and Plageman appealed; and they contend that the decree of foreclosure was in-

valid, and must be reversed, because the estate of Palmer was not before the court at the time it was entered. This position is not tenable. However the heirs of Palmer may be affected by the judgment, his personal representative was not a necessary party to the suit, so far as the appellants herein are concerned. No one interested in the estate of said Palmer appeals. The appellants are merely subsequent grantees of Mattie A. Palmer, to whom the deceased conveyed all his interest in the mortgaged premises. The point made by appellants has several times been decided by this court against their contention. In *Society v. Herbert*, 53 Cal. 378, the court say: "The mortgagor, Burke, having conveyed the mortgaged premises by deed to his wife, and having thenceforth no interest in the property, his personal representative was not a necessary party to the foreclosure suit." In *Schadt v. Heppe*, 45 Cal. 437, where the mortgaged premises, after the death of the mortgagor, had been set apart to the widow, the court say: "For the purposes of a mere foreclosure, therefore, the administrator was no longer a necessary * * * party to the action. Nothing being claimed against the estate, it was no matter of concern to him whether the mortgage should be foreclosed or not." See, also, *Goodenow v. Ewer*, 16 Cal. 461; *Belloc v. Rogers*, 9 Cal. 124; also, *Story*, Eq. Pl. 197; *Pom. Rem. & Rem. Rights*, § 326, and notes. We do not think that either of the other points made by appellants demand special notice. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

98 Cal. 311

GREGORY v. BLANCHARD. (No. 18,070.)
(Supreme Court of California. May 20, 1893.)

MANDAMUS—JURISDICTION—AID TO EXECUTION OF LOWER COURT—TOLL ROADS—FRANCHISE—LEVY AND SALE.

1. The superior court is not authorized to issue a writ of mandate in aid of the execution of a judgment rendered in a justice's court.

2. The franchise of an individual to collect tolls on a toll road, and his rights and privileges therein, cannot be levied on and sold under execution, there being no statutory provision therefor, though Civil Code, § 388, provides that, for the satisfaction of a judgment against a corporation authorized to receive tolls, its franchise, and all its rights and privileges, may be levied on and sold under execution, in the same manner as any other property.

3. A provision in a judgment, and in the writ thereon, requiring defendant "to deliver the possession of said franchise to collect the tolls on the * * * toll road," and "the possession of all property necessary for the exercise of the powers and the receipt of the proceeds" thereof, is not susceptible of execution, and too indefinite to constitute a determination of the rights of the parties.

Department 1. Appeal from superior court, Mono county; W. H. Virden, Judge.

Application by S. W. Gregory for a writ of mandamus to compel H. C. Blanchard to let petitioner into the possession of the franchise to collect toll on the Bodie & State Line Toll Road, and of all property necessary for the exercise of the powers and the receipts of the proceeds thereof. From an order granting the writ, defendant appeals. Reversed.

Charles C. Hayes, for appellant. F. P. Willard, (Richard S. Miner, of counsel,) for respondent.

HARRISON, J. A judgment was rendered against the appellant in the justice's court of Bodie township, in Mono county, on the 31st day of December, 1888, and an execution thereon was issued out of said court on the 27th day of November, 1891. By virtue of this execution the sheriff of Mono county, on the 30th day of November, 1891, levied upon "the franchise to collect toll, and all the rights and privileges thereunder, or belonging thereto, of the said H. C. Blanchard," on a certain toll road, and on the 14th of January, 1892, sold the same to the plaintiff, and executed to him a certificate of such sale. Thereupon the plaintiff notified the defendant of such purchase, and demanded to be let into the possession thereof, and upon his refusal made an application to the superior court of Mono county for a writ of mandamus commanding him "to let the petitioner, S. W. Gregory, immediately into the possession of said franchise, and of all property necessary for the exercise of the powers and the receipts of the proceeds thereof." After a hearing upon the application the court granted the writ, and the defendant has appealed to this court.

1. The superior court was not authorized to issue a writ of mandate in aid of the execution of the judgment rendered in the justice's court. For the purpose of a complete execution of a judgment, resort should be had to the court in which the judgment was rendered. If for that purpose it is necessary to place the purchaser in possession of the property sold by virtue of the judgment, as in the case of a purchaser at a sale under the foreclosure of a mortgage, any writ or process for that purpose must be issued by the court in which the action is pending. If resort is had to another tribunal for the purpose of enforcing the rights acquired by such purchase, it must be by an action in that court, and not by a summary proceeding. The purchaser of property at a sheriff's sale has no greater right to a writ of mandamus to compel its delivery by the judgment debtor than has a purchaser at any other sale. The plaintiff herein has no greater right to the writ by reason of the fact that he bought the franchise at a sale under an execution upon the judgment than he would have had if he had bought it at public auction, or upon a direct dealing with the de-

fendant, and, upon a demand therefor, had been refused its possession. The writ is never employed for the purpose of trying title to property, whether the property be the right to land, or to an office, or to a franchise.

2. A franchise is merely a privilege, and is not the subject of sale and transfer without the consent of the authority by which it was granted. "The persons to whom such privileges are granted hold them in personal trust, and therefore they cannot be transferred by forced sale, (*Munroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Cal. 286,) nor by voluntary assignment, unless by the permission of government, and even then, if a special mode of transfer is pointed out, that mode must be followed," (*Wood v. Turnpike Co.*, 24 Cal. 487; *People v. Duncan*, 41 Cal. 509.) In the absence of a statutory provision therefor, a franchise cannot be levied on or sold under execution. *Freem. Ex'ns*, § 179; *Stewart v. Jones*, 40 Mo. 140; *Gue v. Canal Co.*, 24 How. 263. Whenever such a provision exists, the extent as well as the mode of such levy and sale are limited thereby. Section 388 of the Civil Code provides that, "for the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise, and all the rights and privileges thereof, may be levied upon and sold under execution, in the same manner, and with like effect, as any other property." This provision is, by its terms, limited to a sale of the franchise held by a "corporation" against whom the judgment has been rendered, and we have not been referred to any other provision of the Codes suspending or changing the rule declared in the above cases. Section 523 of the Civil Code, referred to by the respondent, makes only the provisions of the title in which that section is found applicable to individuals as well as corporations, and has no reference to the transfer of a franchise. That title (title 5, pt. 4) purports to define certain rights and obligations of the owners of wagon roads; and this section makes those rights and obligations applicable to all such owners, whether they be individuals or corporations. Similar provisions are found with reference to the titles in which they are placed in sections 511, 531, Civil Code. Neither of these sections, however, or of the titles in which they are found, refers in any respect to the assignment or other disposition of the franchise therein referred to. It follows, therefore, that the plaintiff did not, by virtue of the sale under the execution, acquire the right to exercise the franchise held by the defendant.

3. Inasmuch as a franchise is only a privilege, and is not capable of manual delivery, the provision in the judgment, as well as in the writ thereon, requiring the defendant "to deliver the possession of said franchise to collect the tolls on the Bodie and State Line Toll Road," is not susceptible of execution.

The further provision therein, that he deliver to the plaintiff "the possession of all property necessary for the exercise of the powers and the receipt of the proceeds of said franchise," is too indefinite to constitute a determination of the rights of the parties. The court should determine what property is "necessary" for the exercise of those powers, and not leave it to the arbitrament of the defendant. The plaintiff, moreover, did not claim to have purchased at the execution sale anything but the "franchise," with its rights and privileges, and, even if the franchise had been subject to a sale under that judgment, the purchaser in any suitable proceeding for its recovery must have been limited to that which he had purchased; but, if it could be established that the rights and privileges incident to the franchise included any articles of property, such property should have been designated in the judgment, and not left to be the matter of a future investigation upon the question whether the writ had been complied with. The judgment and order are reversed.

We concur: PATERSON, J.; GAROUTTE, J.

3 Cal. Unrep. 879

HIBBERD v. MELLVILLE. (No. 15,001.)
(Supreme Court of California. May 20, 1893.)

HIGHWAYS—DEDICATION—EVIDENCE.

1. In an action for trespass, where defendant alleges that the land entered on was a public highway, it appeared that the line of the road for nearly its whole length had been changed from time to time by the owner of the land; that during all the time the public had been permitted to use the road it had been barred by several gates, to be opened and closed by persons passing over it; that for 12 years no work had been done or public money expended thereon by the road overseers; and it did not appear that there had been before that time. *Held*, that the road had not become a highway by dedication.

2. A question, "For the last 10 or 15 years, how many people have used that road or traveled it?"—was properly excluded, since its answer would not have shown an intention of the owners to dedicate the road to the public.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; Robert McGarvey, Judge.

Action by Elizabeth A. Hibberd against Charles A. Mellville to recover damages for an alleged trespass. From a judgment for plaintiff, defendant appeals. Affirmed.

J. A. Cooper, for appellant. T. L. Carothers, for respondent.

BELCHER, C. This is an action to recover damages for trespasses alleged to have been committed by the defendant in entering upon the land of plaintiff, riding over and across the same, and cutting down a gate thereon. The defense set up in the answer and relied upon at the trial was that the gate cut down was upon a road which had

become a public highway by dedication, and user by the public for more than 15 years. The complaint alleged that the plaintiff had been damaged by the trespasses complained of in the sum of \$325, but the court found that she was damaged by the cutting of the gate only, and in the sum of \$5, for which sum, with costs, judgment was given in her favor. The defendant moved for a new trial, which was denied, and has appealed from the judgment and order.

The principal question presented for decision is as to whether or not there was a public highway extending across plaintiff's land, and over which the defendant had a right to travel. It is not pretended that the road was ever laid out or established as a highway under the provisions of the Code, and the only question is, had it been dedicated by the owners of the land, and accepted and used by the public, so as to constitute it a public highway? The findings of the court are very full, covering all the probative as well as the ultimate facts, and so far as they need be stated are as follows: "That the plaintiff and her predecessors in title have permitted the defendant and his neighbors * * * to pass over the land of plaintiff. * * * While they have been so traveling over the said land of the plaintiff for more than twenty years without any express understanding between the public and the plaintiff or her predecessors, the route has never been confined to one place for any considerable length of time, and has always been under the control of the plaintiff and her predecessors in title, and has been changed by her and them at their pleasure; and there have during all of said time been gates kept up by the plaintiff and her said predecessors on the route or routes traveled across the land of plaintiff, and at the time of the commencement of this action, and on the said 22d day of April, 1891, (the day the gate was cut down by defendant,) there were, and are now, five gates maintained by the plaintiff on the said route so traveled by the defendant and others. From said dwelling of plaintiff to the north side of her lands she has a lane, across which she has three of said gates, and between two of them the lane widens out, so that plaintiff uses the space between them as a corral, and what travel passes over said road passes through said corral. That plaintiff and none of her predecessors in interest in said land ever intended to dedicate a right of way to the public across said land, and they, or neither of them, have ever so dedicated to the public such right of way. That the road claimed by the defendant to be a public highway across the lands of the plaintiff has never been accepted by the public as a public road, and the road overseers of the road district in which the said lands are situated have not for a period of eleven years next prior to the trial of this action, or at any other time, caused any work to

be done thereon, or any public money to be expended thereon, and have never in any way exercised any acts of control or jurisdiction over the same." Appellant contends that these findings were not justified by the evidence, and this is the main point relied on for a reversal.

"The vital principle of dedication is the intention to dedicate, and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. * * * If accepted and used by the public in the manner intended, the dedication is complete, precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact to be drawn by the jury from the circumstances of each particular case." But "dedication is never to be presumed without evidence of an unequivocal intention on the part of the owner." *Harding v. Jasper*, 14 Cal. 648; *Quinn v. Anderson*, 70 Cal. 456, 11 Pac. Rep. 746; *Ang. & D. Highw.* §§ 142, 147. In this case it was clearly proved that the line of the road for nearly its whole length had been changed from time to time by the owners of the land, and that for about 12 years before the trial no work had ever been done on the road by the road overseers, and no public money expended thereon. As to whether any work had been done on it by the overseers, or money expended before that, the evidence is silent. And speaking of this road and its changes, Robinson, one of plaintiff's predecessors in interest, testified: "As long as they did not interfere with me they could use it. If it had interfered with me I would have raised an objection. I did not intend at the time to part with the title to the land, or give a permanent road there." It was also proved without contradiction that during all the time the owners had permitted the road to be used by the public it had been barred by several gates to be opened and closed by persons passing over it; and, as said in *Quinn v. Anderson*, *supra*, this, in the absence of a statute providing that such gates may be maintained on a public highway, "has always been considered strong evidence in support of a mere license to the public to pass over the designated way, and in rebuttal of a dedication to public use." See, also, *Smithers v. Fitch*, 82 Cal. 153, 22 Pac. Rep. 935, where this language is quoted and approved. Looking, then, at all the evidence in the light of the authorities above quoted, we do not think it can be said that the owners of the land ever manifested an unequivocal intention to dedicate the road in question to the use of the public; and it must follow, therefore, that the judgment cannot be reversed for want of evidence to justify the findings.

The point is also made that the court erred in sustaining objections to certain evidence offered by defendant, but we see no

material error in the rulings complained of. Counsel asked the witness Adams: "Since 1876, for the last ten or fifteen years, how many people have used that road, or traveled it?" The question was clearly immaterial, for the reason that the answer, if given, would not have shown or tended to show an intention on the part of the owners to dedicate the road to the public. Besides, it had already appeared in the testimony that the number was "three or four families." Counsel also asked the witness Ledford: "Did Mr. Kelso tell you, in that conversation about raising money to make a better grade from his house to the county road, that the citizens helped him?" One of the grounds of objection to the question was that it was leading, and that it was so is evident. The objection was therefore properly sustained. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

98 Cal. 235

PEOPLE v. SANSOME. (No. 20,948.)

(Supreme Court of California. May 11, 1893.)

CRIMINAL LAW—REMARKS OF COUNSEL—PRELIMINARY HEARING—NEW TRIAL—INSTRUCTIONS.

1. Where on a criminal trial the prosecuting attorney improperly comments on defendant's failure to testify, and after a verdict against defendant he moves for a new trial, and fails to make the misconduct of the prosecuting attorney one of the grounds of such motion, the objection thereto will be regarded as waived.

2. After the submission of a criminal case to the jury, the officer in charge took the jury-men to an hotel for dinner, and two of them drank intoxicating liquor, but not sufficient to affect them. *Held* not to constitute misconduct which would warrant the reversal of the judgment.

3. Under Code Civil Proc. § 105, providing that a justice of the peace may hold the court of any other justice of the peace in the same county, where a complaint for burglary is filed with a justice of the peace, any other justice of the peace in the same county has jurisdiction to hear the preliminary examination thereon, if requested so to do by the justice before whom the complaint was filed.

4. Where the jury has been fully instructed as to the weight and effect of the testimony of an accomplice, it is not error to refuse to charge that, if defendant committed the crime, a certain witness was an accomplice, as this would be a charge "with respect to matters of fact."

Department 2. Appeal from superior court, Placer county; J. E. Prewett, Judge.

One Sansome was convicted of burglary, and appeals. Affirmed.

L. L. Chamberlain, for appellant. Atty. Gen. Hart and A. K. Robinson, for the People.

PER CURIAM. The defendant was charged by information with the crime of

burglary, committed at Iowa Hill, in the county of Placer, on the 10th day of May, 1891. He was arraigned, and pleaded not guilty to the charge. At the trial, witnesses were called and examined by the people and by defendant, but the latter did not take the stand and testify in his own behalf. At the conclusion of the evidence the district attorney made an opening argument to the jury, speaking about 30 minutes. Defendant's counsel then declined to make any argument at all. The court thereupon instructed the jury, and they retired to deliberate upon their verdict. Within a reasonable time the jury returned and presented to the court their verdict, finding the defendant guilty of burglary in the second degree. Time was then fixed for pronouncing judgment, and, when that time arrived, counsel for defendant moved the court in arrest of judgment and for a new trial, but upon what grounds does not appear from the record, except that in support thereof he presented, read, and filed five affidavits to show misconduct on the part of certain jurors. The time for passing sentence was then, on motion of the district attorney, postponed to give him time to procure and file counter affidavits, and, within the time allowed, counter affidavits of nine of the jurors were filed. The court subsequently denied both motions, and stated, as one of the reasons for doing so, that at the time the motion for new trial was submitted the court called upon and requested the attorney for defendant to designate and draw the attention of the court to any errors alleged to have been committed, and to the particulars wherein he claimed that the evidence was insufficient, and that the request was not complied with, or attempted to be complied with. The court then entered judgment that the defendant be punished by being imprisoned in the state prison for the term of nine years. From this judgment, and the order denying his motion for new trial and his motion in arrest of judgment, the defendant appeals. The principal grounds presented and relied upon for a reversal of the judgment are as follows:

1. While the district attorney was making his opening speech to the jury, he remarked: "True, we have not shown that defendant was in the immediate vicinity of Iowa Hill about the time of the burglary, but Mr. Conroy has testified that he believes he saw this defendant in the town of Auburn on the 30th of April, 1891, ten days before the alleged burglary; and I say to you, gentlemen, the defendant was there, and committed this offense, or why does he not go upon the stand like a man, and tell where he was?" The record shows that the attorney for defendant at once "interrupted the district attorney, and objected to any argument being made upon the failure of defendant to take the stand and testify in his own behalf;" and the "court thereupon instructed the district

attorney that this was not a legitimate argument, and instructed the jury that they were not to consider the remarks made by the district attorney upon the failure of the defendant to take the stand in determining their verdict;" and "the district attorney thereupon, in a few words, proceeded to assert to the jury that the ruling of the court was correct; and the court thereupon suggested that there be no further reference, whether favorable or unfavorable, to the matter, and the district attorney did not further refer to it." It is argued that these remarks of the district attorney, notwithstanding the ruling of the court, constituted "error prejudicial to the defendant, and sufficient to reverse the judgment." The Penal Code provides that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, and "his neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him, on the trial or proceeding." Section 1323. It is clear, in view of this plain provision of the statute, that the district attorney had no right to make the remarks complained of, and it is to be regretted that prosecuting officers, in their zeal to procure convictions, so often forget that they are under as much obligation to give one accused of crime a fair and impartial trial as is the judge upon the bench. But while the remarks were not legitimate or proper argument, still it hardly seems possible that intelligent jurors could have been influenced by them to the prejudice of the defendant, after they were instructed by the court that they were not to consider them in making up their verdict. Conceding, however, that they constituted error, still it was an error that could only be availed of by a motion for a new trial; and the question is, can the defendant, upon the record presented here, be heard to complain of that error? A motion for new trial in a criminal case may be, and ordinarily is, made *viva voce*, and if it is denied, and the defendant wishes to appeal, a bill of exceptions may then be prepared, setting forth so much of the evidence and the rulings as are relied upon to show error; but in making such a motion the grounds relied upon should be stated, and the attention of the court called to them at the time, and the bill of exceptions should show that such was the fact, or the order will not be reviewed on appeal. This is a well-settled rule, where a motion in arrest of judgment has been made and denied in a criminal case, (*People v. Dick*, 37 Cal. 277,) and also where a motion for nonsuit has been made and denied in a civil case, (*Coffey v. Greenfield*, 62 Cal. 602; *Shain v. Forbes*, 82 Cal. 577, 23 Pac. Rep. 198;) and we think it equally applicable to a motion for new trial in a criminal case. Here the bill of exceptions fails entirely to show that the alleged error under review was stated as a ground of the motion for new trial, or that the attention of the court below was in any

way called to it, and it must therefore be regarded as waived.

2. The affidavits read by defendant at the time his motion for new trial was made were to the effect that the case was submitted to the jury at about 11:50 A. M., and that at 1:10 P. M., before they had agreed upon a verdict, they were taken by the officer in charge of them to an hotel for dinner, and that, before eating, four of the jurors took drinks of whisky at the bar of the hotel. In the counter affidavits two of the jurors admitted that, at the time and place named, they each "took one small drink of liquor," but denied that they were drunk or intoxicated or in any way affected thereby. The other two jurors named denied that they drank any intoxicating liquor at all, and each of the nine counter affidavits denied that any of the jurors appeared to be under the influence of liquor while the case was pending before them. It is argued that the admitted indulgence in intoxicating liquor by two of the jurors constituted misconduct on the part of the jury, sufficient to reverse the judgment. We do not think this position can be maintained. If the two jurors who drank a little liquor were not affected by it, and, in view of the conflicting affidavits and the action of the court below, it must be assumed that they were not, then it would seem that neither law nor sound reason would require the judgment to be reversed on this ground. *People v. Deegan*, 88 Cal. 602, 26 Pac. Rep. 500.

3. When the defendant was called upon to plead to the information, he moved the court to set it aside upon the ground, among others, that he was examined and held to answer by a magistrate other than the one before whom the complaint was filed, and who issued the warrant for his arrest. The motion was denied, and an exception reserved. The record shows that the complaint was filed before J. F. Macey, a justice of the peace in and for township No. 7, in Placer county, and a warrant was then issued, and under it defendant was arrested and brought before the said justice; that a time was then fixed for the examination, and, at the time appointed, the defendant appeared in person and by his attorney, and the people by the district attorney; that Justice Macey then stated that he was too ill to proceed with the examination, and thereupon he substituted Amos Stevens, a justice of the peace of township No. 4, in said county, to act as committing magistrate in his place; that defendant objected to any one hearing the preliminary examination except the one before whom the complaint was sworn to, and that, notwithstanding the objection, Justice Stevens proceeded to hold the examination, and, after hearing the evidence, held the defendant to answer before the superior court of the county. It is argued that there is no provision of law authorizing one justice suddenly to call in another justice from a differ-

ent township to continue or conclude a preliminary examination, and hence that the examination should have been set aside. A sufficient answer to this point is found in section 105 of the Code of Civil Procedure, which provides: "A justice of the peace of any township may hold the court of any other justice of the peace of the same county, at his request, and while so acting shall be vested with the power of the justice for whom he so holds court," etc.

4. It is urged that it was plain, from the testimony of the witness Kelley, that he was an accomplice of the defendant, if defendant committed the crime alleged, and the court should have so instructed the jury. But the court fully and properly instructed the jury as to the weight and effect of the testimony of an accomplice, and to have gone further, and told them that Kelley was an accomplice, would have been clearly a charge "with respect to matters of fact," which is not allowed.

5. It is also urged that there was no evidence to connect the defendant with the commission of the burglary charged, and that, if any crime was proven against him, it was that of having in his possession stolen property, for which offense, only, he should have been tried. But there was proof that a burglary was committed, and a large number of watches and other things, subsequently found in the possession of defendant, were stolen. The instructions to the jury upon this and all the other points were quite full and clear, and as favorable to defendant as he could properly claim they should be. The judgment cannot, therefore, be reversed on this ground.

6. Numerous other errors are specified in the bill of exceptions, but they are not particularly referred to in the brief, though it is said none of them are waived, and "all are expressly insisted upon." We fail to find any material error in the rulings referred to which would justify a reversal. The order denying the motion in arrest of judgment was not appealable, and it therefore cannot be considered here. *People v. Majors*, 65 Cal. 100, 3 Pac. Rep. 401; *People v. Henry*, 77 Cal. 445, 19 Pac. Rep. 830. The judgment and order denying a new trial are affirmed.

98 Cal. 323

BEER v. CLIFTON et al. (No. 15,108.)

(Supreme Court of California. May 20, 1893.)

PROMISSORY NOTE—INDORSER AFTER MATURITY—LIABILITY—DEMAND AND NOTICE OF NONPAYMENT.

An indorser of overdue notes is not liable thereon in the absence of demand on the maker within a reasonable time after the indorsement and notice of nonpayment.

Department 2. Appeal from superior court, Mendocino county; Robert McGarvey, Judge.

Action by Jennie Beer against E. Clifton, D. H. Weill, and G. E. White on a promis-

sory note, in which defendants pleaded as an offset plaintiff's liability to defendants Clifton and Weill on certain notes sold and indorsed to them. Plaintiff had judgment for part of her claim only, and, from an order granting her motion for a new trial, defendants appeal. Affirmed.

James W. Oates, for appellants. T. L. Carothers, Crittenden Thornton, and F. H. Merzbach, for respondent.

McFARLAND, J. This action was brought to recover \$3,500, with interest, costs, etc., upon a promissory note made by defendants to plaintiff on March 29, 1890, and payable July 1, 1890. The jury returned a verdict for plaintiff for only \$1,240.24, and plaintiff moved for a new trial upon the grounds of insufficiency of the evidence to justify the verdict, that the verdict is against law, and errors of law occurring at the trial, etc. The court granted a motion for a new trial, stating in its order that the motion was granted because "the first and third instructions offered by defendants' attorneys, and given, are erroneous, and must have been misleading to the jury." The defendants appeal from the order granting a new trial.

The facts necessary to be stated are these: In March, 1889, the plaintiff was, and for several years before that had been, engaged in the business of keeping a country store at Covelo, in Mendocino county. The defendant Weill is her nephew, and for five years prior to the time last stated had been her principal clerk and assistant in said business. On March 18, 1889, she sold said business, together with certain real estate, live stock, and choses in action, to the defendants Weill and Clifton. In payment for the property sold, in addition to certain cash payments and a mortgage for \$1,500 on the real property sold, they gave her seven promissory notes for \$500 each, payable monthly in succession, the first becoming due on November 1, 1889. These notes not having been paid as they became due, and plaintiff becoming anxious for their payment, a little over a year afterwards, to wit, on March 29, 1890, the said notes were taken up by the giving of a note for \$3,500, signed by said defendants Weill and Clifton, and also by the defendant George E. White, which is the note sued on in this present action. Among the choses in action sold by plaintiff to Weill and Clifton on said March 18, 1889, were 11 promissory notes which had been given by different parties to plaintiff, and all of said 11 notes were at the time of said sale overdue. These notes were at the time of said sale, and being overdue as aforesaid, indorsed by said plaintiff; that is, she wrote her name on the back of said notes. Plaintiff testified that she delivered said notes to Weill and Clifton at the time of the sale without indorsement; and that about two weeks afterwards Weill requested

her to write her name on the back, saying that he could not collect the notes unless she did so, and that she would not have indorsed them if she had known that such indorsement would make her liable in any way for or upon said notes, and that she sold them absolutely, and without any intention of being personally liable thereon. But Weill and Clifton contended, and introduced evidence to the point, that according to the terms of the sale they were to collect whatever could be collected on said 11 notes, and that whatever they could not collect after the exercise of due diligence was to be credited upon and deducted from the amount due from them to plaintiff upon the said 7 promissory notes which they had given her, and consequently to be credited upon the \$3,500 note sued on, which was given in lieu of said 7 notes, as aforesaid. Under these circumstances, it was, of course, material and important for the jury, in view of the conflicting evidence, to know what, in law, was the liability which attached to plaintiff upon said 11 notes from the mere fact of her indorsement of them; and upon this point the said instructions, No. 1 and No. 3, are as follows: No. 1: "If you find from the evidence in this case that the plaintiff indorsed the eleven promissory notes by writing her name on the back of each, and that nothing was said by any of the parties when she did so about her liability thereon by reason of indorsing them, then she is liable, and you will so find by your verdict, unless defendants failed to collect the notes, or any of them, through their own negligence." No. 3: "The indorsement of the eleven promissory notes by the plaintiff is admitted, and by that indorsement she made herself liable for their payment. Indorsing them as she did makes her liable, unless there was at the time a contract between her and Clifton and Weill that she was not to be held liable thereon. The burden of showing such a contract is upon her, and she must prove it to your satisfaction, from all the evidence, before you would be justified in finding that she is not liable." It is clear, as the court below decided when granting a new trial, that these instructions were erroneous. They are somewhat conflicting, but they announce the doctrine that the indorser of a note after its maturity is absolutely liable thereon without regard to any right to have a demand made upon the maker and notice to the indorser on nonpayment. This is not the law. The indorser of an overdue note has as much right to demand and notice as the indorser of a note before maturity, the only difference being as to the time when the demand and notice must be made and given. This has always been the law and is stated in all the text-books. In Daniel, Neg. Inst. par. 611, the rule is stated in these words: "When a negotiable instrument is indorsed after maturity, payment must be demanded of the payer within a reasonable time, and

notice in the event of a refusal, given to the indorser, in order to charge him, it being regarded as equivalent to one payable on demand." This court has had occasion to so announce the law, e. g. *Beebe v. Brooks*, 12 Cal. 310; *Thompson v. Williams*, 14 Cal. 162; *Keyes v. Fenstermaker*, 24 Cal. 329. See, also, *McKewer v. Kirtland*, 33 Iowa, 351; *Colt v. Barnard*, 18 Pick. 260; *Swartz v. Redfield*, 13 Kan. 550; *Light v. Kingsbury*, 50 Mo. 331; *Ecfert v. Des Coudres*, 12 Amer. Dec. 609, and note; *Simpson v. Griffin*, 9 Johns. 131; *Leavitt v. Putnam*, 3 N. Y. 494. At common law the rule is that, in case of indorsement after maturity, the demand and notice must be within a reasonable time; reasonable time depending upon the facts in each particular case. Section 3135 of our Civil Code provides that the apparent maturity of a promissory note payable at sight or on demand is, if it bear interest, one year after its date; or, if it does not bear interest, six months after its date. According to the above quotation from *Daniel*, an instrument indorsed after maturity "is equivalent to one payable on demand." In *Chit. Bills*, 215, it is said that indorsing a promissory note after maturity is "equivalent to the act of drawing a bill at sight;" and in *Goodwin v. Davenport*, 47 Me. 118, the court say: "It is equivalent to a note on demand, dated at the time of the transfer, so far as demand and notice are concerned." If these authorities be correct, then it might be safely said that, in case of indorsement of an overdue note, demand and notice should be made and given at least within the time specified in said section 3135 for demand and notice in case of a note payable on demand; and there might be cases where the demand and notice should be within a much shorter time than that mentioned in said section of the Code. In the case at bar, however, the question of reasonable time does not arise, for the jury were erroneously instructed that plaintiff was not entitled to any demand and notice whatever. In fact, no notice was given until July 8, 1890, and the notice did not state the date of the demand. For the reasons above given, the order granting a new trial should be affirmed, for we see nothing in appellants' point that said erroneous instructions were not prejudicial to plaintiff.

The order appealed from is affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

33 Cal. 45

BENSON v. CENTRAL PAC. R. CO. (No. 13,290.)

(Supreme Court of California. May 22, 1893.)

Amendment of previous order.

For report of decision on appeal, see 32 Pac. Rep. 809.

PER CURIAM. That portion of the order made herein March 30, 1893, which affirms

the judgment of the court below, having been inadvertently made, inasmuch as there was no appeal from the judgment pending in this court, it is hereby directed that the said order be amended so that it will read: "The order denying the plaintiff's motion for a new trial is affirmed."

5 Cal. Unrep. 750

LINK v. JARVIS. (No. 18,045.)

(Supreme Court of California. June 3, 1893.)

AMENDMENT OF PLEADINGS — FORM OF ACTION — LIMITATION — INTEREST.

1. Applications to amend pleadings are addressed to the discretion of the trial court, and should be allowed at any stage of the trial, when necessary for the purposes of justice.

2. A complaint which sets out that defendant received plaintiff's money under an agreement which he afterwards refused to perform, and asks damages for the breach, does not state a cause of action sounding in tort.

3. Where money is given under an agreement that the person who receives it will do certain things, and he fails to perform his agreement, the statute of limitations will not commence to run against the claim of the person who gave money until there is a refusal to perform the contract.

4. Where an amended complaint is filed which does not state a new cause of action, nor bring in new parties, it relates back to the filing of the original complaint, and the statute of limitations ceases to run against plaintiff's claim at the date of filing the original complaint.

5. In an action to recover money given under an agreement that the person who received it would do certain things, where such person has refused to perform his agreement he is chargeable with interest on the sum received from the time of such refusal.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by Sylvester Link against Dustin Jarvis to recover money given under an agreement that defendant would do certain things for plaintiff. Judgment was rendered for plaintiff, and from such judgment, and an order denying a motion for a new trial, defendant appeals. Affirmed.

J. M. Kile and M. De Vries, for appellant. Loutitt, Woods & Lezinsky, for respondent.

BELCHER, C. This action was commenced on July 12, 1889, to recover the sum of \$600, money had and received by the defendant for the use and benefit of the plaintiff. Issue was joined, and when the case came on for trial, on the objection of the defendant, the testimony on the part of the plaintiff was excluded by the court, as not admissible under the complaint. The plaintiff thereupon asked leave to file an amended complaint, and, over the objection of defendant, his application was granted, on condition that he pay all costs of the action up to the time of filing the amendment. The costs were paid, and amended complaint was filed September 18, 1890. The new complaint alleged that in October, 1887, the plaintiff gave to the defendant the sum of \$600, under an

agreement that defendant would do for the plaintiff certain specified things; that plaintiff afterwards demanded of defendant that he perform his agreement, but that he then refused, and has ever since refused, to do so, to plaintiff's damage in the sum of \$600, for which he asked judgment, with interest. The defendant answered to the complaint, and, among other defenses interposed, pleaded in bar of the action subdivision 1 of section 339 of the Code of Civil Procedure. The case was tried by the court, and all the findings were in favor of the plaintiff. Among other things, the court found that the plaintiff made frequent demands of the defendant that he comply with his agreement, but that he continuously neglected and delayed so to do, and on October 1, 1888, finally and absolutely refused so to do, and that the action was not barred by the section of the Code pleaded. Judgment was accordingly entered in favor of the plaintiff for the sum prayed for, with interest thereon from October 1, 1888. From the judgment so entered, and an order denying his motion for new trial, the defendant appeals.

The first point made for a reversal is that the court erred in allowing the plaintiff to amend his complaint, after having proceeded to trial upon the original complaint and answer. There was no error in the ruling complained of. The Code provides that courts may allow amendments to pleadings "upon such terms as may be just," (section 473, Code Civil Proc.) and the rule is well settled that applications to amend pleadings are addressed to the discretion of the trial court, and should be allowed at any stage of the trial, when necessary for the purposes of justice. *Bank v. Stover*, 60 Cal. 387; *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. Rep. 673; *Guidery v. Green*, 95 Cal. 630, 30 Pac. Rep. 786.

The next point is that the court erred in allowing the amended complaint to be filed, because the action was thereby changed from one *ex contractu* to one in tort. It is true that such an amendment would not be allowable, but we do not think the amended complaint states a cause of action sounding in tort. It simply sets out that defendant received the plaintiff's money under an agreement, which he afterwards refused to perform, and asks damages for the breach. This no more sounds in tort than did the action for money had and received.

The point is also made that the court erred in finding that the action was not barred by the statute of limitations; and it is argued that the statute began to run when defendant received the money, and continued to run until the amended complaint was filed, and that as more than two years elapsed between those dates, the action was barred. But the statute did not begin to run until the defendant refused to perform his agreement, and that, as found by the court, was less than two years before the amend-

ment was filed. Besides, an amended complaint relates back to the commencement of the action, if a new cause of action is not pleaded, and new parties are not brought in; and in such case the statute ceases to run when the original complaint is filed. *Barber v. Reynolds*, 33 Cal. 497; *Allen v. Marshall*, 34 Cal. 165; *Lorenzana v. Camarillo*, 45 Cal. 125.

Another point urged for a reversal is that the court erred in allowing the plaintiff interest on the amount claimed from October 1, 1888. But it was proved by the plaintiff, and found by the court, that plaintiff made frequent demands upon the defendant that he perform his agreement, and that defendant put him off, from time to time, until October 1, 1888, and then absolutely refused to perform it. If this was so, plaintiff was certainly entitled to interest from that date.

Finally, it is insisted that the findings were not justified by the evidence. It was admitted by defendant that he received \$600 of the plaintiff's money, but claimed that the money was paid to him upon conditions which justified him in retaining it. It would subserve no useful purpose to set out the testimony, but, in our opinion, the judgment cannot be disturbed on this ground.

The appeal from the judgment was taken more than a year after judgment was entered, and should be dismissed, but the order denying a new trial should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

98 Cal. 342

TOWLE v. PACIFIC IMP. CO. (No. 14,425.)
(Supreme Court of California. May 23, 1893.)

NEGLIGENCE — EVIDENCE — GENERAL CHARACTER FOR CARE.

In an action for injuries inflicted by defendant's servant in negligently causing or permitting a team of horses to run over plaintiff, evidence that such servant is a prudent and first-class driver, and that he had never been guilty of any carelessness during the four years he had been in defendant's employ, is inadmissible to show that he exercised ordinary care when the accident occurred, since that question must be determined on evidence of what took place at the time. *Boyce v. Stage Co.*, 25 Cal. 468, and *Ficken v. Jones*, 28 Cal. 618, distinguished.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; F. E. Spencer, Judge.

Action by George W. Towle against the Pacific Improvement Company for the death of plaintiff's wife. From a judgment in defendant's favor, plaintiff appeals. Reversed.

D. M. Delmas, for appellant. S. F. Geil and H. V. Morehouse, for respondent.

BELCHER, C. The plaintiff brought this action to recover damages for the death of his wife, alleged to have been caused by the defendant's servant, by negligently causing or permitting a team of horses to run over her. The defendant had judgment, and the plaintiff appeals.

At the trial the defendant was allowed, over plaintiff's objection and exception, to introduce evidence that the defendant's driver, who was in charge of the team, was a good, first-class driver, careful in handling horses, and that during the four years he had been in the employ of defendant he had never been guilty of any mismanagement or carelessness in the conduct or care of the team. Whether or not this evidence was admissible is the only question presented for decision. The law as to the admissibility of such evidence in cases of similar character is thus stated in *Deering on Negligence*, (section 407): "Whether the act or omission of the defendant is actionable negligence is to be determined by the character of the act or omission, and not by the defendant's character for care and caution. Evidence that the defendant is a careful, prudent, and cautious man is inadmissible to negative his want of ordinary care. Upon the question of the negligence of the engineer at the time of the collision of two trains, evidence of the general incapacity of the engineer, or of his being subject to fits, is immaterial. The reputation of the driver of a horse and carriage is inadmissible in an action by the owner of another horse killed by a collision therewith." And in *Thompson on Negligence* (volume 2, p. 804) it is said: "Evidence that the plaintiff was commonly a careful and skillful driver is not admissible to show that when the accident occurred he was in the exercise of due care. The principle is that the question whether a person was at a given time in the exercise of due care is to be resolved upon evidence of what took place at the time, and not upon evidence of the general character he may sustain." The rule as above declared is supported by numerous decisions in other states, and we think it should be followed in this state. See *Tenney v. Tuttle*, 1 Allen, 185; *McDonald v. Savoy*, 110 Mass. 49; *McCarty v. Leary*, 118 Mass. 509; *Jacobs v. Duke*, 1 E. D. Smith, 271; *Hays v. Millar*, 77 Pa. St. 238; *Dunham v. Rackliff*, 71 Me. 345; *Chase v. Railroad Co.*, 77 Me. 62; *Morris v. Town of East Haven*, 41 Conn. 252; *Williams v. Edmunds*, 75 Mich. 92, 42 N. W. Rep. 534; *Boick v. Bissell*, 80 Mich. 260, 45 N. W. Rep. 55; *Propsom v. Leatham*, 80 Wis. 608, 50 N. W. Rep. 586; *Railroad Co. v. Roach*, 64 Ga. 635; *Railroad Co. v. Newton*, 85 Ga. 517, 11 S. E. Rep. 776. But, whatever may be the rule elsewhere as to the admissibility of such evidence, it is claimed for respondent that under the decisions of the supreme court of this state it must be held

admissible here; and in support of this position counsel cite *Boyce v. Stage Co.*, 25 Cal. 468, and *Ficken v. Jones*, 28 Cal. 618.

The first of these cases was an action to recover damages for injuries to the plaintiff by the overturning of a stage coach in which he was a passenger. The law applicable in such cases to carriers of passengers for hire was declared, and, among other things, it was said that to maintain the action it was only necessary for the plaintiff to prove the overturning of the coach and the injuries caused thereby; that the presumption then arose that the overturning occurred through the negligence of the coachman, and that, in order to rebut this presumption, the defendant must show that the overturning was the result of inevitable casualty, or of some cause which human care and foresight could not prevent; and that, when the pleadings center all the negligence upon the driver, the law requires the defendant to show that he was not only a careful and skillful driver, but that he used that care and skill to the best of his ability on the occasion in question.

The second case cited was an action to recover damages for personal injuries caused by the negligent driving of cattle through the streets of San Francisco. It was held that the driving of cattle through the streets of a city was a highly dangerous business, by which the lives and limbs of human beings were placed in peril, and that, therefore, "the law requires of the proprietors and managers of that business the utmost care and diligence;" that when it was shown that a person lawfully in the street was injured by the cattle so driven, without any fault on his part, a case of *prima facie* negligence was made out, and the burden was cast on the defendant of showing that he was not at fault. The court said: "As it was incumbent on the defendants, in order to overcome the *prima facie* case made out against them, to establish that the injury to the plaintiff did not result from want of due care and skill on their part, they should have been permitted to have shown in the first place the important fact that Jones was competent, careful, and skillful in the conduct and management of that kind of business. * * * The rule of law governing in the case under consideration rests for its foundation on the same principle as that by which the duties and liabilities of the carriers of passengers are governed. In the one case the proprietor of the business must exercise the care, circumspection, and skill which is characteristic of cautious persons where the lives and limbs of human beings are liable to injury from exposure to the fury of excited cattle, and in the other the carrier is to convey his passenger safely and securely; and, because of the value of human life and limbs, the law requires the utmost degree of care and skill in the preparation and management

of the means of conveyance, and will hold the proprietor liable for the slightest negligence. * * * In such case it is well settled to be competent for and incumbent on the defendant to show that those in charge of and conducting the business were persons of good and careful habits and competent skill, and also whatever else is necessary to establish the fact of the utmost care and prudence on the defendant's part."

It is evident from the above brief review of those cases that they are not in point here. They state correctly the law applicable to cases where the utmost care is required, and where the defendant is held liable for injuries resulting from the slightest negligence. The rule declared, however, does not apply to cases where the defendant can be held liable only for a failure to exercise ordinary care, and this distinction seems to be recognized by the cases cited. Here the driver of defendant's team was only required to exercise ordinary care in the management of the team, and the burden was on the plaintiff to prove that at the time his wife was injured the driver was not exercising such care, but was negligent, and that her injuries were the direct result of that negligence. This proof, if made, could only be overcome by counter proof showing that the driver was not negligent, but was exercising ordinary care in the management of the team at that time. It follows, in our opinion, that the evidence objected to was inadmissible, and that the court erred in receiving it. We advise, therefore, that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause is remanded for a new trial.

98 Cal. 346

SULLIVAN v. ZEINER. (No. 14,149.)

(Supreme Court of California. May 24, 1893.)

ADJOINING OWNERS — LATERAL SUPPORT — PRESCRIPTIVE RIGHT.

1. Civil Code, § 832, which provides that each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the adjoining owner to make excavations for construction on using ordinary care to sustain the land of the other, and giving previous reasonable notice of his intention, is merely declaratory of the common law; and, while a coterminous owner has the right to the support of his soil in its natural state by that of his neighbor, such right does not extend to the support of any additional weight or structure he may place thereon.

2. Civil Code, § 1007, which provides that occupancy for the period prescribed by the statute of limitations confers a title by prescription, leaves the circumstances to be determined by the common law; and hence the erection of

a building wholly on one's own land is not the basis of a prescriptive right to have it supported by the soil of the adjacent owner, since no injury is inflicted on the latter on which he could base an action to secure the removal of the building.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Francis J. Sullivan, executor of John Sullivan, deceased, against Wendelin Zeiner to restrain excavations on defendant's land, and for damages. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Frank J. Sullivan, for appellant. Arthur Rodgers, Wm. L. Rodgers, and W. H. Barrows, for respondent.

HAYNES, C. Defendant demurred to plaintiff's complaint. The demurrer was sustained without leave to amend. Judgment was thereupon entered for defendant, and plaintiff appeals therefrom.

The complaint alleges that plaintiff and defendant own adjoining lots in the city of San Francisco; that on plaintiff's lot there is a building, erected 20 years ago, along the line between the two lots; that defendant commenced an excavation on his lot for the purpose of building thereon, and excavated up to the line of, and deeper than the foundation of, plaintiff's building, whereby it is left without the lateral and subjacent support to which it is entitled, etc., and prays judgment for damages and an injunction. The complaint also alleges that no "written notice" of defendant's intention to excavate was given, but no question is made here as to the sufficiency of the notice. There is no allegation in the complaint that defendant's excavation was so made that plaintiff's lot was left without sufficient lateral support if there had been no building thereon, but appellant relies solely upon the proposition that he has gained by prescription a right to the support of his building, whereby the duty is cast upon defendant of protecting it, when the excavation, in the absence of the building, would not have affected his ground. It is well settled at common law that coterminous owners have a natural right to the lateral support of each other's ground; or, to state it more exactly, that, while a coterminous owner has the right to excavate his own ground for any lawful purpose, he must do so in such manner that his neighbor's ground will not by its own weight, or through the action of the elements, fall into the excavation. Appellant contends that the amendment of section 832 of the Civil Code, made in 1874, has modified this rule. That section, as originally enacted, was taken from the proposed Civil Code of New York, and read as follows: "Each coterminous owner is entitled to the lateral and subjacent support which his land by nature received from the land of the other." This section was probably intended

to be a statement of the common law, but it is capable of a widely different construction. If instead of the words "by nature" the words "in a state of nature," had been used, the meaning would have conformed to the common law; while the words used, if literally interpreted, would prevent either owner from diminishing the support which his soil in a state of nature gave to the other, and so make all excavations up to the dividing line unlawful. As amended in 1874, that section now reads: "Sec. 832. Each coterminal owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations."

In *Aston v. Nolan*, 63 Cal. 269, this section as it now stands was considered, and it was there held that it imposed no new duty upon one intending to excavate, unless it were the duty of giving reasonable notice of his intention; and as to what the law was prior to the enactment of the above section, the court, quoting from 2 Washb. Real Prop. 331, said: "Every one has so far the right to have his own soil sustained by that of his neighbor that the latter may not dig so near to the land of the former as to cause the same to fall into the excavation by its own natural weight. * * * But this right of a landowner to support his land against that of the adjacent owner does not, as before stated, extend to the support of any additional weight or structure that he may place thereon. If, therefore, a man erects a house on his own land so near the boundary thereof as to be injured by the adjacent owner excavating his land in a proper manner, and so as not to have caused the soil of the adjacent parcel to fall, if it had not been loaded with an additional weight, it would be *damnum absque injuria*,—a loss for which the person so excavating the land would not be responsible in damages." This case was cited and approved in *Conboy v. Dickinson*, 92 Cal. 602, 28 Pac. Rep. 809, where it was stipulated that the slide of plaintiffs' land into the excavation was not caused or assisted in any respect by plaintiffs' building. The jury were instructed that, in case they found for the plaintiffs, they were only entitled to recover for the damage done to the land, and not for damage to the house; and this instruction was approved. In neither of these cases was the question presented of an easement by prescription for the support of buildings; but, aside from that question, they settle the construction of section 832, Civil Code, and conclusively show that the omission of the words "by nature" from the orig-

inal section did not, as contended by appellant, enlarge the right of lateral support as given by the common law. In *Aston v. Nolan*, supra, after quoting from Washburn on Real Property as above, the learned justice who wrote the opinion said: "It may be added, if the building has stood for five years (in this state) before the excavation, the person who has erected it has acquired a species of easement in his neighbor's land,—a right to the support of his building as well as soil. No such question as this last is presented in the case now before us." This expression of opinion, though not authority, is entitled to consideration. It was doubtless suggested by some of the many authorities which support that proposition, but without a consideration of analogous cases in this court which conclusively settle the question the other way.

Section 1007 of the Civil Code is as follows: "Occupancy for the period prescribed by the Code of Civil Procedure, as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a 'title by prescription,' which is sufficient against all." In *Woodruff v. Mining Co.*, 9 Sawy. 513, 18 Fed. Rep. 753, it was said of this section: "The statute really does nothing but fix the time at which a title by prescription shall vest, which was not very definite at the common law, but leaves the circumstances which shall constitute prescription to be determined by the settled law of the land as it stood before the Code." See, also, *Thomas v. England*, 71 Cal. 456, 458, 12 Pac. Rep. 491. The basis of a right or title by prescription was the fiction of presuming a grant from possession or use for a given time, now for the period required to bar an action for possession. But the possession or use, in order to create the presumption of a grant, must, under the Code as well as at common law, have been made under such circumstances that he whose property or right was affected could have prevented the possession or use, if no grant had in fact been made. This reference in section 1007, Civil Code, to the statute of limitations is significant, inasmuch as the latter statute is based upon the ability of the party to maintain an action, and excludes the time during which a disability to sue may have existed; but the personal ability to sue can surely not be more important, as an element in title by prescription, than the invasion of a right which gave a cause of action. The plaintiff, by the erection of his building wholly upon his own lot, invaded no right of defendant. He might place the foundation of his building upon the surface, or sink it any depth he desired, and in neither case could defendant object. No injury was inflicted upon him upon which he could base an action, and, if so, his failure to sue could create no right against him, or easement in or servitude upon his property. The case of *Hanson v. McCue*, 42 Cal.

303, was upon different facts, but involved this precise question. There the waters from a spring upon defendant's land flowed upon plaintiff's land, and had been used and enjoyed for 15 years without interruption; and this, it was claimed, presumed the grant of an easement. The court said, (page 310:) "The presumption of the grant of an easement, when indulged, is because the conduct of the other party, in submitting to the use for so long a time without objection, cannot be accounted for on any other hypothesis. The acts done by the party claiming the benefit of the presumption, and his predecessors in interest, must, however, have been in themselves such as the other party, having the right to object to or complain of, did neither, but submitted to them without objection or challenge. * * * If they had no right to complain in the first instance, we are not driven to the presumption of the grant of an easement to account for why they did not complain." In *Ditch Co. v. Crane*, 80 Cal. 183, 22 Pac. Rep. 76, it was said: "The latter could not complain, and title by prescription cannot be acquired, unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom the acts are performed;" citing *Hanson v. McCue*, supra. See, also, *Unger v. Mooney*, 63 Cal. 595; *Thomas v. England*, 71 Cal. 457-460, 12 Pac. Rep. 491. In *Gilmore v. Driscoll*, 122 Mass., at page 207, Gray, C. J., said: "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land, which can be seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former." It is true that case did not require the decision of that question, but the statement commends itself as based upon sound reason. The case of *Mitchell v. Mayor*, 49 Ga. 25, involved similar facts, and is directly in point. It is there said: "The fact that the user must be adverse must exist in every such case. If the use of the easement be ab initio legal or rightful, the title of the occupant is as good at the outset as it could be by the lapse of any length of time; but if it be the usurpation of the property of another under a claim of right, it then becomes adverse, for it is in hostility to the title and in derogation of the rights of the original owner. In such cases a grant or license or consent is presumed for the purpose of quieting the enjoyment or possession thus adversely held or used. The injured party, who may for such a long time sleep on his rights, cannot complain of this rule. He could have had redress any day during the twenty years. * * * His remedy was in his own hands. This right of the injured party is a cardinal fact which

must exist, else all statutes of limitation and all rules of prescription or of presumption of license or grant would be but rules of spoliation or robbery." See, also, *Napier v. Bulwinkle*, 5 Rich. Law, 311.

As the principle involved in this appeal is conclusively settled in this state, a review of the authorities cited by appellant from other states and from the English reports becomes unnecessary. Whether there may not be cases arising upon special circumstances where a right, either original or prescriptive, of lateral support to buildings may exist without a grant, is not considered. The demurrer was properly sustained, and the judgment should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

98 Cal. 360

BRODER et al. v. CONKLIN et al. (No. 18,104.)

(Supreme Court of California. May 27, 1893.)
COLLATERAL ATTACK—JUDGMENT—ENTRY AFTER
EXPIRATION OF JUDGE'S TERM.

1. To uphold an order of the judge of a superior court transferring a cause to the superior court of another county on the ground of his disqualification, the supreme court will assume, when such order is collaterally attacked, not only that the judge was disqualified, but that the court to which the transfer was made was the next nearest court in which like objection did not exist, as required by Code Civil Proc. § 398.

2. A conclusion of law that plaintiff is entitled to recover, filed by a judge, together with his findings of fact, followed by a direction to counsel to prepare an interlocutory judgment directing an accounting, is insufficient to serve as the basis for a final judgment; and hence it is not competent for the judge to file such judgment after the expiration of his term, since his judicial power then ceases.

3. A judgment does not become effective until filed with the clerk, and is of no effect if filed after the expiration of the judge's term, no matter when prepared and signed.

4. In an action to establish a trust in property in plaintiff's favor, on the ground of defendant's fraud, and for an accounting of the moneys that had been received by defendant under such trust, a conclusion of law that plaintiff is entitled to recover, followed by a direction to counsel to prepare an interlocutory judgment directing an accounting, is not equivalent to a rendition of judgment by the judge, so as to authorize the clerk, in the performance of his ministerial duties, to enter up judgment after the expiration of the judge's term.

In bank. Appeal from superior court, Mono county; W. H. Virden, Judge.

Action by Broder and others against Conklin and others to establish a trust in plaintiffs' favor in certain property, on the ground of defendants' fraud, and for an accounting of the moneys that had been received by defendants under such trust. From an order striking from the files, and setting aside, a judgment in plaintiffs' favor, plaintiffs appeal. Affirmed.

Richard S. Miner, for appellants. P. Reddy, for respondents.

HARRISON, J. A trial of the issues herein was had in Inyo county before Hon. J. F. Rooney, judge of the superior court of Tuolumne county, who had been directed by the governor to try the cause on account of the disqualification of the superior judge of Inyo county; and on the 26th of September, 1890, the judge filed his findings of fact and conclusions of law, in which he found "that the plaintiffs herein are entitled to judgment," and added, as a closing direction: "Counsel will prepare an interlocutory judgment in favor of the plaintiffs, directing a reference to a commissioner, to be appointed by the court, to take an account between the parties." Between the hours of 6 and 7 o'clock in the afternoon of January 5, 1891, the clerk received through the mail a document signed by Judge Rooney, which purported to be a formal judgment in the case, and which the clerk afterwards entered in the judgment book of Inyo county. Judge Rooney's term of office expired on the first Monday of January, 1891, and the newly-elected judge of Inyo county had assumed his office on the morning of that day. On the 9th of February, 1891, the defendants Conklin gave notice to the plaintiffs that on the 9th day of March, 1891, they would move the court "to strike from the files, and to strike out and cancel and set aside," the aforesaid judgment, upon the grounds that the trial of the cause had not been completed, and that at the time the said document was filed the term of office of Judge Rooney had expired. The judge of Inyo county deeming himself disqualified to act in the matter, the cause was thereafter transferred by him to Mono county for trial, and, the above motion having been brought on for hearing in the superior court of Mono county, an order was made on the 13th of May, 1892, granting the aforesaid motion of the defendants. From this order the plaintiffs have appealed.

1. Upon this appeal the regularity of the proceedings in transferring the cause to Mono county cannot be considered. If any condition of facts could exist under which the transfer would be authorized, the action of the court in making the transfer will be upheld, whenever collaterally attacked. Section 170, Code Civil Proc., prohibits a judge from sitting or acting in any action in which he may be disqualified, except that he may transfer the action to some other court; and section 398, Code Civil Proc., provides that if an action is "pending" in a court, and the judge thereof is disqualified from acting, it must be transferred to the nearest court where the like objection does not exist. We may assume, upon this appeal, not only that the judge of Inyo county was disqualified from acting in the cause, but also that the superior court of Mono county was the near-

est court in which the like objection did not exist. If for any reason the order of transfer was erroneous, it could have been reviewed by a direct appeal therefrom.

2. Upon the expiration of his term of office the judicial power of Judge Rooney ceased, and it was not competent for him thereafter to do any act necessary to complete the trial of any cause which then remained unfinished. *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. Rep. 721; *Connolly v. Ashworth*, (No. 15,053,) 33 Pac. Rep. 60. The trial of the issues of fact in an action is not completed until the decision upon those issues has been given by the court, (*Hastings v. Hastings*, 31 Cal. 95;) and this decision must not only be given in writing, but it must also be filed with the clerk. If not filed until after the expiration of the term of office, it cannot form the basis of a judgment. *Connolly v. Ashworth*, supra. Section 633, Code Civil Proc., requires the court, in giving the decision, to state the facts found and the conclusions of law separately, and provides that, after the decision has been given, judgment must be entered "accordingly." The judgment which is to be entered "upon the decision" is the sentence of the court in conformity with the conclusions of law, and must find its basis therein. *Chamberlain v. Dempsey*, 14 Abb. Pr. 241, and 15 Abb. Pr. 1; *Loeschigk v. Addison*, 19 Abb. Pr. 169; *Belmont v. Ponvert*, 3 Rob. (N. Y.) 693. The conclusions of law resulting from the facts found form the basis of the judgment, and until they have been made the decision of the case has not been given. The findings of fact are in the nature of a special verdict, and the conclusions of law to be drawn therefrom need not be made at the same time with the findings themselves, but may be reserved by the court for argument or further consideration, as is provided in the case of a special verdict in section 628, Code Civil Proc., and, if made at the same time with the findings of fact, they may be changed by the court at any time prior to the entry of judgment. *Condee v. Barton*, 62 Cal. 1; *Crim v. Kessing*, 89 Cal. 489, 26 Pac. Rep. 1074. Inasmuch, therefore, as the judgment is to be entered "upon the decision," and must find its basis in the conclusions of law, which are to be a part of the decision, it follows that the trial of the action is not completed until a decision has been given which states the conclusions of law upon which the judgment is to rest. It sufficiently appears in the present case that at the time when Judge Rooney filed his findings of fact, and certain conclusions of law, he did not himself consider that the action had been fully tried. His conclusion that the plaintiffs were entitled to judgment was qualified by the next clause, in which he directed counsel to prepare an interlocutory judgment for the purpose of directing a referee to take an account between the parties. It is manifest from this direction that the

character and extent of the judgment was not to be determined by him until after such account had been taken. The conclusions of law which he had then made were insufficient as the basis of the judgment which he evidently intended to render, and it still remained for him to make further conclusions of law as the basis of his judgment, or to incorporate them in the order for a reference and an accounting which he had directed to be prepared.

3. The judgment which was prepared and signed by Judge Rooney could not be effective as a judgment until it was filed with the clerk. Until then it was but a purpose in the breast of the judge, which could be changed as he might determine. Whether he deposited it in the post office to be transmitted to the clerk, or himself carried it in person to the office of the clerk, is immaterial. Until it was actually filed it did not become a part of the records in the case, and consequently was not a judgment.

4. Upon the findings that were filed in September the clerk was not authorized to enter any judgment. It is unquestionably true that when a judgment has been rendered the subsequent act of the clerk in entering it is only ministerial, and may be done by him, even after the expiration of the term of office of the judge by whom the judgment was rendered. If the judgment which was entered herein had been in fact "rendered" by Judge Rooney prior to January 5th, it would not have become nugatory by the failure of the clerk to enter it until after that date. The signature of the judge is not necessary to the validity of the judgment, (*Crim v. Kessing*, supra,) but it is of service in determining what has been adjudged, and in its absence there must be something of record, as, for example, the minutes of the court, or the conclusions of law stated in the findings, by which the clerk can be guided in the performance of his ministerial duties, and from which the actual judgment of the court can be ascertained, and by which it can also be determined whether the clerk, while acting in a ministerial capacity, has correctly entered such judgment. There are many judgments whose entry involves nothing more than clerical or ministerial duties, such as a judgment for the recovery of specific real or personal property, or a fixed amount of damages, or one which is rendered generally,—that the plaintiff is not entitled to recover his demand from the defendant. In such cases the mere order for judgment in favor of the defendant or the plaintiff is all that is needed for the clerk; but in many other actions, and especially in those of an equitable nature, the form of the judgment, and the character of relief that is to be granted, are as much matters for the exercise of judicial power as is the determination of the party in whose favor judgment is to be rendered.

Aside from the fact that it is evident from the findings themselves that it was not the opinion of the judge who tried the present case that the trial was completed, a consideration of the character of the action will show that the clerk was neither authorized to enter the judgment which he did enter herein, nor to enter any judgment whatever, upon the findings themselves, at the time they were filed, or at any time thereafter. The action is for the purpose of declaring that the defendant Conklin had been guilty of certain fraudulent acts in the matter of an insolvent's estate, and of declaring that he held certain property in trust for the benefit of the plaintiffs, and for an accounting of the moneys that had been received by him under such trust. Although the court found that the plaintiffs were entitled to judgment, there still remained many matters to be adjudicated by it before there could be a final determination of the rights of the parties. It was necessary to determine the principles upon which the accounting should be had; whether the property that had been conveyed to Conklin should be sold or not; and, if it was to be sold, whether the sale should be had before the accounting was taken, as well as the manner and terms of such sale; whether the sale should be absolute when made by the referee, or should only become so after a confirmation by the court; whether the plaintiffs should have a direct money judgment against Conklin for the amount of their claims, or whether their recovery should be limited to the proceeds of the property received by him; whether those claims should bear interest, and, if so, at what rate; and whether, in the accounting which was to be given by Conklin, he should be charged interest upon the moneys he had received; whether the plaintiff John Broder was entitled to any judgment against Conklin, or was estopped therefrom. These and many other subjects involved in the action demanded judicial determination, and could not be determined by the clerk, and until they were so determined the ministerial act of the clerk in entering the judgment did not arise. The order is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.

98 Cal. 366

CARR v. EEL RIVER & E. R. CO. (No. 14,998.)

(Supreme Court of California. May 30, 1893.)
CARRIERS OF PASSENGERS—ALIGHTING FROM TRAIN
—CONTRIBUTORY NEGLIGENCE.

1. It is the duty of a railroad company to stop its train at a station a reasonable time, so that passengers may get on and off its cars with safety to themselves; and, if it does not do so, it is guilty of negligence in starting the train without notice that it is about to start.

2. It is not contributory negligence per se for a passenger to jump from a train which had failed to stop at the station a sufficient length

of time to enable her to alight therefrom, and which had traveled less than 100 feet when she jumped, but the question should be left to the determination of the jury.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Sarah J. Carr against the Eel River & Eureka Railroad Company for personal injuries sustained by plaintiff while alighting from one of defendant's trains. From a judgment in plaintiff's favor, and an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

Horace L. Smith, for appellant. Ford & Burnell and Chamberlain & Wheeler, for respondent.

GAROUTTE, J. Respondent recovered \$5,000 damages for personal injuries, claimed to have been sustained by her through the negligence of appellant, and this appeal is prosecuted from the judgment and order denying a motion for a new trial. The first count of the complaint relies for a recovery upon the theory that plaintiff, a passenger, was not allowed a reasonable time to alight from the train at Rhonerville, her point of destination, but that appellant negligently and carelessly started the train while she was upon the steps of the coach, preparatory to alighting, and thereby threw her to the ground, causing permanent injuries. The second count of the complaint is based upon the allegations that appellant negligently carried its coach, in which she was seated, beyond the platform for the use of passengers alighting from the cars at said station, and stopped the said coach at an unsuitable place for passengers to alight therefrom; that respondent attempted to alight, but appellant failed to allow her a reasonable time within which to do so, and while she was upon the steps of the coach, attempting to leave the train, the coach was started, she was thrown to the ground, and the injuries received. The answer denies negligence upon the part of the railroad company, and alleges contributory negligence upon the part of the respondent, in this: that she attempted to alight from the train while it was in motion, and after it had started from the station. There was some evidence offered by appellant tending to support its contention in this regard. It is claimed that the law is not properly declared in instructions Nos. 6 and 7, which read as follows: "(6) It is the duty of the carrier of passengers to stop the train a sufficient length of time to enable passengers to alight in safety, and to hold the train still during such time. It is negligence for the carrier to start the train without warning passengers after making such stop, and before the passenger has had a reasonable time to leave the car. Should the carrier start the train while the passenger is on the steps of the car, in the act of alighting, without giving sufficient time to alight, and without giving notice to the passenger, whereby the pas-

senger is thrown from the car and injured, then the carrier is guilty of negligence, and is responsible in damages for all the injuries caused the passenger by such negligent act. (7) Should you find from the evidence that on the 4th day of May, 1890, plaintiff was a passenger on the train of defendant from Alton to Rhonerville station; that the train was stopped on its arrival at Rhonerville station for passengers to leave the cars; that immediately upon the stoppage of the train the plaintiff left her seat in the car, and went out upon the platform or steps of the car for the purpose of alighting; that the defendant started the train before the plaintiff had time to leave the car, and while she was on the steps of the car in the act of leaving it, without giving her notice or warning; and that the plaintiff was thrown from the car by its starting, and injured, without fault on her part,—then, in that event, I charge you that your verdict must be for the plaintiff for the damages sustained by her, not exceeding the amount claimed in the complaint." The principle of law involved in the foregoing instructions is the same, and, considering them together, it is clearly stated and entirely correct. An elementary principle governing the conduct of common carriers of the character of appellant is contained in these charges of the court, and that is, it is the duty of a railroad company to stop its train at a station a reasonable time in order that passengers may get on and off its cars with safety to themselves. The court incorporates an additional principle into the instruction, to the effect that, if such common carrier does not stop its train for a reasonable length of time in order that passengers may get on and off, it is guilty of negligence in starting the train without notice or warning that it is about to start. It is first declared that the railroad company must stop at each station a reasonable time, and, if injury results to passengers owing to its failure so to do, then it is guilty of negligence. Such being the law,—and the soundness of the proposition cannot be doubted,—the additional element incorporated into the charge of the court becomes self-evident as an unquestioned legal principle. The law demands of a common carrier of passengers for hire that he observe the utmost caution, characteristic of a very careful, prudent man. The carrier is bound to use the greatest care and diligence in the transportation of passengers, consistent with the carrying on of his business, and, in view of these demands of the law, appellant has no just cause of complaint against this portion of the court's charge.

Upon the part of the appellant evidence was introduced to the effect that respondent jumped from the train while it was in motion, and it is now contended that if such was the fact, it was negligence per se upon her part, and the court should have instructed the jury to that effect. Conceding

that respondent alighted from the train while in motion, there was some evidence in the case tending to show that the train did not stop at the station a sufficient length of time to enable passengers to alight with safety; that the respondent was upon the lower step of the coach, preparatory to alighting, when the train started, and that the train had traveled a distance of less than 100 feet when she jumped, conceding that she did jump. No evidence is disclosed by the record as to the rate of speed the train was traveling at that moment, and upon this state of facts the court gave the jury the following instruction: "Ordinarily a passenger would be held not to be justified in getting off the train while it is in motion, except at his own risk. Unless the train is moving very slowly, and the circumstances are specially favorable, it would be deemed *prima facie* negligence. It is not necessarily so, however, and, if you believe from the evidence that the plaintiff stepped from the defendant's train while in motion, you are to determine the question of negligence on her part from all the evidence and circumstances in the case. If you believe from the evidence that the defendant's train did not stop a reasonable time to allow her to get off, and started while she was in the act of alighting, and that she jumped from the steps of the car while the train was leaving the station, and in motion, and under such circumstances that an ordinarily cautious, careful, and prudent person would not have apprehended danger therefrom, then you will find for the plaintiff; but if you find from the evidence that sufficient time was not allowed her to get off the car, and that she jumped from the steps of the car while the train was leaving the station, and in motion, and under such circumstances that an ordinarily cautious, careful, and prudent person would have apprehended danger therefrom, then it was such an act of carelessness as would relieve the defendant from the responsibility otherwise resting upon it, and your verdict will be for the defendant." The legal principle enunciated in this instruction is attacked as not sound; appellant's position being that the act of a passenger in jumping from a moving train is negligence *per se*, with the exception that by the act of the carrier the passenger has been placed between two dangers, or that some situation was created by the carrier which interfered with his free agency, and created in his mind a confidence that the attempt to leave the moving train could be made in safety. There is nothing in the record involving the question of the exercise of an immediate judgment upon the part of the respondent as to the choice of one of two impending dangers, and therefore we eliminate that element from the case.

The remaining exception stated by appellant to the general rule upon which he relies is not made plain to us by counsel; neither do we find it recognized in the books. Appellant's claims

in this regard are drawn from the facts of certain cases, where the passenger has been injured in alighting from a train at the suggestion of the brakeman or conductor. Such was the case of *Filer v. Railroad Co.*, 49 N. Y. 47; but that case and others, which as to the facts are found in company, do not recognize the rule of negligence *per se* by reason of alighting from or boarding a moving train, and do not base their respective decisions upon an exception to such rule by reason of the advice or suggestion of one of the employees of the company. A passenger's act in jumping from a moving train may be grossly negligent, and thereby release the carrier from all liability, notwithstanding it was done at the suggestion or upon the assurance of safety by the employee. The employee's advice at the moment is in no sense conclusive upon the passenger as to his negligence or nonnegligence in jumping from the train. Like every other circumstance surrounding the transaction, it casts some light upon the scene, and thereby aids the court, according to the power and brilliancy of its light in each particular case, to determine what a careful, prudent man would have done, placed in the position of the unfortunate passenger. This is all that is decided in the *Filer Case*, and in no sense does the doctrine there declared form an exception to any general principle found in the law of negligence. The earlier cases in many instances recognize the principle of negligence *per se* in alighting from a moving train, but modern authority to a great extent has supplanted that doctrine with broader views upon the question. In this case the court carefully and fairly stated to the jurors what in law would constitute "negligence" and "contributory negligence" upon the part of the respondent, and with that law in their possession remanded them to the jury room to find the facts, and apply the law to the facts. Under the conditions surrounding respondent immediately prior to the injury, and to which we have already adverted, conceding the company's claims that respondent jumped from a moving train, still we think the case without question justified the instructions of which complaint is now made. No trial court would be authorized to grant a nonsuit upon the facts, and such being the case the instruction was properly given. Volume 2 of the *American and English Encyclopedia of Law* (page 762) says: "When a passenger, on having been set down or taken up at the station to or from which the railroad has contracted to carry him, is injured in the attempt to board or leave a moving train, the railway is liable if the person injured in getting on or off the train did not incur a danger obviously apparent to the mind of a reasonable man." In the *Filer Case* the court supports the foregoing doctrine as follows: "That there was more hazard in leaving a car while in motion, although moving ever so slowly, than when

it is at rest, is self-evident; but whether it is imprudent and careless to make the attempt depends upon circumstances; and where a party, by the wrongful act of another, has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for a jury whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard." In the well-considered case of *Johnson v. Railroad Co.*, 70 Pa. St. 357, the trial court indorsed the principle of negligence per se, and the supreme court said: "Instead, therefore, of the rule laid down by the learned judge, he should have left it to the jury to say, under all the circumstances in evidence, whether the danger of boarding the train when in motion was so apparent as to have made it the duty of the plaintiff to desist from the attempt." To the same effect is *Railroad Co. v. Crunk*, 119 Ind. 542, 21 N. E. Rep. 31, where the party jumped from a train moving at the rate of 4½ miles per hour, and that was held not to be negligence per se. See, also, *Banking Co. v. Miles*, 88 Ala. 256, 6 South. Rep. 696; *Nichols v. Railway Co.*, 68 Iowa, 732, 28 N. W. Rep. 44; *Pennsylvania Co. v. Marion*, 123 Ind. 422, 23 N. E. Rep. 973. Among other cases relied upon to support appellant's position is *Jewell v. Railway Co.*, 54 Wis. 610, 12 N. W. Rep. 83. That case is opposed to the views we have expressed and to the authorities we have cited. It does not state the better doctrine, and many of the decisions from other courts upon which it relies for support are not in line with it upon the facts. We notice no other matters in the record demanding our attention. For the foregoing reasons let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

98 Cal. 352

PEOPLE v. WESSEL. (No. 20,958.)

(Supreme Court of California. May 25, 1893.)

RAPE—INFORMATION—TRIAL—INSTRUCTIONS—NEW TRIAL.

1. An information for rape need not allege that defendant was a male, or over the age of 14 years, or, if under that age, that he possessed physical ability, as required by Pen Code, § 262, to commit the offense, since defendant's want of ability to commit the crime is a matter of defense.

2. On a prosecution for rape on a child 11 years old, where defendant has read her testimony given before the committing magistrate to contradict her evidence at the trial, she may be recalled to explain the discrepancies.

3. An instruction that, "while it is the law that the testimony of the prosecutrix should be carefully scanned, still this does not mean that such evidence is never sufficient to convict; and if you believe the prosecutrix it is your duty to render a verdict accordingly,"—is not equivalent to telling the jury that they should convict if they believe the prosecutrix, regardless of

whether her testimony is sufficient to establish the offense, but only means that the offense may be proven by the testimony of the prosecutrix.

4. In a criminal case, where defendant's motion for a new trial is denied, and judgment is pronounced, his application for leave to amend the motion, made nearly a year later, is properly denied, since no motion for a new trial is pending, and there is nothing to amend.

Commissioners' decision. Department 1. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Frederick Wessel, Jr., was convicted of rape, and appeals. Affirmed.

L. F. Smith and P. B. Tully, for appellant. Carl E. Lindsay, for respondent.

TEMPLE, C. The defendant was convicted of the crime of rape, and sentenced to the penitentiary for 10 years.

The first point made is that the court erred in overruling defendant's demurrer to the information on the ground that it did not state facts sufficient to constitute a public offense. The information charges rape upon the person of a female child under the age of 14 years, but does not state that the defendant was a male, or over the age of 14 years, or, if under that age, that he possessed physical ability, as required by section 262 of the Penal Code, to commit the offense. This is not necessary. If the defendant was incapable of committing the offense, such fact may be shown in defense; but the averment that he was capable is implied in the charge that he willfully and feloniously committed the act. *People v. Ah Yek*, 29 Cal. 576; *Com. v. Sugland*, 4 Gray, 7; *Com. v. Sullivan*, 6 Gray, 479; *Com. v. Scannel*, 11 Cush. 548.

It is next contended that the court erred in overruling defendant's objections to certain testimony. To contradict the testimony of the prosecutrix, who was a child of 11 years, the defense read her testimony before the committing magistrate, in which it was claimed that she had made statements inconsistent with her evidence on the trial. Thereupon the prosecution recalled the prosecutrix, and asked her to explain the discrepancies. This course was too plainly proper, and of too common practice, to justify the presentation of the question here. The court instructed the jury as follows: "While it is the law that the testimony of the prosecutrix should be carefully scanned, still this does not mean that such evidence is never sufficient to convict. If you believe the prosecutrix, it is your duty to render a verdict accordingly." It is contended that this is telling the jury that they may act on the testimony if they believe it, although it may not be sufficient in substance, though true, to establish the offense. I cannot understand the instruction as equivalent to telling the jury that they should convict if they believe the prosecutrix. It is simply saying that if they believe it they should

act upon it as establishing the facts proved by it; that is, that the offense may be proven by the testimony of the prosecutrix. The jury was fully instructed as to the elements of the crime. Defendant copied from Ram on Facts a long statement as to the testimony of children, and asked the court to give it as an instruction. To have given it would have been clearly erroneous, and is inhibited by section 19, art. 6, of the constitution.

It is next argued that the testimony of the prosecutrix, if true, fails to show that there was sexual penetration. The child was naturally averse to calling some things by their names, and the prosecuting attorney was considerate, but the testimony is not of doubtful import on this point.

The testimony was ample as to the identity of the defendant. On this subject the witness made some rather inconsistent and unintelligible statements, but that was for the jury.

On the 28th day of August, 1891, the defendant submitted a motion for a new trial, which was then denied, and the court on the same day proceeded to pronounce judgment. On the 25th of June, 1892, the defendant gave notice that he would ask leave to amend his motion for a new trial by adding the ground of newly-discovered evidence, and he served certain affidavits showing the nature of the alleged newly-discovered evidence. The defendant at that time had no motion for a new trial pending. There was, therefore, nothing to amend. It was too late to institute such motion. Section 1182, Pen. Code.

The judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

same, should be payable to another person, as his interest might appear. The lessee surrendered the property to the owner, and the person to whom the loss was made payable notified the agent of the insurance company of the surrender by the lessee, and was informed by the agent that no change in the policy was necessary because of the same. *Held*, that the insurance company thereby waived a provision in the policy that the same should be void if, without the consent of the company indorsed thereon, there should be any change in the title or possession of the property.

2. Such a policy further provided that false swearing in the proofs of a loss would avoid the same; and the insurance company, with notice that the assured had parted with his interest in the property insured, insisted that he should make the proofs of loss. In the sworn proofs the assured was stated to be the owner of the property, and the loss was thereupon adjusted, and the agent of the company authorized to make a draft for the amount of the loss to the order of the person to whom, by the terms of the policy, the loss was payable. *Held*, that the company could not afterwards avoid liability by claiming that the assured swore falsely as to the ownership of the property.

3. Under such a policy the person to whom the loss is made payable may maintain an action in his own name for the amount of the loss, where the value of his interest in the property exceeds such amount.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by the West Coast Lumber Company against the State Investment & Insurance Company to recover the amount of a loss under a fire insurance policy. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Fisher Ames, for appellant. Haven & Haven, for respondent.

SEARLS, C. Action upon a policy of insurance. Plaintiff had judgment, from which, and from an order denying a motion for a new trial, the defendant appeals. On the 18th day of June, 1888, the State Investment & Insurance Company, a corporation,—the defendant herein,—issued its policy of insurance against loss or damage by fire to one E. B. Newkirk, to the amount of \$1,200, upon a three-story frame store building situate in San Diego, Cal.; loss, if any, payable to West Coast Lumber Company, as their interest may appear." The building insured was wholly destroyed by fire February 5, 1889. The complaint contains two counts: (1) A count, in the usual form, for nonpayment by defendant of \$1,200 on account of the loss by fire of the insured property. (2) For the nonpayment of a bill of exchange drawn, by direction of defendant, upon itself, in the adjustment by defendant of the loss, in the sum of \$1,200. The answer sets out a number of defenses to the action, among which may be enumerated: (1) The plaintiff had no interest in the property, except as a holder of a mechanic's lien thereon, which had been paid, satisfied, and discharged. (2) The fire occurred by reason of the neglect of the plaintiff and of E. B. Newkirk to use

means practicable and necessary to preserve the insured property from damages. (3) That the interest of Newkirk in the property was a leasehold interest, and that on or about July 12, 1888, Newkirk and the plaintiff, without the knowledge or consent of defendant, and contrary to the provisions of the policy, conveyed and delivered the property to one E. V. Roberts, whereby the policy became void. (4) That after July 12, 1888, neither Newkirk nor plaintiff occupied or controlled the building, and that defendant had no knowledge that their insurable interest in the property, or occupancy or control thereof, had ceased, until on or about June 13, 1889, and that, at the time of giving the supposed draft or bill of exchange, defendant supposed they had an insurable interest therein. (5) That neither plaintiff nor Newkirk gave notice or proof of loss as required by the policy.

At the date of the policy of insurance, E. B. Newkirk was the lessee of the insured property, under one E. V. Roberts, from whom he held a written lease. The plaintiff herein had furnished lumber to Newkirk for the construction of the building on the property; had on the 20th day of March, 1888, filed its mechanic's lien upon the property as security for the sum due and owing for such lumber, amounting to something over \$2,200; and had on the 11th day of June, 1888, brought suit to recover and to foreclose the mechanic's lien, against the lessee and owner of the premises. The application for insurance was made by plaintiff, the premium paid by it, and the policy was delivered to it. Subsequent to the issue of the policy, and on the 23d day of October, 1888, plaintiff obtained judgment on its claim for \$2,332.58, and it was decreed that plaintiff had a lien therefor on the house and lot of land in question. After the fire the lot of land was sold by the sheriff under the decree of foreclosure, and purchased by the plaintiff. Its value was \$1,000. On or about July 12, 1888, the lessee, E. B. Newkirk, surrendered his leasehold interest in the insured building, and the lot of land upon which it was situated, to his landlord, E. V. Roberts. There was evidence tending to show, and the court found, that thereafter, and prior to the loss, defendant's agent was informed by plaintiff that the leasehold interest had been surrendered by Newkirk, and was assured by the agent of defendant that no change in the policy of insurance was necessary by reason thereof. The court finds, also, that within 60 days after the fire, plaintiff, under the direction and instructions of the defendant, procured proofs of the loss to be made and signed by Newkirk, as required by the policy of insurance, and delivered the same to defendant. These proofs were retained by defendant. An examination of the circumstances of the destruction of the property was made by it, and of plaintiff's interest therein, and right to receive the amount of the insurance under

the policy; and thereafter, by direction of defendant, its agent in San Diego made and accepted, and delivered to plaintiff, its bill of exchange, in writing, for \$1,200. The court finds that there was no misapprehension on the part of defendant respecting the insurable interest of the plaintiff, or of Newkirk, at the time the bill of exchange was executed. The foregoing statement is not intended as a synopsis of all the issues, or of all the facts found by the court, but is deemed sufficient to an understanding of the principal objections made by appellant to the findings of the court, and the judgment based thereon. The contentions of appellant may be grouped under two heads: (1) Those relating to the forfeiture of the policy by the surrender of the leasehold interest of Newkirk to his landlord, and to his subsequent lack of an insurable interest in the property; and (2) those founded upon the alleged false and fraudulent statements of Newkirk in the proof of loss furnished the defendant. The insured building stood upon leased ground, which fact was stated in the policy.

Among the causes of forfeiture mentioned in the policy are the following: If the above-mentioned premises "become vacant and unoccupied, * * * or if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * without the consent of the company indorsed hereon, * * * then, and in every such case, this policy shall be void." The finding of the court is, as before stated, that on or about July 12, 1888, Newkirk surrendered his leasehold to his landlord, E. V. Roberts, and that thereafter, and prior to the fire, defendant's agent was informed of such fact by the agent of plaintiff, and he thereupon assured the agent of plaintiff that no change in the policy of insurance was necessary. This finding is supported by evidence. The witness Hickman, who had charge of plaintiff's business, testified that he informed Mr. Pierce, the agent of defendant, two or three days after the change, that the property had passed from Newkirk to the owner of the real estate, and says: "I told him the policy should be changed to show the difference in ownership, and he claimed it was just as well to let it stand as it was, as our [plaintiff's] interest in the building was not changed, and Newkirk might possibly reclaim his property." And again: "He [Pierce] assured me that the policy was just as good then as it ever was, and covered our interest in the building, just the same." The question involved under this head is not as to the binding effect of the clauses in the policy as to change of ownership or possession, or as to the original right of defendant to insist upon their observance, and in default thereof to uphold a forfeiture of the policy. The proposition is, rather, that, con-

ceding all this, could and did the defendant waive their observance? Insurers may, and often do, by their acts and conduct, place themselves in such a position that they cannot avail themselves of a defense which they might otherwise interpose to an action upon their policies. When thus placed they are said to be estopped from availing themselves, or to have waived their right to avail themselves, of such a defense. If, as was the case here, a building is insured against loss by fire under a policy containing a proviso that it shall be or become void in case the building is or shall become vacant or unoccupied, when, as was well known to the insurer at the date of the policy, and subsequently, it was and remained unoccupied, the insurer will be presumed to have waived the clause as to occupancy. May on Insurance states it in this wise: "To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the courts will neither aid nor presume; and when the alternative is to find this or to find that, in accordance with honesty, there was an intent to waive the known ground of avoidance, they will choose the latter." May, Ins. § 497; Insurance Co. v. Ives, 56 Ill. 402. In many policies of insurance a proviso is inserted inhibiting any waiver of the conditions or requirements of the contract of insurance, except in some specified manner, by certain designated persons or officers, or excepting such waiver shall be in writing, and indorsed on the policy. Questions under provisions of this character arose in *Shugart v. Insurance Co.*, 55 Cal. 408; *Gladding v. Association*, 66 Cal. 6, 4 Pac. Rep. 764; *Enos v. Insurance Co.*, 67 Cal. 621, 8 Pac. Rep. 379. I find no such provision in the policy here. It does provide that certain things shall avoid it unless the consent of the company is indorsed thereon, or "without the written assent of the company indorsed thereon," or "without the consent of the company written thereon," etc.; but there is no clause expressly requiring a waiver of any of the rights of the company to be in writing, or to be assented to by any particular officer, or in any specified manner. Under such circumstances it must be assumed, as was said in *Silverberg v. Insurance Co.*, 67 Cal. 41, 7 Pac. Rep. 38, quoting from *Insurance Co. v. Wilkinson*, 13 Wall. 222: "The powers of the agent are, *prima facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal." The agents of the defendant at San Diego, having the authority to so act, must be presumed, by their conduct and

declarations, exercised and made with full knowledge of all the facts, to have waived, on behalf of defendant, its right to have the policy terminated by the surrender of the leasehold interest of Newkirk to his lessor. To hold otherwise would be to uphold practices which would lull the insured into fancied security; to prevent their seeking other and further insurance, until, when too late, they find themselves doomed to loss by confiding in the declarations, and following the advice, of those who were bound, by every consideration of justice and honesty, to speak the truth, or at least to stand mute. Defendant had a right to cancel its policy, or to treat it as forfeited by reason of the change of title and possession. It failed to do so when it should, if at all, and cannot now be permitted to profit at the expense of plaintiff, who would be a sufferer by the delay.

We proceed to consider the alleged false and fraudulent statement of Newkirk in the proofs of loss furnished defendant, and its effect, if any, on the rights of the latter. The policy provided that "in case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire; occupancy of the building insured; * * * ownership of the property," etc. Also, the following clause: "False swearing, fraud, or attempt at fraud, on the part of the assured, shall cause a forfeiture of all claim under this policy." The false swearing and fraud that will forfeit a policy under a clause of this character is willful fraud or false swearing, and not the result of inadvertence or mistake. *Insurance Co. v. Starr*, 71 Tex. 733, 12 S. W. Rep. 45; May, Ins. § 447. It should be knowingly and willfully false, and intended to injure the company, (*Erman v. Insurance Co.*, 35 La. Ann. 1095,) or, if not so intended, must relate to some matter material to the inquiry, concerning which the company has a right to know the truth, and the effect of which would have a bearing upon its liability, (*Clafin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. Rep. 507.)

1. Was Newkirk guilty of false swearing? The proofs of loss subscribed and sworn to by him are not set out in full in the record. So far as made to appear, the document is as follows: "The property so insured, on which this claim for loss is made, was owned at the time of the fire as follows: By assured, \$5,000. Held in trust or commission for —, and no other person or persons have any title to or interest therein. * * * Witness my hand, at San Diego, this 15th day of April, A. D. 1889. [Signed] E. B. Newkirk. Sworn," etc., "before A. O. Morgan, Notary Public." The finding of the court is that Newkirk surrendered his lease in and to the property on or about July 12, 1888, and thenceforth we must presume he

had no legal interest therein. In determining, however, whether or not he was guilty of false swearing in making the proofs of loss, we may look to all the evidence in the case; and, if such a state of facts is presented thereby as leaves a reasonable presumption of mistake or misapprehension on his part, such presumption should be indulged in preference to that of willful false swearing, founded upon the single fact that the legal title had passed from him. *E. C. Hickman*, who had charge of plaintiff's business in San Diego at the time, testified that, as soon as he heard of the transfer of the property by Newkirk, "I went to him about it, and he said it was only security for the back rent, and that as soon as he was able to pay the rent the building would be returned to him, and in the mean time, if Mrs. Roberts [the owner] was able to sell the buildings, Mr. Newkirk was to receive all the money received from the buildings that was in surplus of the rent in arrears." If this was true, Newkirk still had an equitable interest in the property, and, subject to the payment of back rent, was entitled to be restored to his legal status under the lease. An equitable interest in real property is an insurable interest. This much is deemed due to the memory of Newkirk, who was confined by sickness at the date of taking the proofs, and died three days later.

2. Conceding, however, all that the appellant claims in reference to the falsity of the proofs of loss, and it is not perceived that its case is improved. It is shown to have known where the title was vested. Knowing all this, and the interest of plaintiff in the property, and the amount and nature of such interest, it still insisted that Newkirk should make the proofs of loss, and its agent had them filled out in his office by his bookkeeper, and under his instructions, and then delivered them to plaintiff's agent for execution by Newkirk. It received such proofs on or about April 15, 1889, and, so far as appears, made no objection thereto for a long time thereafter. Its adjuster had, as early as February, 1889, furnished the officers of defendant at San Francisco with evidence of plaintiff's claim, and with information as to the state of the title. On the 3d of June thereafter, defendant instructed its agents at San Diego to draw on it for Newkirk's loss, and to send policy and proper receipts. Thereupon, defendant, by its agents, drew, and delivered to the plaintiff, its bill of exchange, as follows: "San Diego, Calif., June 3, 1889. At sight, pay to order of West Coast Lumber Co. twelve hundred, no 100ths, dollars, value received, and charge the same to account of Pierce & Daly. To Charles H. Cushing, Esq., Sec'y State Investment Insurance Co., San Francisco, Calif." This bill of exchange was presented for payment soon after June 3, 1889, and was not paid to plaintiff, because unaccompanied by a receipt from Newkirk; no

other objection being made to such payment. A receipt from Newkirk was then sent for, but he had died in the mean time, as before stated. Thereafter, and about June 14, 1889, defendant refused to pay the draft. The court finds that there was no misapprehension of the facts respecting the insurable interest of plaintiff or of Newkirk, on the part of defendant, at the time the bill of exchange was executed. There was evidence to support the finding, and I am of opinion defendant had, with a full knowledge of all the facts, waived its right to set up the forfeitures relied upon as a defense to the action. The case made here is in many respects similar, but in some particulars a stronger one in favor of plaintiff than *Silverberg v. Insurance Co.*, 67 Cal. 36, 7 Pac. Rep. 38. In that case the proofs had been taken by the defendant, and pronounced satisfactory, and a promise to pay, while here a bill of exchange, which presupposes a final adjustment of the loss and the furnishing of all needed proofs, had been given. Each, in its way, is a waiver of all causes of forfeiture known, or which ought to have been known, to defendant at the time. *Murray v. Association*, 90 Cal. 406, 27 Pac. Rep. 309; *Wheaton v. Insurance Co.*, 76 Cal. 429, 18 Pac. Rep. 758; *Stache v. Insurance Co.*, 49 Wis. 89, 5 N. W. Rep. 36; *Smith v. Insurance Co.*, 62 N. Y. 85. In the case last cited it was said: "The time for investigation as to breaches of warranty is when a claim is made of payment; and if the company elects to pay the claim, or, what is equivalent, to adjust it by an independent contract, it cannot afterwards, in the absence of fraud, retract, or fall back upon an alleged breach of warranty."

The claim of plaintiff, after satisfying its lien to the extent of the value of the property purchased under foreclosure sale,—\$1,000,—was in excess of the amount of the insurance; and, if it was entitled to recover at all, it was for the \$1,200. *Insurance Co. v. Stinson*, 103 U. S. 25.

A receipt from Newkirk was not necessary to the security or discharge of defendant. A party entitled to maintain an action may, upon payment being made to him, give a valid discharge from the cause of action. Under our law an action may be maintained by the party in interest. The courts, with some exceptions, hold that the party to whom the loss is payable may sue. *Cone v. Insurance Co.*, 60 N. Y. 619; *Chamberlain v. Insurance Co.*, 55 N. H. 249. It is sufficient to say, under this head, that decisions to like effect are to be found emanating from the courts of Missouri, New Jersey, Illinois, and many other states. Where the proceeds of the policy are to go in part to the assured, and in part to others, the authorities are not uniform as to the proper plaintiff. The better opinion, however, is believed to be that all the beneficiaries may unite as plaintiffs in the action.

We have followed counsel for appellant through the several objections made by him as to the sufficiency of the evidence to support the findings, and in his objections to the sufficiency of the facts to uphold the judgment, and it would have been more satisfactory to us, and perhaps to him, to have adopted the same course herein, but the necessity of confining our opinions within briefer limits than such method would have rendered necessary has prevented. The case seems to have been fairly tried, and wisely determined, and the judgment and order appealed from should be affirmed.

We concur: **TEMPLE, C.; BELCHER, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(98 Cal. xviii; 3 Cal. Unrep. 886)

McKENZIE v. GILMORE. (No. 18,067.)
(Supreme Court of California. June 3, 1893.)

HIGHWAYS—DEDICATION.

1. Defendant, for the purpose of changing the course of a highway, opened a road through his land, fenced it on both sides, allowed it to be used by the public, and to be worked and controlled by the public authorities. *Held*, that the road was dedicated to the public.

2. Where a person dedicates land for a public highway he cannot afterwards reclaim the same by showing that he was induced to make such dedication by the promise of a neighbor to give him the use of other lands, and that he had ceased to use such lands.

3. A petition asking that a highway be vacated was presented to a board of supervisors. Viewers were appointed, and in their report they recommended that the highway be made a private road, and that the owners of the land over which the road passed give a deed to the county for the private road. The board made an order adopting the report, but no deeds of the land were ever made. *Held*, that the order of the supervisors was not an abandonment of the highway.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; Edward Sweeney, Judge.

Action by Isaac McKenzie against John Gilmore to cause obstructions to be removed from a highway. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

N. P. Chipman, for appellant. L. V. Hitchcock and J. T. Matlock, for respondent.

TEMPLE, C. This is an action brought by a road overseer to cause certain obstructions to be removed from the public highway. The cause was tried with the aid of a jury, which found for the defendant. The plaintiff appeals from the judgment, and from an order refusing a new trial.

There are numerous assignments of error in the record, but I think it necessary to notice but a few of them. The existence of the highway for a portion of the way was shown by proceedings before the board of supervi-

ors, which resulted in an order establishing the road. Between certain points this road had been changed by one Hickman, who opened a road across his land, fenced it on both sides, and allowed it to be used by the public, and to be worked and controlled by the public authorities. The old road had been fenced up. It was claimed that the new road was dedicated by Hickman to the public. Defendant was permitted to show, as rebutting the presumption which would arise from the above and other acts on the part of Hickman, that Hickman had opened the road to the public in consideration of the promise of one of his neighbors that he should have the use of certain other land if he would allow the new road to be opened, and that subsequently he had ceased to use the land given him as a consideration. This was clearly erroneous. The facts being assumed, there was a complete dedication to the public. The effect of the acts of Hickman, which show a dedication, cannot be qualified by evidence that he was induced to dedicate by his neighbor. If such proof could have any effect, it would strengthen the proof of dedication. He proves that he did dedicate when he shows that he was paid by a neighbor to do so, and tries to avoid the effect of his acts by showing partial failure of consideration. The use was not given to Copeland, but to the public, by acts indicating an offer without condition. It was also error to allow proof that Cone had consented to the obstructions, or had himself obstructed the road at another point, except so far as such proof might tend to discredit Cone as a witness. On the trial the defendant admitted the erection and maintenance of the gates which constituted the obstruction complained of, but justified on the ground that the highway, if one ever existed, had been vacated by the board of supervisors. In this matter it appeared that a petition was presented to the board, signed by the defendant and several others, asking that the road be vacated. A day was set for the hearing, when viewers were appointed, who subsequently reported to the board, stating, among other things, that Gilmore agreed to give Cone and Hickman a private road 25 feet wide, and concluding as follows: "Being that a portion of this road has recently been abandoned, we recommend that the road described in this report be made a private road, and that the landowners over which the road passes give a deed to the county for a private road on the route as described above, which is shown more particularly by the accompanying plat." After the filing of this report the board made the following order: "In the matter of the road in Antelope road district, known as the 'Gilmore Private Road,' it was ordered by the board that the viewers' report be adopted." Deeds were not taken from the landowners for the right of way, nor were any steps taken to establish a private road. The last order was

made June 5, 1889. Nothing further seems to have been done until December 4, 1889, when the board made an order rescinding an order made April 3, 1889, pertaining to gates on Gilmore's land, and ordering the road master to open the road to the public.

Under the last order the plaintiff assumes to be acting. Defendant contends that the order of June 5th is an order vacating the road. That a private road could not be established until the public road was first vacated. Therefore, although the report did not in terms recommend that the road be vacated, such is necessarily implied, and by adopting it the board must be held to have vacated the highway, although it was not competent for them to convert it into a private road in that way.

I do not think this position can be maintained. An order vacating a public highway is legislative, and the enactment ought to appear in the order. Great strictness is not required, but, if an order may be helped by such a reference, the report referred to should itself be sufficient to indicate the act determined upon. The statute does not provide for viewers in the matter of the discontinuance of a highway. The provisions in regard to viewers evidently refer only to laying out and altering highways. By the twenty-first section of the county government act of 1883, in force when these proceedings were had, it was provided that the board should cause to be kept a road book containing all proceedings and adjudications relating to the establishment and discontinuance of roads, etc. This matter does not seem to have been entered in such book. The report adopted did not recommend the abandonment of the road, but that deeds be taken of a right of way for a private road 25 feet wide, and then the laying out of a private road. The adoption of the report was an indication that the board would pursue that course, but no conveyances were received, and to lay out a private road would seem to require the concurrence of the person chiefly interested. Section 2692, Pol. Code. Although the board indicated a willingness to pursue that course, it does not appear that they had the power to do so. Under the circumstances, I do not think the order was an abandonment of the highway, and it was therefore error to admit it in evidence over the objection of plaintiff.

This will dispose of many exceptions taken. If the order were excluded, no instructions in regard to its effect would be required. The plaintiff was entitled to an instruction as to the right of defendant to erect gates across a public highway, and the instruction offered upon that subject should have been given. I think the court erred in giving the fourth and seventh instructions asked for by the defendant. The fourth was upon a matter which had no bearing upon the issues in the case, and the seventh was erroneous. Neither the public nor the county is responsible for unauthorized acts of the board of su-

pervisors. Their acts, when ultra vires, are simply void, and cannot be imputed to the public. I think the judgment and order should be reversed, and a new trial had.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

98 Cal. 299

PEOPLE v. BEMMERLY. (No. 20,939.)

(Supreme Court of California. May 16, 1893.)

MURDER—INSANITY AS A DEFENSE—INSTRUCTIONS—NEW TRIAL—MISCONDUCT OF JURY.

1. The fact that several jurors in a murder cause were separated from their fellow jurors during the progress of the trial, and out of the sight of the officer who had them in charge, contrary to the orders of the court, is not sufficient ground to grant a new trial where it does not appear that anything was said to either of them concerning the cause, or that they were guilty of any misconduct, or that they did any act inconsistent with their duties as jurors during the separation.

2. Nor does the fact that one of the jurors drank intoxicating liquors during the progress of the trial constitute a ground for a new trial, where it does not appear that such juror was affected by the liquor.

3. Where the record on appeal in a criminal cause does not contain defendant's testimony in the court below, an objection that the court erred in permitting the district attorney to cross-examine him upon matters not brought out in direct examination will not be considered.

4. A statement of defendant's testimony in the assignment of errors in a criminal cause cannot be considered as a part of the record in determining whether or not the court below erred in permitting certain questions to be asked him. *People v. Faulke*, 30 Pac. Rep. 837, 96 Cal. 17, followed.

5. On a trial for murder, the burden of showing insanity, relied on as a defense, is on defendant, and the insanity must be established by a preponderance of evidence. *People v. Travers*, 26 Pac. Rep. 88, 88 Cal. 238, followed.

In bank. Appeal from superior court, Yolo county; J. E. Prewitt, Judge.

One Bemmerly was convicted of murder in the second degree. From the judgment of conviction, and from an order overruling his motion for a new trial, he appeals. Affirmed.

For former appeal, see 25 Pac. Rep. 266.

K. Clark, J. C. Ball, J. E. Strong, and J. Craig, for appellant. Atty. Gen. Hart, for the People.

HARRISON, J. The defendant was convicted of murder in the second degree, and upon the judgment of conviction, and an order denying a new trial, he has appealed.

1. After the jurors had been impaneled and sworn to try the cause, the court, upon its own motion, ordered them into the custody of the sheriff during the progress of the trial, and instructed the sheriff to keep them together, and not to speak to any one, or per-

mit any other person to speak to them or in their presence, about the case; and also instructed them not to drink any intoxicating liquors during the progress of the trial. One of the grounds urged for a new trial and upon the appeal is that before the final submission of the cause certain of the jurors separated from the others, and from the officer who had them in charge, and that certain of the jurors did before the final submission of the case to them drink intoxicating liquors. It appears that after an adjournment upon one of the days while the cause was on trial certain of the jurors, while upon the street in company with the sheriff, joined a crowd of people who were listening to the utterance of a street fakir, and were for a few minutes out of the sight or custody of the sheriff; that on a Sunday which intervened during the trial, eight of the jurors, in company with a deputy sheriff, attended church separately from the remaining four, and that some of the other four listened to the singing and preaching of the Salvation Army in the streets of Woodland; that one of the jurors, in the company of a deputy sheriff, visited his place of business, without being accompanied by the others; that individual jurors were several times during the trial separated from the body of jurors for a few minutes at a time, and occasionally were out of sight of the officer who had them in charge; that several of the jurors, at various times during the trial, drank intoxicating liquors, and at times engaged in conversation with other persons. It was not shown that anything was said to either of the jurors concerning the case before them, or that they were at any time during their separation guilty of any misconduct, or that they did any act inconsistent with their duties as jurors. The amount or character of the intoxicating liquors which they drank is not shown, nor the time or frequency of such drinking, and it was not claimed that either of them was in any visible way affected thereby. Ten of the jurors were severally sworn before the court, and denied that they had conversed with any person respecting the case, or been influenced by any matter other than the evidence before them; and those who drank the intoxicating liquors denied that they had been affected thereby. Two of the jurors were not examined upon these points, but there was no showing made against their conduct. We cannot hold that these facts constituted such misconduct as to justify setting aside the verdict. The direction to the sheriff to keep the jury together, as well as the instruction to the jurors themselves not to drink any intoxicating liquors during the progress of the trial, was for the purpose of having the trial conducted in an orderly and discreet manner, and was evincive of the desire of the court to prevent the jury from being affected by any improper influences. The ultimate object of these instructions was not to keep the jury together,

but to prevent them from improper intercourse with others, and their being kept together was merely a means of accomplishing this ultimate purpose. The direction of the court did not give to the defendant the right to control the action of the jury or of the officer in that respect during the pendency of the trial, nor the right to any exception for error or misconduct by reason of a failure to literally comply therewith. The mere fact that the direction of the court was violated does not give to the defendant the right to have the verdict set aside. He must show as fully as if the direction had not been given that one or more of the jurors was influenced in his verdict by some outside influence during or in consequence of such separation. Neither does the mere fact that a juror drank intoxicating liquor during the trial show that his verdict was affected thereby. The defendant, in addition thereto, should show that the juror was affected by the liquor which he drank, or should at least show the quantity and character of the liquor, so that there might be a basis for the court to determine whether it would presumptively affect his capacity as a juror. The failure on the part of the people to call two of the jurors to exonerate themselves from the charge of having been influenced in their verdict by reason of the violation of the above direction of the court does not strengthen the position of the defendant. The burden of showing error was upon him, and, in the absence of any showing that these two jurors had themselves drank any liquor, or conversed or been spoken to about the case, the people were not required to introduce negative testimony upon these points.

2. It was held upon the appeal from the former trial of the defendant (87 Cal. 117, 25 Pac. Rep. 266) that the dying declarations of the deceased were properly received in evidence. The testimony at the present trial concerning the circumstances under which they were made does not differ in any material respect from that presented upon the former trial.

3. The objection that the court erred in permitting the district attorney to cross-examine the defendant upon matters not brought out in direct examination is not sustained by the record. The bill of exceptions merely shows that the court permitted him to be cross-examined "upon the transcript of the reporter's notes of his testimony at the former trial." In the absence of the testimony given by him, we cannot say that it was upon matters to which he did not testify at the present trial. The statement of such testimony in the assignment of errors cannot be regarded as a part of the record for this purpose. *People v. Faulke*, 96 Cal. 17, 30 Pac. Rep. 837.

4. Objections are made by the appellant to some of the instructions given to the jury, but, after a careful examination thereof, we are unable to say that the court committed

any error. The instructions are very voluminous, occupying 50 pages of the printed transcript, and informed the jury very fully upon the law applicable to the defenses presented at the trial. The chief argument of the appellant is directed to showing that the court erred in instructing the jury upon the subject of insanity, and that the burden of showing that defense was upon the defendant, and must be established by a preponderance of evidence. This rule was, however, affirmed in *People v. Travers*, 88 Cal. 238, 26 Pac. Rep. 88, and cannot any longer be regarded as an open question in this state.

The judgment and order are affirmed.

We concur: MCFARLAND, J.; FITZGERALD, J.; DE HAVEN, J.; PATERSON, J.

98 Cal. 374

BRUNNER et al. v. MARKS. (No. 14,971.)
(Supreme Court of California. May 30, 1893.)

MECHANICS' LIENS—CONTRACT—JUDGMENT FORECLOSING LIEN ON PORTION OF BUILDING—VALIDITY—PLEADING AND PROOF—VARIANCE.

1. A building contract provided for adding to an old building on a part of a lot, and the erection of a new building on the other part. Mechanics' liens were filed for the construction of additions to the building situated on that portion of the lot covered by the old building. The complaint in an action to foreclose such liens alleged that the contractor agreed to provide all materials, and change into a two-story building the one-story building then on the premises described, (referring to the entire lot,) and such allegations were not denied. The findings supported the allegations, and the judgment followed the findings. *Held*, that the judgment was not open to the objection that it was invalid because the liens were filed on a portion of the building only.

2. The fact that the notice of liens describes the building as situated on a specified number of feet of a certain lot, while the complaint describes it as situated on the entire lot, causes no variance, and is immaterial.

Department 1. Appeal from superior court, Mendocino county; Robert McGarvey, Judge.

Action by F. Brunner, Sr., and others, against A. Marks and B. Marks and others, to foreclose mechanics' liens. From a judgment for plaintiffs, defendants appeal. Affirmed.

T. L. Carothers and E. H. Wakeman, for appellants. J. M. Mannon and J. A. Cooper, for respondents.

GAROUTTE, J. In this action judgment was rendered foreclosing certain mechanics' liens, and the appeal is prosecuted from that judgment, and the order of the court denying a new trial.

Various liens were filed against the property by different mechanics, and actions brought thereon, which were subsequently consolidated under an order of the court. Appellants were the owners of a lot in the city of Ukiah, described as being 66 feet front upon State street, with a depth of 86 feet upon Perkins street. There was a

building situated upon this lot, covering a frontage of 48 feet, at the time the contract was entered into with one Ludwig, upon which this action arose. The contract, as stated by Ludwig, was to build a one-story brick building, and to extend to two stories an old brick building. The old building here referred to is the building covering 48 feet of said lot, the one-story building to be erected covering the remaining 18 feet of the lot. The contract price was \$8,000 for the entire work, and one contract covered it all.

Appellant relied upon 29 assignments of errors of law, but states his principal one to be that all the liens but one were filed against that part of the structure situated upon the lot described as having a frontage of 48 feet, the remaining lien being filed against that portion of the building not covered by other liens; "that is to say, all the liens but one are filed against that portion of the structure covered by 48 feet frontage, and the remaining one against the balance of the structure, covering about 18 feet frontage." It will be seen that appellants' contention is that the liens were filed upon a portion of the building, and not upon it all; and that, consequently, no valid judgment could be rendered foreclosing them, inasmuch as no judgment could embrace more than is included in the claim of lien. This principle is supported by *Mills Co. v. Kremer*, 94 Cal. 210, 29 Pac. Rep. 635, where the court said: "The statute gives a lien upon the entire building for any portion of the labor done or materials furnished therefor, and there is no provision for a lien upon a portion of a building, or for the sale of a part of a building to satisfy a lien upon the whole." There can be no question but that a fatal variance might be created between the claim of lien and the complaint upon the one side, and the proof upon the other, by showing that the lien did not cover the entire building; but in the present case the liens, save one, are claimed for labor and materials furnished in the improvement and construction of additions to that certain building or structure situated upon the portion of appellants' lot having 48 feet frontage, and covered by the old building. In direct line with the claim made by the lien follows the allegation of the complaint, as follows: "That on or about the 25th day of October, 1889, the defendant T. J. Ludwig entered into a contract with the defendants A. Marks and B. Marks, whereby the said Ludwig agreed to provide all materials, and add to and change into a two-story brick building the one-story brick building then upon the premises above described." (Referring to the entire lot.) This allegation of the complaint is not denied, and therefore no issue is made by the pleading as to whether or not the claim of lien covers an entire building or only a part

thereof. Such being the fact, appellant was not authorized to introduce evidence against his own admission. The findings of the court also fully support the allegations of the complaint in this regard, and the judgment follows the findings; hence the difficulties that arose in the Willamette Case are not present here. These views also dispose of the ruling of the court upon the question addressed to the witness Copeland as to the character of the structure erected upon the lot.

The fact that the liens described the building as situated upon 48 feet of the lot, and the complaint described the building as situated upon the entire lot, causes no variance, and is entirely immaterial. The description of the land upon which the structure is erected, required to be set out in the claim of lien, is not a technical description, and is demanded only for the purposes of identification, although in this case it appears that the description in these liens was technically correct. Having disposed of appellants' principal point, we will not notice the little ones in detail, but simply say that after a due consideration of them we think them too small to justify a reversal of the case. For the foregoing reasons, let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

98 Cal. 377

HANSON v. SLAVEN. (No. 14,456.)

(Supreme Court of California. May 30, 1893.)

SALE — OPTION TO PURCHASE — ACCEPTANCE — ACTION FOR FAILURE TO DELIVER — INABILITY TO PERFORM CONTRACT — SUFFICIENCY OF EVIDENCE.

1. In a letter to plaintiff, defendant and another agreed to take 2,000 shares of stock of a specified corporation, subscribed by the former, and granted him "the privilege of calling for all or any part of said 2,000 shares, at any time during the next two years from the date of this letter, at \$30 per share." Within the two years, plaintiff told defendant he wanted the stock. *Held*, that the written offer to plaintiff, and the latter's statement to defendant, constituted an agreement to sell and buy, containing concurrent conditions, mutually dependent on each other.

2. Under Civil Code, § 1439, providing that, before any party to an obligation can require another party to perform any act under it, he must be able, and offer, to fulfill all conditions imposed on him on the like fulfillment by the other party, plaintiff was not entitled to maintain an action on such agreement against defendant for failure to deliver such stock on demand, in the absence of an offer by him to pay for it, unless defendant's conduct was such as to excuse the failure of such offer.

3. A direction by defendant, to his agent, to tell plaintiff "that he will get his stock. Our stock is all hypothecated,—tied up. As soon as we are free, I will give him his stock,"—did not constitute such refusal to deliver the stock as will excuse the failure of plaintiff to offer to perform on his part, where neither party regarded it as a refusal at the time.

4. It appeared that, during the times plaintiff demanded such stock, large amounts of it were for sale; that buyers were few; and that

an offer of the agreed price per share would have secured to defendant any reasonable amount of it. *Held* that, though defendant's stock was held by third persons as collateral, the evidence was insufficient to support a finding that defendant had placed it out of his power to deliver the stock.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Charles Hanson against Henry B. Slaven on a contract for the sale to plaintiff of certain shares of stock of the American Contracting & Dredging Company of New York. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Galpin & Zeigler, for appellant. W. C. Belcher and E. P. Cole, for respondent.

GAROUTTE, J. This is an appeal from a judgment of nonsuit in an action brought to recover the sum of \$1,270,000, as damages for a breach of contract to deliver 2,000 shares of stock of the American Contracting & Dredging Company of New York city. The contract was executory, and in the following words: "San Francisco, June 10, 1882. Charles Hanson, Esq. Dear Sir: We hereby agree to take and pay for the amount of stock subscribed by you, namely, two thousand shares, at \$30 per share, in a company now being organized, and to be known as the American Contracting and Dredging Company of New York city. We further grant to you the privilege of calling for all or any part of said two thousand shares at any time during the next two years from the date of this letter, at thirty dollars per share. Respectfully, yours, H. B. Slaven. M. A. Slaven." The latter portion of the writing forms the basis of plaintiff's cause of action, he claiming to have been damaged by reason of the failure and refusal of respondents to deliver the stock as therein provided.

The motion for a nonsuit was based upon very narrow grounds,—grounds that could well have been enlarged. It was made upon the ground that plaintiff had failed to prove the payment or tender of the purchase price of said stock, to wit, \$60,000 mentioned in the option, within the time therein stated, to wit, two years from date, and there was no waiver of such tender or excuse for the making of the same. The evidence bearing upon the question of nonsuit may be summarized as follows: Robert F. Pratt, who had charge of certain branches of Slaven's business, testified: "In January, 1883, Hanson called me into his private office, and said: 'I want my stock. You tell H. B. Slaven I want my stock.' I said, 'All right. H. B. Slaven is in town, and I will report to him just what you say.' And I did report the conversation to Slaven, who said: 'Tell good friend Hanson that he will get his stock. Our stock is all hypothecated,—tied up. As soon as we are free I will give him his stock.' In March, Hanson

again asked me for his stock, but he never tendered me any money at any time. I told Hanson what Slaven said about it." Plaintiff Hanson testified: "I told Slaven in December, 1882, I wanted the stock, and he said he would get it for me, but he never did. I told him again in February that I wanted the stock, and he said he would get it for me. I never tendered any money to Slaven at any time. Never offered to pay him any, either in writing or otherwise. Never at any time tendered any money to Pratt, or to any person. Never offered to pay any person any money for this stock."

That portion of the writing involved in the consideration of this case constitutes, under section 1727 of the Civil Code, an agreement upon the part of the Slaven to sell to Hanson 2,000 shares of stock, or any part thereof, at the price stated, at any time within two years from date. If, at any time within the two years, Hanson accepted the Slavens' proposition, as stated in their agreement, then the contract, under section 1729 of the Civil Code, became an agreement to sell and buy, containing concurrent conditions mutually dependent upon each other. Taking a broad and liberal view of the testimony cited, it may be fairly construed to constitute a notification to the Slavens by Hanson of an acceptance upon his part of the offer to sell previously made by them. His testimony as to his statements made to Slaven is a little more explicit than his demands and claims made through the medium of the witness Pratt, but in neither case did he state that he would take the entire 2,000 shares. His option extended to all or any part, and it would seem but fair to the vendors that they should know the exact amount he elected to buy. Still, we pass the point, conceding it to be a fair inference of fact from the evidence that his acceptance extended to the entire amount. We then have an agreement upon the one part to sell to Hanson 2,000 shares of stock, and an agreement upon the part of Hanson to pay therefor, to the Slavens, the sum of \$60,000. Upon this state of facts, let us see wherein lies plaintiff's cause of action for a breach of the contract. Section 1439 reads: "Before any party to an obligation can require another party to perform any act under it * * * he must be able, and offer, to fulfill all conditions concurrent, so imposed upon him, on the like fulfillment by the other party, except as provided by the next section." This section is equally applicable to obligations arising either upon agreements for the sale of realty or personalty, and the authorities, both before and since the adoption of the Codes, recognize that fact. It follows therefrom, in order that one party may place the other party in default upon a contract consisting of mutually dependent obligations, he must not only be able to perform, but must offer to perform. If he is able to perform, and offers

to perform, he has done his part, and a refusal to accept such offer, and thereby meet him halfway, creates a breach of the contract, and gives an immediate right of action. Whatever courts of other states may have held upon this question, the provisions of our Code are plain and explicit, and demand that an offer of performance be made. See section 1485, Civil Code, et seq. In *Englander v. Rogers*, 41 Cal. 422, it was held that a complaint which stated that the plaintiff was "ready and willing" to perform failed to state a cause of action, as it showed no default upon the part of the defendant, the complaint failing to allege a tender. In *Loan Soc. v. Hildreth*, 53 Cal. 721, the complaint was held fatally defective in failing to allege an offer to perform. In this case the plaintiff testified that he made no offer to perform; that he made no offer to pay the \$60,000; and that was the concurrent condition assumed by him under the contract.

Plaintiff, having failed to make an offer of payment of the \$60,000, has no cause of action for a breach thereof, unless the defendant's conduct was such as to excuse the failure of an offer. As showing such excuse, appellant contends (1) that respondent refused to deliver the stock; and (2) that he had placed it out of his power to deliver it. All the evidence in the record tending to show a refusal to deliver is the evidence of the witness Pratt, wherein Slaven said to him, in answer to a request or demand for the stock from Hanson: "Tell good friend Hanson that he will get his stock. Our stock is all hypothecated,—tied up. As soon as we are free, I will give him his stock." Under no recognized principle governing the construction of language can this statement of Slaven be construed into a refusal to deliver the stock. It was a promise to deliver the stock at a future day, and indicated a perfect willingness to deliver it. The authorities all agree that, in order to constitute an implied waiver of an offer or tender, the refusal must be explicit and positive. In the latest edition of Mr. Benjamin's work on Sales it is said, in section 568: "It must be a distinct and unequivocally absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end." And this language is approved in *Smoot's Case*, 15 Wall. 36. We have in the present case no such refusal as is contemplated by the law, and plaintiff's requests for his stock, made subsequently to the foregoing statement of Slaven, and Slaven's promise to deliver the stock, made subsequent to this statement, clearly indicate that neither party regarded Slaven's language at this time as constituting a refusal. When Hanson was told by Pratt what Slaven said in reference to the

matter, he appears to have made no objection to Slaven's plea for an extension of time in which to make the delivery, and, in the absence of any objection upon his part at that time to a failure of present delivery, his assent to the course proposed by Slaven must be assumed. To be sure, subsequently, he made further demands for the stock of the witness Pratt, but nothing is disclosed by the record to indicate anything in the nature of a refusal to have followed from such demands.

Neither is the evidence sufficient to support a finding of the jury that defendant had placed it out of his power to deliver the stock. It appears that during these times large amounts of the stock were for sale. The stock was plentiful, but buyers few, and the whole record indicates, conceding that the stock was then held by third parties as collateral, that an offer of \$30 per share would have brought to the possession of Slaven any reasonable amount of it for purposes of sale at that figure. For these reasons it is not shown by the record that the defendant was unable to comply with the contract. Upon the facts of this case it becomes unnecessary to determine, by a construction of the writing, whether an offer to perform should be made within the two years referred to in the writing, or whether Hanson did not have a reasonable time from the date of his acceptance of the terms of the contract in which to make the offer, as his testimony disclosed that he made no offer at any time. For the foregoing reasons, let the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

98 Cal. 384

DIXON v. PLUNS. (No. 14,429.)

(Supreme Court of California. May 31, 1893.)

MISCONDUCT OF JURY—AVERAGE VERDICT—PROOF—AFFIDAVITS OF JURORS—PERSONAL INJURIES—PRESUMPTION OF NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. Where a jury agree that each member thereof shall write out the sum which he thinks plaintiff is entitled to recover, and then divide the aggregate of such sums by 12, and that the quotient shall be the amount of their verdict, such verdict is obtained "by a resort to the determination of chance," within the meaning of Code Civil Proc. § 657, providing that for the purpose of obtaining a new trial such misconduct of the jury may be shown by the affidavits of the jurors.

2. The fact that plaintiff passed under a scaffold erected over the sidewalk, on which defendant was engaged with tools and materials repairing a building, is not negligence contributing to his injury from a chisel dropping on him.

3. Where a chisel dropped from the scaffold erected over the sidewalk, and on which defendant was at work repairing the building, it is presumed to have dropped because of defendant's negligence.

In bank. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action for personal injuries by Katie E. Dixon against William J. F. W. Pluns. Plaintiff had judgment, and from an order denying a new trial, defendant appeals. Reversed.

H. C. Firebaugh, for appellant. Nagle & Nagle, for respondent.

GAROUTTE, J. Respondent, while walking upon the sidewalk of Larkin street, in the city of San Francisco, was struck upon the head, and quite seriously injured, by a chisel that fell from a scaffolding above, upon which one of appellant's employes was standing while engaged in affixing a cornice to the building. Damages were recovered in the lower court, and the appeal is from the judgment and an order denying a new trial. This case was decided in department, and the judgment and order reversed upon the ground that the verdict was arrived at by chance. The question involved being an important one, and there being some decisions of this court opposed to the doctrine there laid down, which had not been noticed in the opinion, the case was ordered to bank for further consideration.

Appellant moved for a new trial upon the ground of misconduct of the jury in this: that they arrived at their verdict by a resort to the determination of chance. The Code expressly provides that such misconduct may be shown by the affidavits of jurors, (section 657, Code Civil Proc.,) and in support of the motion appellant presented the affidavit of one Koster, a juror, wherein he stated "that, upon retiring to the jury room, the twelve jurors first agreed by a vote that the average sense of the jurors should control in arriving at what the verdict should be, and then the twelve jurors agreed to be controlled by their vote, and voted that the said average sense of the jurors should be arrived at in the manner following, namely, by each individual juror writing on a piece of paper what he would fix the verdict at, and that the sums so written should then be added together, and the aggregate divided by twelve, and that the amount resulting should be taken as the average sense of the jurors, and be put in the verdict accordingly; and thereupon the said plan was carried out," etc. Courts have not been astute in perceiving sufficient error to set aside verdicts upon the ground here relied upon, and evidence sustaining the verdict has been generally favored; but upon this motion no opposing affidavits were offered, and the merits of the contention rest alone upon the sufficiency of the statement of facts above recited. Reduced to its lowest terms, the affidavit plainly discloses that the verdict was the result of a previous agreement, and was arrived at upon the basis that the amount of the verdict should be the quotient resulting from a division wherein 12 was the divisor, and the sum of the various

amounts at which each juror would fix the verdict the dividend. The calculation was made in pursuance of a prior agreement that the result should be the verdict; and that result was adopted as the verdict, not upon further consideration of the jury, and upon the determination that such amount formed a just and proper verdict, but it was adopted in pursuance of the prior "agreement." The decisions of our courts clearly indicate that they do not countenance such procedure, and the verdict must be set aside if the affidavits of jurors are entitled to be received as evidence to prove the agreement and the consummation thereof; and that matter is dependent upon the solution of the question, is the verdict a chance verdict, within the meaning of the statute?

Counsel for respondent, with good reason, rely upon *Turner v. Water Co.*, 25 Cal. 397, to support his contention in this regard. It is there decided that a verdict arrived at in the manner hereinbefore set forth is not a chance verdict, and therefore cannot be attacked by the affidavits of jurors. But, after mature consideration, we think the principle there declared erroneous, and that the establishment of a contrary rule, in this country especially, where the rights of property, reputation, and life are all taken into the jury room, and there passed upon by jurors, will result in a purer and more satisfactory administration of justice. In the case cited Mr. Justice Sanderson used the following language: "To ascertain this average the jury may properly adopt the method which was used in the present case, but they ought not to agree to be bound by the result, whatever it may be. If they do so agree, and such result is made the verdict without further consideration or assent, such verdict is vicious and irregular, and must be set aside whenever the fact is made to appear by proper and competent evidence." If this character of verdict is vicious and irregular, it can only be vicious and irregular upon the ground that it was not the result of that calm and deliberate judgment of jurors contemplated by the law, but that it was arrived at by a resort to chance or lot. The vicious character of the verdict can consist of nothing else. The jurors have not been corrupted. They have acted under no duress, mistake, or fraud. Their verdict is the result of free and voluntary action. Outsiders have not participated in or influenced their determinations. Hence the verdict is vicious only in this: that the amount was determined by a resort to methods condemned by the law. In the few cases relied upon to support *Turner v. Water Co.* it will be noticed that the verdicts were upheld upon the ground that, after the computations were made and the result obtained, that result was not adopted as the verdict of the jury in pursuance of the prior agreement, but independently thereof, and upon further deliberation and thought; and as to such a course we see no serious objection.

"Chance" may be defined to be hazard, risk, or the result or issue of uncertain and unknown conditions or forces, and the facts here developed bring the case clearly within such definition. In the present case each juror agreed that a definite amount should be the verdict of the jury, at a time when he had no knowledge whatever as to what the amount should be, for it had not yet been computed. No person even knew the figures upon which the computation would be made. If the estimate of each juror is before the eyes of the others when the agreement is made, then no element of chance will be found in the result, for it would be a mere matter of mathematical computation; but without a knowledge of these estimates the character of the verdict will be as entirely unknown to the jurors as though the whole matter were decided by the casting of a die or the tossing of a coin. In the casting of a die or the tossing of a coin justice has an equal chance with injustice, but under the system here considered one unscrupulous and cunning juror always has the power to defeat justice by increasing or decreasing the amount of the verdict in proportion as he places his estimate at an unconscionably high or low figure. In the casting of a die the chance of winning or losing is dependent upon the face of the die that presents itself after the cast. In arriving at a verdict in the manner here practiced the chance of the respective parties, plaintiff and defendant, to secure the verdict is entirely dependent upon the sum total of the estimates made by the various jurors, and that sum total is as uncertain and unknown to the jurors at the time the agreement is made as the result of the cast is unknown to the gamester. We are clearly of the opinion that this verdict was obtained by a resort to chance, and *Turner v. Water Co.*, and other cases following in its wake, are no longer valuable as authority.

Under a statute similar to the provision of our Code this question has been directly adjudicated, and the position here taken supported, in the recent case of *Improvement Co. v. Adams*, (Colo. App.) 28 Pac. Rep. 662. Under the same provision of the Idaho statute this question has been carefully considered in the very late case of *Flood v. McClure*, (Idaho,) 32 Pac. Rep. 254. *Turner v. Water Co.* is there reviewed, and its reasoning declared not sound. It is insisted that the case of *Turner v. Water Co.*, having been decided under the former practice act, and the same provision being carried into the Code of Civil Procedure, that re-enactment carried with it the construction previously given the provision. Such can only be the law where the rules of statutory construction are the same at the date of both enactments. This principle is declared in *Blythe v. Ayres*, 96 Cal. 591, 31 Pac. Rep. 915, and also in *Flood v. McClure*, (Idaho,) 32 Pac. Rep. 254.

As the cause must be returned to the lower court for further proceedings, we pass to an

examination of some additional matters. The motion for a nonsuit was properly denied. Upon the evidence we cannot say that the respondent was guilty of contributory negligence in walking upon the sidewalk at the time the injury was inflicted. She had a right to be there, and had no sufficient reason to anticipate danger from overhead. Respondent's evidence also established a prima facie case of negligence upon the part of the appellant. He was engaged with tools and materials directly over a thoroughfare where people were constantly travelling, and had an undoubted right to travel. Under such circumstances, the law demanded of him more than ordinary care. He was called upon to exercise the greatest care and caution in the performance of his work, in order that travelers might not be injured. The injury was received at the hands of appellant by the dropping of the chisel while respondent was walking upon the public street. Under the foregoing circumstances, the court was justified in submitting the case to the jury. This question is carefully considered and the authorities reviewed in *Mullen v. St. John*, 57 N. Y. 567. In that case the wall of a building fell upon a traveler in the street. The court held that the presumption of negligence arose from the fact of the building falling. In *Lyons v. Rosenthal*, 11 Hun, 46, the injury arose from the falling of a box of goods from the story above, and it was held that negligence would be presumed. In support of this doctrine the court cited various English authorities which, upon the facts, stand upon common ground with the case at bar. See *Kearney v. Railroad Co.*, L. R. 5 Q. B. 411; *Byrne v. Boadle*, 2 Hurl. & C. 722; *Scott v. Docks Co.*, 3 Hurl. & C. 596. The rule recognized by the foregoing authorities as pertaining to this class of accidents is, where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *Shear. & R. Neg.* § 60.

Inasmuch as counsel for respondent at the oral argument stated that he relied upon previous decisions of this court to the effect that affidavits of jurors would not be received to impeach a verdict arrived at in the manner set out in the affidavit of the juror in this case, and for that reason did not offer counter affidavits upon the hearing of the motion for a new trial, which he could have done, it is ordered that the order denying a new trial be reversed, and the same remanded to the court below for further action as herein indicated; that the court below permit the respondent, if she shall be so advised, to file within 20 days after the filing of the remittitur counter affidavits as to the manner in which the jurors arrived at their

verdict; and that thereupon, upon such affidavits and the other matters already before it upon the motion for a new trial, the court render its decision thereon. It is further ordered that the order heretofore made in this court submitting her appeal from the judgment be set aside, and that the hearing upon the said appeal be continued to a day to be hereafter fixed upon the motion of either party hereto.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; PATERSON, J.; DE HAVEN, J.

(98 Cal. 415)

DAVIS v. HONEY LAKE WATER CO.
(No. 18,047.)

(Supreme Court of California. June 3, 1893.)

STRIKING OUT PLEADINGS—DEMURRER—APPEAL.

1. A demurrer which contains no other matter than the grounds enumerated in Code Civil Proc. § 430, is not irrelevant or redundant, within section 453, providing for striking out pleadings.

2. A demurrer, though stricken out, constitutes part of the judgment roll.

3. Under Code Civil Proc. § 647, providing that an order striking out a pleading will be deemed to have been excepted to, an exception to an order striking out a demurrer is unnecessary.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; W. T. Master, Judge.

Action by John C. Davis against the Honey Lake Water Company. Defendant demurred, and on motion the demurrer was stricken out, and judgment entered for plaintiff, and defendant appeals. Reversed.

Goodwin & Dodge, Olney, Chickering & Thomas, and Warren Gregory, for appellant. A. L. Shinn, for respondent.

VANOLIEF, C. The complaint consists of three counts, each for the recovery of a specific sum of money on an alleged distinct cause of action. The action was commenced in the county of Lassen, and the summons was served on the defendant in the city and county of San Francisco on the 29th day of August, 1891. On the 28th day of September, 1891, the defendant filed a demurrer to the complaint on the grounds of misjoinder of causes of action, and that the complaint does not state facts sufficient to constitute a cause of action against the defendant. On November 3, 1891, on motion of plaintiff's attorney, the court ordered that the demurrer be "stricken from the files of the court, for the reason that it had not been filed in time." On November 4, 1891, the default of the defendant was entered, and judgment rendered in favor of plaintiff for the full sum demanded, viz. \$4,589. This appeal is from the judgment, and comes here upon the judgment roll alone. The roll contains a copy of the demurrer, indorsed "Filed" by

the clerk, as above stated, and shows no other disposition of it than the order striking it from the files.

The appellant's counsel contend that the court erred in thus disposing of the demurrer, and that defendant was not thereby put in default; and, consequently, that the judgment by default was unauthorized by law; and I think this point should be sustained. A similar point was carefully considered and decided in the case of *Larco v. Casanueva*, 30 Cal. 565, under section 50 of the practice act, which then read as follows: "Sham and irrelevant answers and defenses, and so much of any answer as may be irrelevant, redundant, and immaterial, may be stricken out on motion." The principal question as to the construction of that section was whether the word "defenses" included demurrers, and it was held that it did not. The corresponding provision of the Code of Civil Procedure omits the word "defenses," and reads as follows: "Sec. 453. Sham and irrelevant answers and irrelevant and redundant matter in a pleading may be stricken out." In the part of this section relating to irrelevant and redundant matter, however, the word "pleading" is substituted for the word "answer" in the practice act. While there is no doubt that the word "pleading" includes demurrers, and that irrelevant and redundant matters may be inserted in demurrers, yet a demurrer stating only one or more of the grounds enumerated in section 430 of the Code of Civil Procedure, as in this case, contains nothing irrelevant and nothing redundant; nor is it claimed that it does. And since the record shows that the demurrer was filed within thirty days after the service of summons, it appears that the ground upon which it was stricken out, namely, that it "was not filed in time," is not true.

But it is contended for respondent that inasmuch as the demurrer was stricken out, it constitutes no part of the judgment roll, and therefore cannot be looked to for the purpose of ascertaining when it was filed. But, notwithstanding the order striking it out, the demurrer was a pleading in the case, and therefore constitutes a part of the judgment roll. *Abbott v. Douglass*, 28 Cal. 296. To the objection that the record shows no exception to the order striking out the demurrer, the answer is that the law deems that such an order was excepted to. Section 647, Code Civil Proc. Finally, it is claimed that the demurrer may have been stricken out on the ground that it had not been served, since the record does not show whether it had been served or not. But the only other possible valid grounds are those stated in section 453 of the Code of Civil Procedure, namely, the insertion in the demurrer of irrelevant or redundant matter, which, as above shown, is negatived by the record. I think the judgment should be re-

versed, and the court below directed to restore the demurrer to the files, and to proceed to dispose of it according to its merits.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to restore the demurrer to the files, and to proceed to dispose of it according to its merits.

98 Cal. 418

CROCKER et al. v. CARPENTER et al.
(No. 18,078.)

(Supreme Court of California. June 3, 1893.)

QUIETING TITLE—TRIAL BY JURY—OBJECTIONS TO EVIDENCE.

1. In an action under Code Civil Proc. § 738, authorizing an action against one claiming an interest in real property adversely to plaintiff, for the purpose of determining such adverse claim, defendant is not entitled to a trial by jury, where the only issue is whether defendant is entitled to a specific performance of a contract for the purchase of the land, made by plaintiff's grantor.

2. Where evidence is objected to at the trial only on the general grounds of "incompetency, irrelevancy, and immateriality," the objection that the proper foundation for its admission had not been laid will not be considered on appeal.

Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action to quiet title to realty by one Crocker and others against one Carpenter and others. Plaintiffs had judgment, and defendants appeal. Affirmed.

Thompson & Paulsell, E. Murphy, and A. H. Carpenter, for appellants. Loutitt, Wood & Levinsky, for respondents.

DE HAVEN, J. The complaint in this action states substantially a cause of action under section 738 of the Code of Civil Procedure, which authorizes one person to bring an action against another, claiming an interest in real property adversely to him, for the purpose of determining such adverse claim; and the prayer of the complaint is that the defendants be required to set forth the nature of their adverse claims, and for a judgment that the title of plaintiffs to the lands described be quieted, and declared good and valid, and that plaintiffs are entitled to the possession of the same, and the defendants be enjoined "from asserting any claim whatever of, in, or to the said lands, * * * or any part thereof, or to the possession thereof, adverse to these plaintiffs." The judgment of the superior court was in favor of plaintiffs, and the defendants appeal.

1. The court did not err in refusing the demand of the defendants that all the issues made by the pleadings should be tried by a jury. It is certainly true that in an action

brought under section 738 of the Code of Civil Procedure the issues may be such as require their trial by a jury, upon the demand of either of the parties. In the case of *Donahue v. Meister*, 88 Cal. 121, 25 Pac. Rep. 1096, which is relied upon by defendants, the court said that the main effect of section 738 of the Code of Civil Procedure was "to give parties the right to compel others, by suit, to litigate and determine controversies in cases where such right did not exist before; but if, in such a suit, issues arise which are clearly cognizable in a court of law, the Code does not take away the right to have such issues tried by a jury." And this same principle was again affirmed in the later case of *Newman v. Duane*, 89 Cal. 597, 27 Pac. Rep. 66. But there is a very broad distinction between those cases and the one now under consideration. In both of the cases cited the issues were of a purely legal character, as distinguished from those usually arising in what are termed "equitable actions." In *Donahue v. Meister*, from which we have just quoted, the defendant asserted a right to the possession of the premises in controversy, founded upon prior possession, and alleged that he had been ousted from such possession by the plaintiff in the action, and he demanded judgment for the recovery of such possession; and the court simply held that the issues tendered by this answer were such as are involved in an ordinary action for the recovery of real estate, and that the defendant was entitled to have the same tried by a jury. So, also, in *Newman v. Duane*, 89 Cal. 598, 27 Pac. Rep. 66, the defendant was in possession, and, in his answer, not only denied that the plaintiff was the owner of the land there in controversy, but also alleged that he (the defendant) had been in possession of such land for more than 15 years; and it was held by the court in that case that the action, under the issues thus made, was, in substance, one for the recovery of specific real property, and that the defendant was entitled to a jury for the trial of his alleged rights. But in the case at bar there are no such issues. The defendants admit that the legal title to the land described in the complaint is in the plaintiffs, and, while alleging possession in themselves, they do not claim any right to such possession except under and by virtue of an alleged agreement for the sale of said lands made by the predecessor of plaintiffs, and to which agreement the defendants claim they have succeeded by assignment; and they aver that "they are now ready, able, and willing to make to plaintiffs herein the payments," required by such agreement, and under the general prayer of their answer they, in effect, ask for a specific performance of such agreement. Indeed, in the brief filed in this court in behalf of defendants, their counsel

say: "The defendants based their defense upon these contracts, and demanded a specific performance thereof." It is very clear to us that the defendants were not entitled to a jury for the trial of the equitable issues thus presented.

2. The court admitted in evidence the answers of certain defendants in an action brought against them by one Tully R. Wise concerning this same land. The answers were not verified by the defendants referred to, nor signed by them, and there was no evidence showing that they knew the contents of such answers when filed, or that they had ever authorized the attorneys signing them to make the statements therein contained. The defendants objected to the admission of these papers upon the general grounds of incompetency, irrelevancy, and immateriality, and also as not being in rebuttal. We think there was no error in overruling the general objection thus made. If the defendants desired to object to the offered evidence upon the ground that the proper foundation for its admission had not been laid, because it had not been shown that the facts stated in such answers were inserted with the knowledge of defendants, the objection should have been specifically pointed out, and called to the attention of the court and the opposing counsel. If this specific objection had been made it is possible that it could have been removed by further evidence upon the part of plaintiffs, showing such knowledge, but the general objection that the offered evidence was incompetent was not sufficient. When such a general objection is overruled by a trial court the party against whom the ruling is made cannot be permitted for the first time to urge in the appellate court the particular objection which, if it had been openly urged in the trial court at the time of the ruling complained of, might have been easily cured. This is not laying down a merely technical rule. It is one which has its foundation in the proper consideration of what is due to the court and adverse counsel in the trial of a case. As was well said by the supreme court of the territory of Arizona in *Rush v. French*, 1 Ariz. 124, 25 Pac. Rep. 816: "The object of requiring the grounds of objection to be stated, which may seem to be a technical rule, is really to avoid technicalities, and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits." See, also, *Bundy v. Hyde*, 50 N. H. 121.

3. There are many other errors assigned upon rulings of the court in the admission and exclusion of evidence, but we do not deem it necessary to notice them, further

than to say that we discover no material error in the record.

Judgment and order affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.

98 Cal. 406

SAMUEL v. ALLEN. (No. 18,077.)

(Supreme Court of California. June 3, 1893.)
CONTRACTS — PERFORMANCE — SUFFICIENCY OF
OFFER—FINDINGS.

1. Civil Code, § 1489, provides that an offer of performance may be made at any place within the state if the person to whom the offer ought to be made, or such person's residence or place of business, cannot, with reasonable diligence, be found in the state. *Held*, in an action to recover money due upon a contract to convey land, that a sufficient compliance with this section was not shown by proof that plaintiff prepared a deed and was ready to deliver it; that defendant was a resident of another state; and that plaintiff had been told that defendant had no residence in this state.

2. An action may be maintained for the recovery of unpaid purchase money on a contract to convey land, even though the vendor retains in himself the title to such land.

3. Where, in an action to recover money due upon a contract to convey land, the answer alleges that plaintiff was unable to convey the land free from incumbrance, and there is evidence tending to support such allegation, the failure to find upon it is error.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by A. J. Samuel against Ormanzo Allen to recover money due upon a contract for the sale of land. From a judgment for plaintiff, defendant appeals. Reversed.

W. S. Wright, for appellant. Church & Cory, for respondent.

TEMPLE, C. This appeal is from the judgment, but was taken within 60 days after the rendition and entry thereof. The action is brought to recover money due upon a contract for the sale of land. The plaintiff, who is the vendor, avers that he has performed all the conditions of the contract on his part, and that on the 17th day of January, 1890, the defendant refused to accept performance on his part, and notified plaintiff of his refusal to accept performance on the part of plaintiff, and still does refuse to accept performance. These allegations are specifically denied in the answer. There was, at the trial, no attempt made to prove the alleged waiver of an offer to perform, or that defendant had refused to accept performance on the part of plaintiff, or had notified him to that effect. In lieu of the waiver alleged, plaintiff proved that he prepared a deed, and was ready to deliver it, and that defendant was a resident of Austin, Minn., and plaintiff had been told in Los Angeles that defendant had no residence in this state. Section 1489 of the Civil Code provides that, in the absence of an express provision to the contrary, an offer of per-

formance may be made "(3) if such person cannot, with reasonable diligence, be found within this state, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can with reasonable diligence be found within the state; or (4) if this cannot be done, then at any place within this state." It was not shown that the defendant was not at the time of the alleged offer within this state, nor that he did not have a place of business within the state. Nor was any diligence shown on the part of plaintiff to find defendant within the state, or to ascertain whether he had here a place of business. It is denied in the answer that any offer of performance was ever made, or at least the denial is as broad as the allegation, which is really that an offer had been waived. We think the evidence does not sustain the finding that the offer was made by plaintiff, or that defendant has refused to perform.

The appellant contends that inasmuch as plaintiff, by his contract, retained the title to the land, which was the subject of the contract, he cannot maintain an action for the unpaid purchase money, except in the form of an action to enforce specific performance, or for foreclosure of the lien. It is true that in some sense the vendor has a lien on the land for the portion of the purchase money which remains unpaid, and that it has been held that until a conveyance has been made the lien constitutes such security as will prevent the creditor from suing out an attachment, but it has also been uniformly held that such contract does not establish the relation of mortgagor and mortgagee. There is therefore no statutory prohibition upon the right to a personal action to enforce the debt when it becomes due. The action is for money due, as much so as though suit were upon a promissory note. It is not, therefore, a local action, and the court in Fresno county has jurisdiction, although the land which is the subject of the contract is in Los Angeles county.

The defendant denied that plaintiff was able to convey the land free from incumbrance, and it is stated in a stipulation that defendant had denied that plaintiff could furnish title according to the contract. There was evidence, the effect of which appellant contends was to show an existing incumbrance. There should have been a distinct finding upon this question.

We think the evidence also defective in that it did not show what was the pro rata share of the water stock mentioned, or that the money claimed to be due as an assessment upon such stock, in the supposed tender, was assessed or paid by plaintiff upon such pro rata share. We advise that the judgment be reversed, and a new trial had.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and a new trial ordered.

3 Cal. Unrep. 890

CLARK v. OLSEN et ux. (No. 18,090.)

(Supreme Court of California. June 3, 1893.)

FRAUDULENT CONVEYANCES — ACTION TO SET ASIDE — REVIEW ON APPEAL — SUFFICIENCY OF EVIDENCE.

1. Where, in an action to set aside a conveyance from a husband to his wife as fraudulent as to plaintiff, a creditor of the husband, the evidence plainly supports a finding that the conveyance was not made with such intent, a judgment for defendants, based on such finding, will not be disturbed.

2. It was not reversible error to refuse to strike out certain parts of the answer as "sham, irrelevant, and redundant," where they could have no effect upon, and were not necessary to support, the judgment.

3. It was not error to exclude certain letters written by defendants to plaintiff, offered to show the financial condition of defendant husband, where the complaint alleged the husband's insolvency, and the answer did not deny it.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by Howell Clark against A. S. Olsen and wife to set aside a conveyance from said Olsen to his said wife on the ground that it was made with intent to delay, hinder, and defraud plaintiff, a creditor of said Olsen. Judgment for defendants. From an order denying his motion for a new trial, plaintiff appeals. Affirmed.

S. Salon Holl and Carter H. Smith, for appellant. F. T. Baldwin and Baldwin & Campbell, for respondents.

VANCLIEF, C. The defendants are husband and wife, and this action is in the nature of a creditors' bill in equity, to set aside two conveyances of a certain tract of land (about 327 acres) situate in the county of San Joaquin, made by A. S. Olsen to his wife, Anna, on the ground that they were made "with intent to hinder, delay, and defraud the creditors of the said A. S. Olsen, and particularly the plaintiff herein." The separate answers of the defendants admit the conveyances, but deny the alleged intent thereby to hinder, delay, or defraud any creditor of A. S. Olsen. Judgment passed for the defendants, and the plaintiff brings this appeal from an order denying his motion for a new trial.

1. The court found, among other things, that neither of the conveyances was made with intent to hinder, delay, or defraud any creditor of A. S. Olsen, and also found that A. S. Olsen never had any beneficial interest in the land, though the naked legal title had been vested in him for the use and benefit of his wife, whose equitable title was her separate property. Counsel for appellant contend that these findings are not jus-

tified by the evidence. If the finding that the conveyances were not made with intent to hinder, delay, or defraud the plaintiff, or any other creditor of A. S. Olsen, is justified by the evidence, it disposes of the appeal in favor of the respondents, so far as the facts are concerned, even though creditors may have been hindered and delayed by those conveyances, (*Bull v. Bray*, 89 Cal. 286, 26 Pac. Rep. 873; *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. Rep. 557;) and that the evidence is sufficient to justify this finding is so plainly apparent that no statement of it, in detail, is necessary in this opinion.

2. It is contended for appellant that the court erred in denying plaintiff's motion to strike out certain parts of the separate answers of defendants, on the alleged ground that such parts of their answers "are sham, and irrelevant and redundant." It does not appear that any part of the answers was sham. The seventh paragraph of each answer, alleging the declaration and recording of a homestead by the wife, and the tenth paragraph, alleging a novation of promissory notes from the husband to plaintiff, may be conceded to be insufficient defenses; but the first does not affect the issue as to the intention of defendants to delay or defraud creditors by the conveyance of the land from the husband to the wife, and therefore does not affect, and is not necessary to support, the judgment. As to the novation of the promissory notes, the court found that the plaintiff had obtained a valid judgment upon the original notes, which was a lien upon all real property of A. S. Olsen in the county of San Joaquin. This, by implication, negated the novation of the notes, and defeated any possible effect on the tenth paragraph of the answer. All the allegations and findings relating to the homestead and to the novation of notes may be stricken from the record without any possible effect upon the judgment. As to other parts of the answers comprehended in the motion to strike out, the most that can be fairly claimed is that some of them are averments of evidentiary facts tending to negative the alleged fraudulent intent of the defendants, and to prove that the entire equitable estate in the land was the separate property of the wife; but this was not one of the grounds of the motion. Besides, the striking out of all such parts of the answers would not have curtailed the evidence given upon the issue as to the alleged fraudulent intent.

3. It is claimed that the court erred in excluding certain letters written by defendants to plaintiff, offered by plaintiff to show the financial condition of A. S. Olsen at the time he conveyed the land to his wife. It is averred in the complaint that, at all the times therein mentioned, A. S. Olsen was insolvent, and had no other property not exempt from execution than the land in question. This averment was not denied, and

the court expressly found it to be true; therefore the exclusion of the letters was neither injurious to the plaintiff nor erroneous. I think the order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

PACIFIC YACHT CLUB v. SAUSALITO
BAY WATER CO. (No. 14,965.)

98 Cal. 487

(Supreme Court of California. June 8, 1893.)

ACTION TO QUIET TITLE IN EASEMENT—VENUE.

An action to determine plaintiff's right to the use of the waters of a spring on defendant's land, and to maintain pipes for the enjoyment of such use, is an action to quiet title to realty, within the meaning of Const. art. 6, § 5, requiring such actions to be brought in the county in which the land is situated. *Fritts v. Camp*, 29 Pac. Rep. 867, 94 Cal. 394, followed.

Department 1. Appeal from superior court, city and county of San Francisco; Walter N. Levy, Judge.

Action by the Pacific Yacht Club against the Sausalito Bay Water Company. Plaintiff had judgment, and defendant appeals. Reversed.

Kellogg & King, for appellant. John H. Dickinson, for respondent.

GAROUTTE, J. This litigation arises over an alleged right by plaintiff to the use of the waters of a certain spring, and the right to maintain pipes for the enjoyment of such use. The complaint, in effect, alleges "that the plaintiff is the owner of a certain tract of land in Marin county; that when plaintiff bought said land there was situated upon the adjoining land of the Old Sausalito Land and Dry Dock Co., plaintiff's grantor, a spring of water; that this spring was and is the only available water supply for the use of plaintiff's property; that plaintiff specially contracted and agreed with the Old Sausalito Land and Dry Dock Co. that, as part of the consideration for the purchase price of the land aforesaid, plaintiff should have the privilege of laying pipes from said spring over the adjoining land of said grantor, to plaintiff's clubhouse, and should have the free and uninterrupted use of water from said spring forever; that plaintiff has had the free, uninterrupted, and continuous use and adverse possession of the water pipes aforesaid, and the water of said spring, in the manner above described, ever since the 10th day of May, 1879, and that all claims against said easement and adverse thereto are barred by the statute of limitations; * * * that defendant claims some right or interest to the land upon which said spring is situated, and upon which said water pipes are laid, and further claims the exclusive right to use and sell the water of said spring; that any right defendant may have was acquired subsequently to the right granted to this plaintiff and from the same grantor; that defendant claims the right and privilege to charge the plaintiff herein water rates for the use of the water of said spring, and demands of plaintiff that it pay to defendant at the rate of 75 cents per 1,000 gallons for the water plaintiff uses; that defendant threatens to disconnect plaintiff's pipes from said spring, and shut off the supply of water from plaintiff's clubhouse, unless plaintiff pays at once said water rates." Wherefore plaintiff asks for an injunction restraining defendant from interfering with the water pipes running from plaintiff's clubhouse to the spring above described, and from shutting off from said pipes the supply of water furnished thereto by said spring, or any part thereof, and for general relief.

This action was brought in the city and county of San Francisco, and the subject-matter of the action is all situated in the county of Marin. Defendant demurred to the complaint, upon the ground that the court had no jurisdiction of the subject-matter of the action by reason of the fact

that it was brought in the city and county of San Francisco, instead of the county of Marin. The point made is jurisdictional, and if it has merit the demurrer was not necessary. It is provided in section 5, art. 6, of the constitution, "that all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated." A fair construction of the complaint in this case proves it to be an action to quiet plaintiff's title to an easement in the waters of a spring situated upon defendant's land, and the right of way over defendant's land for the purpose of conducting such waters. This fact is fully exemplified by an examination of the findings and conclusions of law. An adjudication of plaintiff's title to the easement is the principal relief granted, and the restraining order is merely incidental thereto, and follows an affirmation of plaintiff's title as a matter of course. There can be no question but that a complaint might be framed, alleging title to an easement, a threatened interference therewith, and asking for an injunction, which could not be considered an action to quiet title, for in a case of that character the defendant in his answer might concede the easement, and deny the interference; but here the complaint alleges title in the plaintiff, and adverse claims upon the part of the defendant, and that the defendant justifies its acts by reason of such claims. Upon a careful examination of the complaint in the case of *Fritts v. Camp*, 94 Cal. 394, 29 Pac. Rep. 867, we find it in all essential particulars similar to the complaint in the case at bar. The cause of action appears to be the same, the prayer for relief is the same; and that action was dismissed upon the ground that the court had no jurisdiction, it being brought in the wrong county, thereby violating the provision of the constitution heretofore quoted; and upon the authority of that case we think the court had no jurisdiction over the subject-matter of the present action. Judgment and order reversed, and cause remanded, with directions to the lower court to dismiss the action.

We concur: HARRISON, J.; PATERSON, J.

97 Cal. 532

GOULD v. WISE. (No. 19,021.)

(Supreme Court of California. April 28, 1893.)

MORTGAGES—PRIORITIES—DELIVERY.

1. Defendant agreed with A. to sell him certain land, part cash, and balance secured by mortgage. Defendant went with A. to a notary's office, where a deed was executed. While the mortgage was being prepared, A. said, "Let me see that deed," and took it from the table, and went, without defendant's knowledge, to plaintiff, from whom he negotiated a loan. A. then returned to defendant, paid him

the money, and executed the mortgage, which defendant at once recorded. Prior to this time plaintiff had the deed and A.'s mortgage to her recorded. *Held*, that defendant's mortgage was entitled to priority, as there had been no delivery of the deed to A. at the time he negotiated the loan from plaintiff. 32 Pac. Rep. 576, affirmed.

2. Defendant's negligence in allowing the deed to be removed from the room was not such as would justify an estoppel against a plea of nondelivery of the deed. 32 Pac. Rep. 576, affirmed.

Beatty, C. J., dissenting.

On rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J., (dissenting.) Having dissented from the order denying a rehearing of this cause, I desire to state briefly the grounds of my dissent. The decision of the court is based upon the single proposition that on the facts testified to by the appellant he was not estopped to deny the delivery of his deed as against an innocent purchaser for value from his grantee. There are other questions presented by the record, which have been fully argued by counsel; but, since they have been left unnoticed by the court they will not be considered here, it being my intention merely to state my reasons for dissenting from the proposition decided, as to which alone the case becomes a precedent.

If there were no doubt of the soundness of the conclusion that on the facts as stated by the appellant there was no estoppel, it would still, in my opinion, be insufficient to warrant a reversal of the judgment and order of the superior court; for the judge who tried the cause was not bound to accept the appellant's version of the facts upon his own uncorroborated testimony. The possession by his grantee of his deed, fully and formally executed, acknowledged, and certified, and containing a recital that the purchase price had been fully paid, was *prima facie* proof of a delivery. It created a presumption against appellant which it became necessary for him to rebut, and his testimony that there was no delivery merely produced a conflict of evidence upon which the finding of the judge who tried the cause should be held conclusive. To rebut the presumption of delivery in such a case for the purpose of defeating the title of an innocent purchaser who has paid a valuable consideration on the faith of the grantee's possession of a deed to which every appearance of validity has been imparted by the voluntary act of the grantor, it is necessary to show not only that there was no delivery as between the parties to the instrument, but that the grantor did not voluntarily intrust it to the custody of the grantee, or allow him to obtain the custody by any culpable negligence; for, if the grantor has voluntarily intrusted such evidence of title to one who abuses his confidence, or even if he has neglected reasonable precau-

tions to prevent his perfected deed from being stolen, he is estopped from denying a delivery as against an innocent purchaser for value. All the authorities sustain this proposition, and none more emphatically than those cited in support of the opinion of the court. This being so, upon what principle can it be held that a trial court must accept the uncorroborated testimony of the grantor that he did not intrust his grantee with the possession of his deed, and that he was not guilty of culpable negligence in allowing him to get possession of it? It seems to me a sufficiently dangerous rule to hold that such testimony may be accepted to defeat the apparent validity of the deed. To hold that as matter of law it necessarily defeats its validity, or, in other words, that when the trial judge has found in favor the presumption and against the testimony of the interested party, his finding of fact must be reversed on the ground that it is contrary to the evidence, is going beyond all reason and in the face of numerous decisions of this court. It establishes a new rule, which not only puts it in the power of a party to relieve himself of the consequences of his own folly or negligence at the expense of innocent purchasers, but opens a wide door to deliberate fraud; and this in a class of transactions of every-day occurrence, which it should be the policy of the law to guard against every element of danger or uncertainty.

But, aside from this consideration, which is sufficiently serious, I am entirely satisfied that there is no authority for holding that, on a fair construction of the appellant's own statement of the manner in which Adams obtained and kept possession of his deed, he is not estopped to deny a delivery. Two decisions only are cited in the opinion of the court to sustain its conclusion upon this point. In one—*Burson v. Huntington*, 21 Mich. 416—it was held that the maker of a negotiable promissory note was not estopped to deny its delivery as against an innocent holder for value; and in the other—*Tisher v. Beckwith*, 30 Wis. 55—it was held that a grantor of land was not estopped to deny a delivery of his deed against an innocent purchaser for value. But in each of those cases the instrument in question had been obtained by theft, and without the consent, express or tacit, of the maker. It had not, in other words, been intrusted by the maker or grantor to the custody of the payee or grantee, and the only question was one of culpable negligence. The opinion of the court in each case fully and expressly concedes that, if the instrument had been voluntarily intrusted to the party making a fraudulent use of it, the loss must have fallen upon the maker or grantor. It was also conceded that the same result must have ensued if the instrument had come into the hands of the grantee or payee by rea-

son of the culpable negligence of the maker or grantor. But it was held on the peculiar facts of each case—proved by the testimony of disinterested witnesses—that there was no culpable negligence. In the Michigan case the maker of the note, after signing it, but before it was stamped, went out of the room to get a surety to sign with him, leaving the note lying on a table, and his sister present, at the same time directing the payee not to touch it while he was gone. Before he returned, the payee took the note, and went away with it, in defiance of the command of the maker and the protest of his sister. It was held not culpable negligence to fail to anticipate this criminal act of the payee. In the Wisconsin case, the deed, not fully executed, was placed in a locked trunk, of which the grantor's wife kept the key. While so kept it was stolen by the grantee, (the grantor's son,) and completed by a forgery. The court, in its opinion, distinctly says that if the deed had been completely executed by the grantor the loss must have fallen on him, on account of his negligence in leaving it where the grantee could gain access to it, but holds that he was not bound to anticipate the theft of an instrument to which apparent validity could only be imparted "by the crime of forgery."

It seems scarcely necessary to point out the broad distinction between those cases and one in which the grantor shows by his own testimony that his grantee took the deed into his possession, and kept it long enough to impose upon an innocent mortgagee by his tacit, if not his express, consent. All the authorities are clear to the effect that, if Adams had asked and obtained express permission of the appellant to take the deed away, the estoppel would have been complete; and if an express consent will raise the estoppel I cannot see why a tacit consent does not work the same result. If my deed is lying on a table before me, and my grantee tells me by word and act that he is going to take it away with him, if I make no effort to prevent him, if I utter no word of protest, I consent as truly as if I did so by express words. This is precisely what the appellant did. He knew, apparently, that he was running a risk,—he did not like it, but he permitted it,—and, having enabled his grantee to perpetrate a fraud, he is allowed to saddle its consequences upon an innocent party. More than this, he is allowed to subject an innocent party to a serious hardship, in order that he may reap an advantage from his own wrong. The case shows that the same \$1,000 advanced by the respondent on her mortgage was paid over to the appellant as the second installment of the purchase price of the land, and this by the decree of the court he is allowed to keep, together with the first payment, and his land. In other words, he comes out of the transaction with the land that he sold, with the

\$500 paid at the date of the sale, and with the \$1,000 of which the respondent has been defrauded by his assistance. If Adams had not been enabled to perpetrate this fraud by the opportunity the appellant gave him, it is to be presumed he never would have made a second payment on his purchase, and the most the appellant could have got would have been the first payment and the land. By contributing to entrap the respondent he adds to his gains the precise sum, and the identical money which the respondent was induced to advance. He is not content to be restored to the position he would have occupied if the fraud had not been committed, but must make all the profit of it. There is, in my opinion, no rule of equity or law that lends itself to such a conclusion.

98 Cal. 409

WILHOIT et al. v. LYONS. (No. 18,074.)

(Supreme Court of California. June 3, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RECORDING—POWERS OF ASSIGNEE.

1. Civil Code, § 3459, which declares that, unless an assignment for the benefit of creditors shall be properly recorded, it shall be void against every creditor of the assignor not assenting thereto, applies only to creditors of the assignor at the time the assignment is made.

2. Where land in possession of the assignee in an assignment for benefit of creditors, which has not been recorded as required by law, is sold under a judgment against the assignor, the purchaser will be presumed, in an action against him by the assignee to quiet title to the land, to have purchased with notice of the assignment, where he does not aver in his answer, or offer any evidence, that he did not have such notice.

3. Failure of the assignee in an assignment for the benefit of creditors to give a bond as required by Civil Code, § 3467, does not affect the validity of the assignment, or authorize an action by the assignor, or one claiming under him, to set it aside.

4. An assignment for the benefit of creditors, which provides that the assignee shall sell the property assigned, "using a reasonable discretion as to the times and modes of selling and disposing of said estate as it respects making sales for cash or on credit, at public auction or by private contract or sale," is not void under Civil Code, § 3457, subd. 5, which provides that an assignment for the benefit of creditors shall be void if it confers on the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust, as the discretion given in the assignment will be treated to mean such discretion as the assignee is authorized by law to exercise.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by R. E. Wilhoit and others, assignees of M. E. Bryant, an insolvent debtor, against A. I. Lyons, to quiet title to lands. Judgment was rendered for plaintiffs, and from the judgment and an order denying a motion for a new trial, defendant appeals. Affirmed.

John E. Budd, James H. Budd, and J. B. Hall, for appellant. Baldwin & Campbell, for respondents.

BELCHER, C. The plaintiffs brought this action to quiet their title to certain real property in San Joaquin county, and they claimed title to the property under a deed of assignment made to them by M. E. Bryant, an insolvent debtor, for the benefit of his creditors, on February 16, 1886. The defendant denied the plaintiffs' ownership or right to the possession of the property, and set up title to it in himself under and by virtue of a sheriff's deed conveying the property to him under date of September 15, 1890. The court below gave judgment for the plaintiffs, from which, and from an order denying his motion for a new trial, defendant appeals.

The facts of the case, as shown by the findings and evidence, are as follows: On January 30, 1886, M. E. Bryant was the owner of the property in dispute, but was insolvent, and unable to pay his debts. On that day, under the provisions of the Civil Code relating to "assignments for the benefit of creditors," he signed, acknowledged, and delivered to the plaintiffs, for the benefit of his creditors, a deed of assignment of all his property not exempt from execution. The grantees accepted the trust, and filed the deed for record in the recorder's office of the county; and on the same day the judge of the superior court of the county fixed the amount of the bond to be given by such assignees, as required by section 3467 of the Civil Code, at the sum of \$25,000. On February 16, 1886, a mistake was discovered in the deed of January 30th, in this: that in the habendum clause thereof the name of R. E. Wilhoit, one of the grantees, had been omitted, and the name of H. S. Sargent inserted in its place. The mistake was made by the draughtsman of the deed, and was not discovered by any one until the day named. Thereupon the said deed was taken from the recorder's office, and the name of Sargent was erased from the habendum clause, and the name of Wilhoit was written in place thereof, and its date was changed to February 16, 1886. Bryant then again duly acknowledged the deed, and delivered it to the grantees, and they again accepted the trust and filed it for record; and, as shown by the certificate of the county recorder, it was recorded "in Book G, vol. 6, page 540, of Miscellaneous San Joaquin County Records." The judge of the superior court also made a new order on February 16th, requiring the assignees to execute a bond, conditioned as required by section 3467 of the Civil Code, in the sum of \$25,000. Under the order first made fixing the amount of the bond to be given, a bond was drawn and signed by the principals and five sureties. It referred to the assignment of January 30th, and the order

of that date, and proper certificates were attached to it, showing that four of the sureties justified thereon on February 12th, and one on February 17th. The bond was approved by the judge of the court who made the orders on February 18, 1886. On August 2, 1888, the defendant recovered a judgment against Bryant for the sum of \$3,728.29, and on February 12, 1890, an execution was issued on this judgment, and placed in the hands of the sheriff of San Joaquin county for service. The sheriff levied the execution on the real property in dispute, and under it sold the property to the defendant in part satisfaction of his judgment on March 8, 1890. No redemption from the sale was had, and on September 15, 1890, the sheriff executed to the defendant a deed of the property, which was duly acknowledged and recorded on the same day.

1. Appellant contends that the deed of assignment was never recorded in the proper book, and hence that it was void as against him. The law authorizes an insolvent debtor to make an assignment for the benefit of his creditors, and the provisions relating to such assignments are found in sections 3449-3473, Civil Code. Some of these sections were amended in 1889. The following, as they stood before the amendments, need only be referred to: "Sec. 3453. An assignment for the benefit of creditors must be in writing, subscribed by the assignor or by his agent thereto, authorized by writing. It must be acknowledged or proved and certified in the mode prescribed by the chapter on recording transfers of real property, and recorded as required by sections 3463 and 3464," etc. "Sec. 3459. Unless the provisions of the last section are complied with, an assignment for the benefit of creditors is void as against every creditor of the assignor not assenting thereto." "Sec. 3463. An assignment for the benefit of creditors must be recorded, and the inventory required by section 3461 filed with the county recorder of the county in which the assignor resided at the date of the assignment," etc. "Sec. 3465. An assignment for the benefit of creditors is void against creditors of the assignor and against purchasers and incumbrancers in good faith and for value, unless it is recorded," etc. "Sec. 3466. Where an assignment for the benefit of creditors embraces real property, it is subject to the provisions of article 4 of the chapter on recording transfers, as well as to those of this title." "Sec. 3473. An assignment for the benefit of creditors, which has been executed and recorded so as to transfer the property to the assignee, cannot afterwards be canceled or modified by the parties thereto without the consent of every creditor affected thereby." It is argued that section 4235 of the Political Code provides how and in what books the different kinds of papers are to be recorded by county recorders, and that, when the deed in question was recorded in a volume of

"miscellaneous" records, it was not in compliance with the requirements of that section, and did not constitute a recordation under the sections of the Civil Code above cited. Conceding, without deciding, this to be so, still the deed was undoubtedly valid as against the assignor and all creditors assenting to it, and it served to vest the assignor's title to the property in the assignees. *Bryant v. Langford*, 80 Cal. 543, 22 Pac. Rep. 219; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. Rep. 675. It was at most void only against creditors not assenting thereto, and against purchasers and incumbrancers in good faith and for value.

The question, then, is, does the appellant come within either of these classes? He obtained his judgment on August 2, 1888,—nearly two years and a half after the deed was executed,—and the record entirely fails to show by averment or proof that he had any claim whatever against Bryant on February 16, 1886. But the statute evidently makes a deed of assignment void against nonconsenting creditors only when they were such at the time it was executed, and not against those who might subsequently become such. In *Kane v. Desmond*, 63 Cal. 464, there was a verbal gift of a piano by a husband to his wife. The piano was subsequently seized by the sheriff under an execution issued against the husband, and the wife brought an action to recover its possession or value. This court said the "transfer by gift was valid and effectual between herself and her husband and all the world, excepting existing creditors and bona fide subsequent purchasers without notice. There was no proof that Day—the execution creditor—was a creditor of the husband at the time of the gift, and there is no presumption that the gift was void as to him as a subsequent creditor." And see *Hussey v. Castle*, 41 Cal. 239. This being so, the contention of appellant that the deed was void as to him because he was a creditor cannot be sustained.

The only remaining question, then, under this head is, was appellant a purchaser in good faith and for value? There can be no pretense that he was such purchaser if he had notice, actual or constructive, of the prior deed at the time of his purchase, and the rule is well settled that the burden was cast upon him to show that he had not such notice. *Long v. Dollarhide*, 24 Cal. 218. In *Eversdon v. Mayhew*, 65 Cal. 167, 3 Pac. Rep. 641, it is said: "To entitle a party to protection as such a purchaser he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith and without notice, actual or constructive, prior to and down to the time of its payment; for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser;" citing numerous cases. Here there was no averment in the answer of defendant

that he did not have notice of the deed of assignment to plaintiffs, nor was any proof offered by him tending to show a want of such notice; and the court found that ever since the date of their deed "plaintiffs have been, and now are, in possession of all the real estate and premises in the complaint mentioned, and each and every part thereof." It must be presumed, therefore, that appellant had notice of the deed to respondents at the time of his purchase, and hence that he was not a purchaser in good faith.

2. Appellant also contends that the assignment was void, because no bond was given by the assignees as required by section 3467, Civil Code. A bond was given and approved, as above stated, but it is objected that it was insufficient, because it referred to, and purported to be made in pursuance of, the deed of January 30th. *Bryant v. Langford*, 80 Cal. 542, 22 Pac. Rep. 219, was an action to set aside this same deed of assignment upon the ground that the assignees had failed to give the bond required by section 3467 of the Civil Code. It was held that the failure of the assignees to give the bond required did not affect the validity of the deed, or authorize an action by the assignor to set it aside. But appellant, by his purchase at the sheriff's sale, acquired the rights and interests of Bryant in the property, and can have no better standing before the court than Bryant had. If, therefore, Bryant could not have the deed set aside upon the ground stated, it must be clear that appellant cannot.

3. Appellant further contends that the deed of assignment was void as against him because it conferred upon the grantees the power to sell the property therein described on credit. This contention is rested upon the provisions of section 3457, subd. 5, of the Civil Code, which reads as follows: "An assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto, in the following cases: * * * (5) If it confer upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust." The language objected to as making the whole deed void is found in the habendum clause, and is as follows: "To have and to hold the said real estate, * * * in trust and confidence, however, to sell and dispose of the said real estate, * * * using a reasonable discretion as to the times and modes of selling and disposing of said estate, as it respects making sales for cash or on credit, at public auction or by private contract or sale." It is argued that the giving to the assignees a reasonable discretion as to making sales of the property for cash or on credit was in violation of the section of the Code above quoted, because, if exercised, it might delay the immediate conversion of the property to the purposes of the trust. There are two sufficient answers to this conten-

tion. In the first place, as before stated, it does not appear that appellant was a creditor when the deed was executed, and, if not, he cannot be heard to complain of it. And, in the second place, the deed conveyed to the grantees all of the grantor's property "for the benefit of all his creditors, without any preference or priority other than that provided by law." The "reasonable discretion" conferred upon the grantees as to selling the property must therefore be treated as a lawful discretion, or, in other words, such discretion as they were authorized by law to exercise.

4. It is objected that there has been unusual and unwarranted delay on the part of the trustees in the execution of their trust. The delay has certainly been unusual, but it is probably accounted for by the large number of suits which have been instituted to determine the rights of different claimants to the property. The records show that six of the cases besides this have been brought to this court on appeal. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

3 Cal. Unrep. 893

DESCALSO v. DUANE. (No. 14,794.)

(Supreme Court of California. June 3, 1893.)

NEW TRIAL—DISMISSAL.

1. An order both denying and dismissing a motion for new trial, though somewhat inconsistent, must be considered as a dismissal, and proper, where, through inexcusable neglect of the moving party, the motion has not been brought into condition for hearing.

2. The fact that such a motion can be brought to hearing, under Code Civil Proc. § 660, either by the moving or opposite party, after notice or affidavits, etc., does not prevent the opposite party applying for dismissal, where, through inexcusable neglect, the motion has not been brought into condition for hearing.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by P. C. Descalso against John Duane. Order denying and dismissing motion for new trial. Defendant appeals. Affirmed.

Moses G. Cobb, for appellant. Stanly, Stoney & Hayes, for respondent.

TEMPLE, C. This appeal is from an order somewhat inconsistent in its terms, denying and dismissing a motion for a new trial. To deny a motion is to entertain and act upon it, and at the same time to end it, when, of course, it cannot be dismissed. A dismissal is a refusal to entertain it. The two forms were adopted because the decisions of this court have caused some doubt

as to what is the proper remedy in case the moving party fails to prosecute his motion with reasonable diligence. In *Quivey v. Gambert*, 32 Cal. 305, it was held that an order dismissing a motion for a new trial, or striking out the statement, was not appealable, because, though after final judgment in point of time, they did not follow it in legal sequence, or in the same line of procedure, and did not depend upon it. The court therefore recommended that the trial court let the motion proceed to the final hearing, and then deny it for failure to prosecute with reasonable diligence. In *Calderwood v. Peyser*, 42 Cal. 110, this rule is criticised, and the rule declared to be that any special order made after final judgment is appealable, the only test being the point of time. But the court still held that it was error to dismiss the motion for a failure to prosecute, but that the proper practice was to deny the motion. The legitimate penalty for failure to prosecute an action or proceeding would seem to be a dismissal, and if it be allowed to be regularly submitted for decision it is difficult to see why it should not be decided on its merits. This practice has sometimes been insisted upon since *Calderwood v. Peyser*, as in *McDonald v. Conkey*, 57 Cal. 325, and sometimes it has not been, as in *Chase v. Evoy*, 58 Cal. 348, in which it was said it makes no difference. In the present case the motion was not in a condition to be submitted, and the order must be considered as a dismissal. I think the practice was proper.

Appellant contends that such a motion cannot now be dismissed for failure to prosecute, because either party may bring the motion on to be heard. Section 660, Code Civil Proc. This section provides that the motion shall be heard at the earliest practicable period after notice of the motion, when made on the minutes of the court, or after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing by either party. But before either party can bring it on to be heard it must be in a condition in which it can be submitted; and if it is not, simply because of the inexcusable neglect of the moving party, the opposite party may apply for a dismissal. Here, after the statement had been agreed upon, the moving party was ordered by the court to have it engrossed. More than five months elapsed before the respondent made his motion for a dismissal, during which nothing was done. The statement was a short one, and could have been engrossed in two or three days. At the time no showing was made, explaining or excusing the delay, except that a few orders were procured, extending defendant's time to engross the statement. It does not appear why these were required, or what right the court had to make them, but they do not cover the last two or three months of the period. I do not think we can say that the order dismissing the motion was an abuse of discretion.

Having reached this conclusion, it is not necessary to determine whether the papers used on the hearing were properly identified. There can be no doubt, however, that a bill of exceptions is a safe mode. *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. Rep. 299. It is required by rule 29 of this court. I think the order must be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

98 Cal. 442

McCALLION et al. v. HIBERNIA SAV. & LOAN SOC. et al. (No. 14,970.)

(Supreme Court of California. June 5, 1893.)

STAY BOND—JUDGMENT AGAINST SURETIES.

In an action to determine who is entitled to receive certain money which is paid into court, a judgment for plaintiff is not one "directing the payment of money" within the meaning of Code Civil Proc. § 942, requiring a stay bond on appeal therefrom; and where a bond in addition to the ordinary appeal bond is given, to stay such judgment, it is void, and no judgment can be entered thereon against the sureties.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by J. J. McCallion and others against the Hibernia Savings & Loan Society and others. From a judgment against the sureties on a stay bond, defendants appeal. Reversed.

M. C. Hassett and Jas. F. Tevlin, for appellants. D. L. Smoot, for respondents.

GAROUTTE, J. Division No. 1 of a society known as the Ancient Order of Hibernians had several thousand dollars deposited in the Hibernia Savings & Loan Society. Dissensions arose in the organization, and an action was brought against the Hibernia Savings & Loan Society by certain individuals, claiming to compose the only true and genuine division No. 1, to recover this money. Certain other parties, making the same claims, intervened, and asked that the money be awarded to them. The loan society paid the money into court, and the interveners were substituted as parties defendant. The city and county treasurer became the custodian of the fund, under an order of the court, during the pendency of the action. Judgment was rendered that plaintiffs were entitled to the money; that the city and county treasurer pay the same over to them, and that the defendants pay the costs of the action, amounting to \$312. Defendants appealed, and gave a stay bond in the sum of \$7,500, being double the amount of the judgment and costs. Upon appeal the judgment was affirmed. 12 Pac. Rep. 114. Subsequently, upon a return of the remittitur to

the trial court, plaintiffs moved for judgment against the sureties upon the stay bond, as provided in section 942 of the Code of Civil Procedure, and judgment was thereupon rendered against them in the sum of about \$600. 23 Pac. Rep. 798. This appeal is prosecuted from that judgment.

The case disclosed by the record is not such a one as requires a bond to stay execution, and that fact is fatal to a recovery upon the bond, and demands a reversal of the judgment. It was said in *Powers v. Crane*, 67 Cal. 66, 7 Pac. Rep. 135: "On behalf of the sureties, who are the real parties in interest here, it is claimed that the undertaking, except in so far as the \$300 is concerned, about which no question arises, was without consideration, and void. The pretended consideration therefor was a stay of execution of the decree appealed from, and, if the law itself operated a stay upon the giving of a \$300 bond, it would seem that the point is well taken. That the statute did so operate was held by this court in the case of *Snow v. Holmes*, 64 Cal. 232, 30 Pac. Rep. 806. As the statute itself wrought the stay, there was no consideration for the sureties' promise. The benefit which the plaintiff in the case of *Johnson v. Powers* secured from the appeal came from the statute, and not from the promise of the sureties." See, also, *Powers v. Chabot*, 93 Cal. 266, 28 Pac. Rep. 1070. It is only upon a statutory bond that judgment can be ordered against the sureties on motion, and if the judgment from which appellants take this appeal is not such as calls for the giving of a bond to stay execution, aside from the ordinary \$300 appeal bond, the filing of a bond for that purpose is unnecessary and useless labor, and, if so filed, is void as a statutory bond. Section 949, Code Civil Proc., provides that the ordinary appeal bond of \$300 stays execution in all cases except those mentioned in sections 942, 943, 944, and 945. We then proceed to an examination of this judgment in the light of those sections, to determine where it shall be properly placed. Section 942 relates to appeals from judgments or orders directing the payment of money, and it is under the provisions of this section that respondent bases his claims for an affirmation of the judgment in this case. It was held in *Estate of Schedel*, 69 Cal. 242, 10 Pac. Rep. 334, that section 942 applied only to appellants who were required to perform the directions of the judgment or order appealed from, and this construction of the section has since been approved in *Born v. Horstmann*, 80 Cal. 453, 22 Pac. Rep. 169, 338, and *Pennie v. Superior Court*, 89 Cal. 32, 26 Pac. Rep. 617. In the present case the fund over which this litigation arose was not in the possession of appellants, either at the time the judgment was rendered, or when the appeal was taken, and never had been in their possession; and, that being the fact, they were not required,

"to perform the directions of the judgment." Upon the reasoning of the foregoing cases, it is very clear that appellants were not required to give a stay bond covering the fund which was in the possession of the court, and any judgment rendered by motion against the sureties upon the bond for any portion of the fund found to be lost or misappropriated is void. This money constituted a special fund in the hands of the court, and the litigation between these parties was conducted for the purpose of securing a judgment of the court, adjudicating as to where the title to this fund was located. When the money came into the possession of the court the litigation resolved itself, essentially, into an action to try the title to personal property; and if the judgment rendered in this case was such as to bring itself within the provisions of any of the sections of the Code from 942 to 945, inclusive, it came within section 943, as a judgment directing the delivery of personal property. While it is intimated in the *Schedel Case*, supra, that the term "personal property," as used in section 943, does not include money, we have no doubt that where the money is a special fund, and capable of identification, it would answer to the term "personal property," as used in that section. But, conceding that the judgment here rendered is such as was contemplated by that section, still no stay bond was required, for the fund was in the possession of the court, and such fact, by the terms of the section itself, does away with the requirement; and the principle declared in the authorities previously quoted would also defeat any claims by respondent respecting the necessity for a stay bond, even in the absence of such provision in the section. As to that portion of the judgment awarding costs against appellants, a stay bond was not required to restrain the issuance of an execution to recover such costs. The appeal bond effected that object. The real judgment in the case is that plaintiffs are the owners of the money, and, no stay bond being required by the statute as to such a judgment, no stay bond is demanded as to the costs. The costs taxed against defendants were incidental to the judgment, and, as to a stay of execution, inseparably connected therewith. A judgment for costs is not the judgment directing the payment of money contemplated by section 942. If such were the fact, a stay bond would be required in almost every conceivable case, when, to the contrary, it is only required in the four cases covered by sections 942 to 945 of the Code. The judgment referred to in the foregoing sections is the decree passing upon the matter directly involved in the litigation, and in all other cases the proceedings are held in abeyance by virtue of the statute itself. For the foregoing reasons we conclude that no bond to stay execution was required in the case, and it follows therefrom that no judg-

ment could be rendered against the sureties upon the bond given. Let the judgment and order be reversed, and the cause remanded.

We concur: HARRISON, J.; DE HAVEN, J.

(98 Cal. 462)

WEBER et al. v. GILL. (No. 14,746.)

(Supreme Court of California. June 6, 1893.)

MUNICIPAL CORPORATIONS—WATER COURSE WITHIN CITY LIMITS—REMOVAL OF EARTH FROM CHANNEL—HOW AUTHORIZED.

1. Act March 2, 1889, (St. 1889, p. 577, being the charter of the city of Stockton,) § 30, subd. 9, provides that the council shall have power "to regulate, under the superintendence of a board of public works, the moving and anchoring of vessels within the waters of the city, and to prevent the obstruction of the free navigation of the same." Section 147 provides that the department of streets and wharves shall embrace the control of the water front and wharves, the public thoroughfares, "the water courses and channels within the city, * * * and of everything of a public nature pertaining to said subjects." *Held*, that an ordinance was not necessary to authorize a person under a permit from the council and board of public works to remove sedimentary deposits from the channel of a natural water course within such city in order to protect city property and improvements against overflow.

2. A resolution of the city council, and a permit from the board of public works of such city, authorizing a person to remove such sedimentary deposits at a point where a street crosses such water course, are not invalid.

In bank. Appeal from superior court, San Joaquin county; Joseph Budd, Judge.

Action by Weber and others against Gill to enjoin defendant from removing earth from the channel of Mormon slough, a natural water course within the corporate limits of the city of Stockton. From a judgment for defendant, plaintiffs appeal. Affirmed.

Louttit, Woods & Levinsky, for appellants. James H. Budd and John E. Budd, for respondent.

PER CURIAM. This is an action to enjoin the defendant from removing earth from the channel of Mormon slough, a natural water course within the corporate limits of the city of Stockton. The earth referred to is sedimentary deposits brought down by the waters of the channel. The facts agreed upon show that, "for the protection from overflow and destruction of the property of and in said city, and the public streets and bridges and navigable waters of said Mormon channel, it was at all times mentioned in the complaint, and now is, necessary to remove, or cause to be removed, said sedimentary deposits aforesaid in said Mormon channel." The quantity of earth deposited has been increased by the construction, under the direction of the United States government, for the purpose of protecting the navigable waters of the San Joaquin river, Stockton channel, and that portion of Mormon channel lying west of Center street, of re-

straining dams across Mormon channel below the point where defendant has been excavating and east of Center street. The effect of these dams has been to make a restraining basin of Mormon slough above the points where they were erected. The street from which the earth was removed crosses the slough, but has not been used as a highway for the reason that it has never been bridged. The blocks of land described in the complaint, in front of which the digging was done, are owned by the plaintiffs. The defendant claims the right to remove the earth under a resolution of the city council and a permit from the board of public works.

It is claimed by the appellants that the resolution of the city council and the permit given by the board of public works are void; that the work should have been done in accordance with the act of March 23, 1872, (St. 1871-72, p. 540;) but that, if the council or board of public works is clothed with the right to authorize the removal of earth from the streets, such authority can be granted only by ordinance. We do not think the contentions of the appellants are sound. The charter of the city of Stockton, approved by the legislature March 2, 1889, (St. 1889, p. 577,) provides: "Sec. 30. The council shall have power to pass ordinances * * * (9) to regulate, under the superintendence of a board of public works, the moving and anchoring of vessels within the waters of the city, and to prevent obstruction to the free navigation of the same." Section 147 provides that "the department of streets and wharves shall embrace the control of the water front and wharves; of the streets, sidewalks, bridges, and public thoroughfares; * * * of the water courses and channels within the city; * * * and of everything of a public nature pertaining to said subjects." The mayor, the city surveyor, and the superintendent of streets constitute the board of public works, and are designated as the "department of streets and wharves," and it is their duty to see that the water courses and channels are not obstructed by anything which will cause the waters thereof to overflow and injure or destroy the public streets or property of the city. The fact that the filling of the streets in front of plaintiff's land is a benefit to the land is immaterial. The city has the right to have the waters flow through the channel without interruption or obstruction, and to as full an extent as when Capt. Weber, who owned the entire site of the city by grant from the Mexican government, transferred the streets and squares to the city, (in 1851.) The streets were conveyed by him to the city authorities without any reservation, and with reference to a map made by him in 1850, in which Mormon channel was delineated from the western to the eastern limits of the city. Those who framed the charter doubtless saw that, if the board of public works were required, in the exercise

of their authority, to proceed under an ordinance of the city council, great damage to the property of the city and its residents might be caused by obstructions in the water courses within the city. Authority was expressly conferred upon the board, therefore, to act in respect to the control and protection of water courses and channels directly, and no ordinance was necessary in the case at bar. The act of March 23, 1872, was intended to provide against overflow by authorizing the city authorities to widen and deepen the channel of Mormon slough from Hunter street, a distance of five miles easterly. The act provides for condemnation proceedings, but it is not contended in this case that the respondent has removed, or attempted to remove, any portion of the land belonging to plaintiffs, or has attempted to widen or deepen the channel. All defendant proposes to do is to remove a deposit of earth which has partially filled up the channel, and which, if allowed to remain, will tend to cause an overflow of the waters, and an injury to property of the city. The fact that the deposit is due in whole or in part to the acts of the United States government in improving the navigable portion of the stream below is immaterial. The city has the right to remove obstructions from a natural water course, so as to preserve it in its natural form, without regard to the cause of such obstruction.

The judgment is affirmed.

4 Cal. Unrep. 4

HAMLIN v. PHILIPS. (No. 15,040.)

(Supreme Court of California. June 6, 1893.)

REVIEW ON APPEAL.

Where, in an action to establish a trust, the findings controvert plaintiff's claims at all points, and there is evidence to support the findings, a decree for defendant will not be set aside except on the most satisfactory and convincing grounds.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by Catherine Hamlin against Nancy M. Philips, and Nancy M. Philips as administratrix of the estate of P. J. Philips, deceased, to establish a trust in certain real estate. From a judgment for defendant and from an order denying her motion for a new trial, plaintiff appeals. Affirmed.

R. P. Clement, A. G. Burnett, and T. J. Geary, for appellant. J. W. Rose and Barham & Bolton, for respondent.

GAROUTTE, J. This action was brought to obtain a judgment and decree that the land described in the complaint, the title to which stood in the name of P. J. Philips at the time of his death, and also certain personal property, was the property of the plaintiff, and that P. J. Philips, deceased, was her trustee, and that his estate had no right or interest in said property, or any part thereof. Judgment went for defendant, and

this appeal is taken from the judgment and order denying a motion for a new trial. The findings are full and complete. They controvert the claims of the plaintiff at all points, and warrant the judgment rendered. It is now insisted that the evidence does not support the findings. We have examined with great care the record containing a detailed statement of the evidence given at the trial, and find ample there to justify the findings of the court. The plaintiff is a sister of Philips, deceased. She was about 77 years of age at the date of the trial, and was the principal witness in the case. She was a woman of means, and advanced money to her brother for various purposes. The property involved in this litigation was purchased with this money, and the title taken in the name of Philips. The administratrix of the estate now insists that the money was a loan, and plaintiff claims that it was invested for her benefit, and that the title to the property purchased was held by Philips in trust for her. Plaintiff's testimony is self-contradictory in many respects, apparently attributable to weakness of memory, but sufficient is found therein to support defendant's theory of the case, that the money was advanced to plaintiff's brother as a loan.

It is not necessary to enter into a review of the evidence in detail for the purpose of indicating in this opinion wherein it supports the findings. Upon a careful examination of the record, the fair import of all the evidence, taken together, is in line with the findings and judgment of the court. The arguments of the learned counsel for appellant as to the improbability of these advances being made by her as loans, and as to the inferences of fact that may be drawn from the rather peculiar circumstances of the case, might well have been addressed to the trial court before final judgment rendered, and also upon the hearing of the motion for a new trial. Such arguments necessarily possess much greater force and weight when addressed to the court of original jurisdiction than when directed to the appellate tribunal. The case is essentially one wherein it devolved upon the trial court to carefully sift and weigh the evidence, and where this court would not be justified in setting aside a decree made in the exercise of that power and that duty, unless upon the most satisfactory and convincing grounds. For these reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

98 Cal. 433

CITY OF STOCKTON v. WEBER et al.
(No. 14,775.)

(Supreme Court of California. June 3, 1893.)

CETERMINES—ABANDONMENT—RECONVEYANCE FOR OTHER PURPOSES—CONDITIONS PRECEDENT.

1. Pol. Code, § 3105, vests title in the inhabitants of a city or town to lands "used" as

a "public" cemetery. Section 3106 declares a place where six or more bodies are buried "a cemetery." Section 3 declares no part of the Code retroactive, unless so expressed. *Held*, that title to land which had ceased to be used as a public cemetery before enactment of said sections was not affected thereby, but remained in the original owner; and that upon abandonment for cemetery purposes, and removal of bodies, the title would be discharged from such use.

2. The owner whose land had been used for some years for cemetery purposes conveyed same to a city for nominal consideration, provided the city obtain authority from the legislature, and remove the dead therefrom within certain time; said city to preserve the land as an ornamental public square, or use it for erection of public buildings, with reverter to the grantor in case of sale or otherwise to private uses. *Held*, that abandonment of the land for cemetery purposes and removal of the bodies was a condition precedent to the vesting of title.

3. Such a condition was not void as in contravention of Const. art. 4, § 25, subd. 7, forbidding special legislation, since, if other and general legislation could not be obtained, it made the condition simply impossible, not unlawful.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action of the city of Stockton against Helen Weber, Charles M. Weber, Jr., Thomas J. Weber, and Julia H. Weber. Judgment for defendants. Plaintiff appeals. Affirmed.

Swinerton & Rutherford, for appellants. James H. Budd, for respondents.

HAYNES, C. This action is brought by the city of Stockton to quiet title to "block 237, east of Center street," in said city, which, prior to 1872, was outside the city limits. The complaint alleges that prior to 1860 Charles M. Weber was the owner of the block in question, and dedicated it to the public as a cemetery, and that such dedication was accepted by the public prior to that year. The fourth paragraph of the complaint is as follows: "That on the 12th day of May, 1880, said Charles M. Weber, by a deed signed, sealed, and acknowledged by him, and by him delivered to plaintiff, sold, granted, bargained, and conveyed to plaintiff said block No. 237, to be preserved and kept as an ornamental square, and for the erection of public buildings thereon; and ever since the said delivery of said deed plaintiff has been, and now is, the owner in fee of said block No. 237, subject to the use thereof as a public cemetery, and to be kept by plaintiff as an ornamental square, and for the erection of public buildings thereon." Charles M. Weber died in 1881, and respondents, his widow and heirs, claim title in fee. The answer sets out the deed mentioned in the complaint. It is a bargain and sale deed for the expressed consideration of one dollar. Following the granting part and description of the property, down to the in testimonium clause, the deed is as follows: "Provided, the city, by its legal represent-

atives, obtains authority from the legislature of this state and makes the necessary removals of the dead from the said block within twelve months from the first day of January, A. D. 1881. Said city to preserve the same as an ornamental public square, or use it for the erection of public buildings, without any right to sell or dispose of the same for private uses, and to revert back to and become the property of said Weber, his heirs or legal representatives, in the event of sale or otherwise for private uses, and the title to the same to be as valid in such event as if this deed had never been made. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and to its assigns, forever, subject to the foregoing conditions." The answer denied the dedication of the block as a public cemetery, or that any dedication for such purpose was accepted by the public; admitted that prior to 1860 Weber permitted a large number of bodies to be buried there, and gave verbal license therefor, but that no time was fixed during which the bodies should remain, or when they should be removed; alleged that the city accepted the delivery of the deed upon the conditions expressed therein, and under an agreement to carry out said conditions before title should vest thereunder, and that the city had never procured such act of the legislature, nor removed the bodies of the dead, nor improved the block. Findings and judgment passed for defendants, and plaintiff appeals upon the judgment roll and a bill of exceptions.

The court found that for about 10 years prior to 1860 Charles M. Weber was the owner of a tract of land adjacent to the city of Stockton. That he surveyed and platted the same into lots and blocks and public streets, a part of which is the block in question; and that said Weber until his death, and since that time the defendants, his heirs, owned said tract so laid out continuously from the year 1860 to the time of the trial of this action, and are in the exclusive possession thereof. That prior to 1860 said C. M. Weber permitted a number of dead bodies to be buried in said block under a verbal license. That no time was fixed or agreed upon during which they should remain, nor when they should be removed. That said C. M. Weber, deceased, and his heirs, always reserved his and their rights as the absolute owners of said block in fee simple. That no burials were ever permitted by C. M. Weber without a reservation of all his rights in and to said block, and the whole thereof, and he never consented to its use by the public as a burial ground. That no part of it was ever used by the public for a burial ground for five years, nor was there ever an uninterrupted use thereof by the public for any purpose; and that it never was dedicated to nor accepted by the public

as a cemetery. The testimony shows that the first interment in that block was in or about 1852, and the last in the spring of 1862; that about 1861 the Rural Cemetery was established; and that prior to the execution of said deed nearly all the bodies had been removed from that block. The number remaining is not definitely shown, but said to be "six or more."

Appellant contends that the finding that there was no dedication to nor acceptance by the public of the block in question as a public burial ground is not sustained by the evidence, and cites the act of 1854, which declared that, "where the bodies of six or more persons are buried, such place is a public graveyard." But whether it was or was not a public graveyard is immaterial, unless that fact divested the legal title of Weber. Upon this point counsel for appellant cite section 3105 of the Political Code, which is as follows: "The title to lands used as a public cemetery or graveyard, situated in or near to any city, town, or village, and used by the inhabitants thereof continuously, without interruption, as a burial ground for five years, is vested in the inhabitants of such city, town, or village, and the lands must not be used for any other purpose than a public cemetery." Section 3106 of the Political Code re-enacts the above-mentioned provision of the act of 1854, omitting the word "public," so that it now reads: "Six or more human bodies being buried at one place constitutes the place a cemetery." These provisions of the Political Code took effect January 1, 1873, and by section 3 of the same Code it is declared that "no part of it is retroactive, unless expressly so declared." Section 3105 vests title in the inhabitants of, etc., only to lands "used as a public cemetery or graveyard," while under the following section the place where six or more bodies are buried is a cemetery, though not used as a public cemetery or graveyard. The block in question ceased to be used for the burial of the dead more than 10 years before this section of the Code was enacted, and, not being then used as a public cemetery, Weber's title was unaffected by its enactment. Whether that section operates in any case to divest the title absolutely, or further than is necessary to the use, leaving it to revert to the original owner when the ground is abandoned and all the bodies removed, is not considered or decided. That the title to the block in controversy remained in Weber notwithstanding the use of the ground for burial purposes, subject to such use, and that the abandonment of the ground for such use, and the removal of all the bodies, would leave the absolute title discharged from such use in the respondents, is fully sustained by *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. Rep. 728. There the city of Los Angeles conveyed certain public lands in 1857 to three trustees, of whom Mallard was the survivor, in trust

for the purpose of a city cemetery. A portion of the land was so used until 1861, when the city by ordinance discontinued its use, and provided for the removal of the bodies, and all except a few were removed. In 1870 the city conveyed to plaintiff, who brought an action against the surviving trustee to compel a conveyance, and the action was sustained. The circumstance that the legislature confirmed the conveyance by the city to the plaintiff did not, we think, affect plaintiff's title.

Appellant further contends that the deed made by Weber in May, 1880, conveyed the title to the city, to be preserved and kept as an ornamental square, and for the erection of public buildings thereon, "subject to the use thereof as a public cemetery." Respondents contend that the deed contained a condition precedent, which was never performed by the city, and that, therefore, no title ever vested in appellant. It is expressly conceded that no act of the legislature was procured under which the bodies might lawfully be removed, and that none were removed by the city; and, if the clause relating thereto is a condition precedent, it is plain no title under the deed has vested in appellant. Appellant's construction of this deed cannot be sustained. The use of the block as an ornamental public square and the erection of public buildings is inconsistent with "the use thereof as a public cemetery." The deed, however, required the use as a cemetery to be absolutely ended by the removal of all bodies then remaining therein within 12 months from January 1, 1881. These uses, being inconsistent, could not coexist, and it was plainly the intention that they should not. "The first step in the construction of a deed is to ascertain the understanding and intention of the parties at the time of contracting. * * * To arrive at this intention, the situation of the parties and the subject-matter at the time of contracting should be considered. * * * The whole of the context must be considered to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause." *Brannan v. Mesick*, 10 Cal. 95, 106. Weber then owned, and respondents still own, a large amount of property in the vicinity of this block. It was obviously to his interest, in view of the remainder of his property, that this block should be devoted to other purposes. So long as any of the bodies buried there remained, it tended to depreciate the value of the remainder of his property; while its improvement as an ornamental square, or by the erection of city buildings, would enhance the value of his other property. The deed clearly shows an intention on the part of the grantor to terminate its use as a cemetery, and that, such termination being first accomplished, it should then be devoted to the other use. If its use as a cemetery was to continue, there was no reason why the conveyance should be made,

and none for the requirement that the bodies should be removed. The consideration named in the deed was merely nominal. The true consideration was the removal of the dead from the vicinity of his other property, and the future improvement and use of the block for the other purposes named; nor was there any necessity that the title should pass until the bodies were removed. It would therefore seem clear that the intention of the parties was that the removal of the dead then remaining should be a condition precedent to the vesting of title in appellant. The real intention, it is true, would not avail unless the language used is capable of a reasonable construction which would effectuate that intention. Here, however, the language used was apt and appropriate to express that intention. The grant is immediately followed by the proviso: "Provided, the city, by its legal representatives, obtains authority from the legislature of this state, and makes the necessary removals of the dead from said block within twelve months from the first day of January, 1881." "A proviso in deeds and laws is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided." *Voorhees v. Bank*, 10 Pet. 471. "It always implies a condition, unless subsequent words change it to a covenant." *Bouv. Law Dict. tit. "Proviso."* "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." *Civil Code*, § 1436.

Counsel for appellant argue that, if this were a condition, the grantor would have stated in the deed that the title would not vest until the condition was performed, or, on failure to perform, that the title would revert; and that this is clear because the deed does state on what condition a reverter will take place, viz. if the grantee sells or disposes of the ground to private uses. But the use of words expressly stating that the title shall only vest upon performance of a condition precedent is not necessary. The word "provided" expresses as much, and is one of the apt words commonly used to create a condition. *Raley v. Umatilla Co.*, 15 Or. 172, 13 Pac. Rep. 890; *Gibert v. Peteler*, 38 N. Y. at page 168. The first condition prevented the estate from vesting, if not performed, and in such case there could be no reverter; but a condition subsequent does not prevent the estate from vesting, and therefore upon a breach the grantor cannot again have the title except by a reverter, based upon the breach and a re-entry therefor.

But it is further contended that the condition under consideration requires an unlawful act, and is therefore void. Counsel base this contention upon article 4, § 25, subd. 7, of the constitution, prohibiting special legislation authorizing, among other things, "va-

cating cemeteries." But this provision of the constitution does not prohibit the enactment of a general law under which the removals might have been lawfully made. The condition was not that the removal of the bodies be made without authority of law, but that the grantee would procure the enactment of a law permitting it, and making the removal lawful. If the necessary legislation could not be obtained, it simply made the condition impossible of performance, not unlawful. A condition subsequent, which is impossible of performance, is void, but not so with a condition precedent. "If a condition precedent is impossible from the beginning, or for any reason incapable of performance, the estate will not vest." Devl. Deeds, § 964, and cases there cited. If it were possible to construe this proviso as a condition subsequent, appellant would be in no better situation. The time limited for the performance of the act has passed. The condition has not only not been performed, but no effort has been made to perform it. For several years the city has assessed this block to respondents, who have paid the city taxes thereon. Under these facts, it is not perceived upon what ground appellant could maintain an action to quiet title against respondents. These views render a consideration of the other findings unnecessary. The judgment appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

98 Cal. 454

PORTER v. BUCHER et al. (No. 18,032.)
(Supreme Court of California. June 6, 1893.)

SALE BY HUSBAND TO WIFE—DELIVERY AND CONTINUED CHANGE OF POSSESSION—QUESTION FOR JURY—ACTION FOR CONVERSION—EVIDENCE.

1. In an action by a married woman against her husband's assignee in insolvency and others for the conversion of hay, it appeared that plaintiff owned about 150 head of cattle and horses on a farm on which her husband had filed a declaration of homestead, and on which they lived; that before the assignment about 130 tons of hay raised on the farm were stacked in corrals which had been used for several years for that purpose, and from which it was fed to stock; that plaintiff and her husband went to the stacks, estimated the quantity, and agreed on the price; that the latter, by words, delivered the hay to plaintiff, who then closed the gates, and made a payment; and that she afterwards paid the agreed price. Thereafter, on going away for several weeks, she told witnesses that the hay was hers; that she feared the boy would let the cattle in, and destroy it, and requested them to look after it. Plaintiff bought her husband's hay the previous year, and fed it from the same corrals. There was evidence that it was the custom for stock owners, when they bought hay in the stack, to take their stock to it, and feed it without removing it. *Held*, that the question whether or not there was an immediate delivery, followed by an

actual and continued change of possession, was for the jury, and it was error to direct a verdict for defendants.

2. An arrangement between plaintiff and her husband, whereby he fed two cows and two horses from the same hay in consideration of his services in assisting to feed her stock, was not necessarily inconsistent with her ownership and possession, though evidence of it was competent as tending to show his possession and control of the hay.

3. Evidence of the official character of some of defendants, and that the hay was taken from plaintiff under a writ of replevin in an action against her husband, was competent, though the complaint in the replevin case was defective.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; G. G. Clough, Judge.

Action by Phear E. Porter against John Bucher, Joseph Mark, A. L. Smith, and A. D. Martin for the conversion of certain hay. From a judgment entered on the verdict of a jury, directed by the court, in favor of defendants, and from an order denying her motion for a new trial, plaintiff appeals. Reversed.

Spencer & Raker, J. D. Goodwin, and Clarence A. Raker, for appellant. Jenks & Clafin, for respondents.

HAYNES, C. This action is in trover for the conversion of hay. The plaintiff appeals from a judgment against her, and from an order denying her motion for a new trial. Appellant is the wife of Howard B. Porter, with whom she lived upon a farm upon which her husband had duly filed a declaration of homestead, and which farm was principally used for raising hay. The wife was the owner of about 130 head of cattle and 20 or 30 horses, which were her separate property, and were kept on the homestead. The crop of hay for 1888, estimated at about 120 tons, was stacked in corrals which had been used for several years for that purpose, and from which the hay was fed to the stock. After the hay was stacked, plaintiff and her husband went to the stacks, estimated the quantity of hay, agreed upon the price, and the husband, by words, delivered the hay to appellant, who thereupon closed and fastened the gates of the corrals, made a payment of \$10 thereon, and a few days later made another payment, of \$30, and, in accordance with the agreement of sale, assumed the payment of certain specified debts of the husband, amounting, with the cash payments, to about \$870, and which debts she afterwards paid. In October, 1888, the husband filed a petition in insolvency, was thereafter adjudged an insolvent debtor, and defendant Martin became assignee. Shortly thereafter the assignee served a written demand upon the insolvent for the delivery of the hay and other property upon the farm, and was then informed by appellant of her purchase, and that the hay belonged to her. The assignee brought an action of replevin against the husband, and

took the hay. The taking under the writ was resisted by the appellant, under her claim of ownership, and after the taking a demand for the hay was duly made, and this action was brought to recover the value of the hay, and special damages. The cause was tried before the court and a jury, and upon the conclusion of the evidence the court instructed the jury as follows: "Gentlemen of the jury: The court instructs you, first, that there is no evidence which will contradict this finding: That the plaintiff entered into a contract,—a purchase of certain stacks of hay; that said property was stacked in the corral usually used by H. B. Porter to stack his hay in; that said property remained there after the sale to the plaintiff in this action by the said H. B. Porter, and never was removed from the said corral until removed by the officer in this action; that the said premises were the homestead of both parties; that under that state of facts they used the property apparently as they had before the sale, each assisting the one and the other in feeding the stock of both parties from the corral; and that, therefore, there was not a sufficient change of possession, as intended and directed by the law, to transfer the title, as against a creditor. In view of this statement, I feel called upon, and it is my duty, to instruct you, and give you the following instructions: Gentlemen of the jury: Under the circumstances disclosed by the evidence in this case, a sale of personal property is absolutely void, unless accompanied by an immediate delivery, and followed by an actual and a continued change of possession. The evidence is not sufficient to warrant you in finding that there was such delivery and change of possession of the property in controversy in this action, and it is therefore your duty to find for the defendants, and you are instructed so to do."

The principal question arises upon this instruction. No question was made as to the bona fides of the sale of the hay to appellant, nor as to the fact that she had there, upon the ranch, said cattle and horses, which were her separate property. Some additional facts appeared in evidence, which should be noticed. Appellant had bought her husband's hay the preceding year, and fed it from the same "stack corrals," and in other years had bought hay from others for her stock. Mr. Rodkey, a witness for plaintiff, testified that he was employed and paid by Mrs. Porter, the winter before, to feed her stock, and fed out most of the hay from the same corrals. That in the fall, (1888,) after haying, she went to Oroville, and was gone a month or six weeks. That she then told witness that the hay (the same here in question) belonged to her; that she was afraid the boy would let the cattle get in, and destroy it; that she wanted it to feed her cattle, and desired the witness to look after it. Another witness, Mr. Pepperdine,

testified that she also informed him of her ownership of the hay, and also requested him to look after it in her absence; that he stayed there a month after the return of plaintiff and her husband, and did not see Porter do anything about the hay. Evidence was also given tending to show that it was the custom in that vicinity for cattle owners, when they bought hay in the stack, to take their cattle to the hay, and feed it there, without removing it, and that plaintiff had fed a part of this hay before it was taken by the sheriff under the writ.

The instruction given to the jury, to find for the defendants, was erroneous. Section 3440 of the Civil Code lays down no new rule as to what shall constitute a delivery. Any delivery that is sufficient to pass the title as between the parties is still sufficient, the statute only adding that it shall be "immediate." The expression, "an actual and continued change of possession," was construed in *Stevens v. Irwin*, 15 Cal. 503. It was there said: "The word 'actual' was designed to exclude the idea of a mere formal change of possession, and the word 'continued' to exclude the idea of a mere temporary change. But it never was the design of the statute to give such extension of meaning to this phrase, 'continued change of possession,' as to require, upon a penalty of the forfeiture of the goods, that the vendor should never have any control over or use of them. This construction, if made without exception, would lead to very unjust and very absurd results." The supreme court of Pennsylvania said: "In determining the kind of possession necessary to be given, regard must be had, not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property." *Crawford v. Davis*, 99 Pa. St. 578. In *Byrnes v. Moore*, 93 Cal. 394, 29 Pac. Rep. 70; *Claudius v. Aguirre*, 89 Cal. 503, 26 Pac. Rep. 1077; and numerous other cases,—it is held that what constitutes an immediate delivery, and an actual and continued change of possession, is a fact to be determined upon the evidence in each particular case. We think there was sufficient evidence tending to show such delivery and change of possession as to require a submission of those questions to the jury, and such as would have sustained a verdict in favor of the plaintiff. The cattle and horses were her separate property, returned by her for taxation, and had for years been kept by her upon the homestead. She had before purchased hay from her husband, and fed it to her stock from the same stack corrals; had employed and paid Rodkey to feed her stock the preceding winter; and when she was leaving for a visit to Oroville, in October, had requested Rodkey and Pepperdine to look after the hay, and see that the cattle did not get into the corrals and destroy it. The stock being hers, and kept upon the ranch where she had the right to

keep them, the presumption was that the hay which was fed to them was hers also. If the ruling of the court below correctly stated the law, it would logically follow that, in order to make a valid purchase of hay from her husband, she must immediately remove the hay from the homestead, or buy it from day to day as she fed it to her cattle. If a neighbor had bought this same hay, and, according to the custom of that portion of the country, had brought his cattle to the hay, and was there feeding it, no one would contend that it was not sufficient, as a delivery, and actual and continued change of possession, to satisfy the statute. "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried. * * *" Civil Code, § 158. The Code provides no different rule as to the formality of such transaction between husband and wife from that required between strangers, yet the law, giving a reasonable construction to all such statutes, takes into consideration, not only the character of the property, but the relations of the parties, and the use of the property intended, and only requires that which would naturally be done in an honest and business-like transaction, where there was no thought of fraud or concealment. Indeed, any other course, while it might unquestionably fulfill the strictest requirements of the statute touching an actual and continued change of possession, would at once suggest, as the reason for such departure, an intention to defraud. She was not bound to remove the hay to other land, nor to own the land upon which the stack stood. It was a benefit to the land, in which she, as well as her husband, was interested, to feed the hay upon it. The hay could not be branded, as cattle are, and any unusual notice of her ownership would at once have invited an attack upon the ground of actual fraud. But the possession of the land was not solely in the husband, and therefore the possession of the hay could not, from the bare fact that it was on the land, be wholly in the husband. At the most, that fact, taken alone, would have made the possession joint. "The effect of declaring the homestead was to convert the separate title of the husband into a joint title in himself and wife, to the extent of the homestead." *Burkett v. Burkett*, 78 Cal. 312, 20 Pac. Rep. 715. In *Barber v. Babel*, 36 Cal. 17, after discussing the question whether the declaration of homestead created a joint tenancy, the court said: "But, however this may be, there is a joint interest in the homestead,—a joint holding, if not a technical joint tenancy."

The husband had two cows and two horses which were fed from the same hay. Plaintiff testified that, by agreement between herself and husband, his cows and horses were to be fed, in consideration of his services in assisting to feed her stock. This arrange-

ment was not necessarily inconsistent with her ownership and possession, though it was competent evidence tending to show the husband's possession and control.

Some exceptions were taken to rulings receiving and excluding oral evidence, but these are not of a character requiring special notice.

Evidence of the official character of defendants Bucher and Mark, and that the taking was under a writ of replevin in the case of *Martin v. Howard B. Porter*, was competent, notwithstanding the defect in the complaint in that case. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

(98 Cal. 555)

Ex parte HAYES. (No. 21,025.)

(Supreme Court of California. June 6, 1893.)

LIQUOR LICENSE—EMPLOYMENT—CONSTITUTIONALITY OF ORDINANCE.

1. The enactment of an ordinance making it unlawful to sell intoxicating liquors without a license, and prohibiting the sale of such liquors in dance houses or other places where musical and theatrical entertainments are given, and where females attend as waitresses, is a valid exercise of the power conferred by Const. art. 11, § 11, on counties, cities, and towns, to make all such local police, sanitary, and other regulations as are not in conflict with general laws.

2. Nor does such ordinance make such a discrimination against women in the matter of employment as will bring it in conflict with Const. art. 20, § 18, providing that no persons shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession.

In bank. Application on habeas corpus by Hayes for a discharge from imprisonment. Denied, and petitioner remanded.

Davis Louderbaek, for petitioner.

PER CURIAM. This is a proceeding upon habeas corpus, and the question involved is whether it is competent for the board of supervisors of the city and county of San Francisco to provide by ordinance that it shall be unlawful to engage in the business of selling spirituous, malt, or fermented liquors without a license, and at the same time to provide that no license shall be issued to any person for the purpose of engaging in the business of selling such liquors or wines in any dance cellar or dance hall, or in any place where females are permitted to wait or attend in any manner on any person, and wherein there is also any musical, theatrical, or other public exhibition; thus, in effect, prohibiting the sale of liquors or wines in such dance cellars or

other places where musical and theatrical entertainments are given, and where females attend as waitresses. The fundamental principles which underlie and support legislation of this character were announced by this court in *Ex parte Christensen*, 85 Cal. 208, 24 Pac. Rep. 747, and also received an exhaustive discussion by the supreme court of the United States in the case of *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13; and upon the authority of those cases we hold that the ordinance under consideration here is a valid exercise of the power conferred by section 11 of article 11 of the constitution of this state upon counties, cities, and towns to make "all such local police, sanitary, and other regulations as are not in conflict with general laws."

It is claimed, however, by the counsel for the petitioner that the ordinance makes a discrimination against women in the matter of employment, and is therefore in conflict with section 18, art. 20, of the constitution of this state, which is in these words: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." This section does not, in our opinion, operate as a limitation upon the power of the state or its municipalities to prescribe the conditions upon which the business of retailing intoxicating liquors shall be permitted to be carried on, or in regulating the manner in which such business shall be conducted. Petitioner remanded.

BEATTY, C. J. I concur in the judgment. Upon the facts shown by the petition and the return the petitioner is lawfully detained, irrespective of the validity of the amended ordinance. If it is valid, the complaint clearly charges him with its infraction; if it is invalid, the facts alleged constitute an infraction of the unamended ordinance. In either case an offense is charged; and, the imprisonment being lawful in any event, the question as to the validity of the ordinance cannot be decided in this proceeding without going outside of the case presented, which I do not care to do.

McFARLAND, J. I concur in the order remanding the petitioner, because I do not think that the points sought to be made by him can be raised on habeas corpus. A proceeding under the writ of habeas corpus cannot be turned into either a writ of error or a nisi prius trial. As to whether parts of the ordinance in question are constitutional, I express no opinion, except to say that, in my judgment, they are not covered by the *Christensen* Case, 85 Cal. 208, 24 Pac. Rep. 747. The facts in that case are entirely different, and the dictum of the opinion therein delivered must be taken in connection with the facts then before the court. If taken in its broadest sense, then it can be maintained only by assuming that there is no constitu-

tional right of property in wines or any kind of spirituous or malt liquors, and that by statute or ordinance they can be confiscated wherever found, like smuggled goods.

(98 Cal. xviii)

Ex parte SMITHZ. (No. 21,024.)

(Supreme Court of California. June 6, 1893.)

In bank. Application on habeas corpus by Smithz for discharge from imprisonment. Denied, and petitioner remanded.

Davis Louderbaek, for petitioner.

PER CURIAM. Upon the authority of *Ex parte Hayes*, (No. 21,025,) 33 Pac. Rep. 337, petitioner is remanded.

(98 Cal. 446)

BURY v. YOUNG et al. (No. 14,910.)

(Supreme Court of California. June 5, 1893.)

DEED—DELIVERY IN ESCROW—POWER TO RECALL—EVIDENCE.

1. Where the grantor executes a deed of his land, and delivers it to another, with instructions only to hold without recording until his death, and then to deliver it to the grantee, the grantor cannot recall the deed, nor alter its provisions, and he has no interest in the land, except a life estate. *McFarland, J.*, dissenting.

2. On the question whether a grantor had power to recall a deed delivered in escrow, evidence of subsequent acts of the grantor, tending to show his intentions at the time he made the deed, is inadmissible.

In bank. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action for partition by Eliza J. Bury against Elizabeth C. Young and others. Plaintiff had judgment, and defendants appeal. Affirmed.

F. A. Coldwell and L. J. Maddux, for appellants. C. C. Wright and John W. Armstrong, for respondent.

GAROUTTE, J. This is an action of partition. Plaintiff and defendant Young are sisters, and also daughters of one M. A. Hinkson. For title to support their respective claims, Mrs. Bury relies upon a deed from her father, and Mrs. Young claims as a devisee under her father's will. While suffering from a paralytic stroke, Hinkson called to his bedside, for legal advice as to the disposition of his property, one Hazen, an attorney at law, and, acting upon his advice, he signed and acknowledged a grant deed of his real estate, wherein his aforesaid daughters were named as grantees. This deed he gave to Hazen, with instructions not to record it, but to deliver it to the grantees upon his death. He appears to have recovered from his sickness, and subsequently endeavored to secure possession of the deed from said Hazen, but was unsuccessful in this regard. At a later date he made a will devising all his real estate to appellant Young. Subsequently he died, and Hazen delivered the aforesaid deed to plaintiff, Bury.

The sole question in this litigation is, did the title pass to the grantees under the deed? In other words, was there a delivery of the deed by the grantor? The findings of the court as to the matter of delivery are fully supported by the evidence of the witness Hazen, and it is as to the sufficiency of those findings of fact to support a delivery of the deed that our attention will be directed. The findings are as follows: "(1) That on the day last named the said M. A. Hinkson delivered the said deed to P. J. Hazen, Esq., of Modesto, Cal., for the said plaintiff and defendant last named, and instructed the said Hazen to hold the same for said plaintiff and defendant without recording it until his, the said M. A. Hinkson's death, and thereupon to deliver the same to the said plaintiff and defendant. (2) That the said M. A. Hinkson then and there parted with all dominion over said deed, and reserved no right to recall it, or to alter its provisions, or to have or enjoy any other or further interest in said premises than to hold the use thereof until his death."

If the question here presented were a new one, or if the decisions of the courts of our sister states might be fairly said to divide as to what was the true rule of law applicable to such case, speaking for myself alone, I am not prepared to say but that the judgment in this case should be reversed, for the reason that the aforesaid findings indicate upon the part of the grantor an intention to make a post mortem disposition of his property, and such a thing cannot be done by deed. But the decisions of the courts of many states, promulgated by the most learned judges of those states, hold that the facts stated in the findings quoted constitute a valid delivery of the deed, and that the fee title forever passed from the grantor, and we deem the law settled in that regard. It may be conceded that the roads traveled by courts in arriving at this conclusion have not always been the same, but, whatever may have been the various lines of reasoning pursued, the same result has always been reached, and a valid delivery declared. We shall not enter into a discussion of the elementary principles of law supporting the proposition here involved, but content ourselves with a reference to the views of various courts as to the law applicable to the state of facts here presented. In the well-considered case of *Cook v. Brown*, 34 N. H. 460, the decision of the court upon this question concludes as follows: "If the owner of land desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed, or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor, the holder in such case being a trustee for the grantee." In *Pruitsman v. Baker*, 30 Wis. 650, Chief Justice Dixon, speaking for the court, approved the doctrine

cited from *Cook v. Brown*, supra, and declared the same rule in the following language: "As to the grantor, delivery is absolute and final, and so is his conveyance of the land, the title to which passes at once to the grantee, qualified only by the right of the grantor to use and occupy, or take and receive the rents and profits during his life, or until the event shall have happened upon which second delivery be made. The grantor in such case converts his estate into a life tenancy, and makes himself the tenant of the grantee. These conclusions result unavoidably from the certainty of the event upon which the second delivery is made to depend, and from the impossibility, under the circumstances, that the grantor will ever be able to recall or repossess himself of the deed. He delivers the writing, therefore, as his deed, always so to remain, and never to return to him, and it becomes presently operative, and the title vests immediately in the grantee." In *Wheelwright v. Wheelwright*, 2 Mass. 446, Chief Justice Parsons, in speaking to the question of delivery of a deed by the depository to the grantee after the death of the grantor, said: "If a grantor deliver any writing, as his deed, to a third person, to be delivered over by him to the grantee on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee; and if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by a plea of non est factum, whether generally or specially pleaded." In *O'Kelly v. O'Kelly*, 8 Metc. (Mass.) 439, Chief Justice Shaw said: "That a deed was made, executed, and acknowledged by the ancestor, was proved. The question was whether it was delivered so as to take effect, and pass the estate. If it was delivered by the grantor to any person in his lifetime, to be delivered to the grantee after his decease, it was a good delivery upon the happening of the contingency, and related back so as to divest the title of the grantor by relation, from the first delivery." In *Taft v. Taft*, 59 Mich. 185, 26 N. W. Rep. 426, Chief Justice Campbell, speaking for the court, said: "The other deed held by Mallory depends upon other considerations. If the deed had been delivered to him irrevocably on the simple consideration that he should transfer it to the defendant on the death of Aden Taft, it would come within several of our own decisions, and might therefore be valid upon their authority. *Latham v. Udell*, 38 Mich. 238; *Wallace v. Harris*, 32 Mich. 380. There is much authority elsewhere in favor of the same doctrine." The foregoing principles are also approved in *Stephens v. Rinehart*, 72 Pa. St. 434; *Hathaway v. Payne*, 34 N. Y. 92; *Stone v. Duvall*, 77 Ill. 475, and many cases from other states, not necessary to mention.

Upon a careful examination of the authori-

ties cited by appellant, and other cases, bearing upon this question, not cited, we have failed to find a case supporting a contrary doctrine to that announced in the foregoing citations. In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument; that he failed to part with all control and dominion over it; that, upon the happening of some event or contingency or condition, he had the right, if so disposed, to reach out, and take it from the possession of the depository. Such is not the case under consideration, for here the court finds as a fact that "the grantor parted with all dominion over said deed." There are well-considered cases holding that, even though the grantor delivers the deed to the depository, reserving the right to recall it, yet if he dies without recalling it, and the deed is then delivered, such delivery is complete and entire, and carries title. We are not disposed to indorse that doctrine, and think the principle recognized in this case goes far enough for all proper purposes. The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that, when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time. That question is determined by the grantor's intention in the matter, and his intention in making the delivery is a question of fact, to be solved by the light of all the circumstances surrounding the transaction. As before intimated, the views of courts are not uniform as to how and when the deed takes effect. *Prutsman v. Baker*, supra, says the title passes, full and complete, upon the first delivery, and that the depository becomes the trustee of the grantee, and that the grantor holds a life estate in the property. *Stone v. Duvall*, supra, holds the first delivery to be an inchoate delivery. Many of the cases declare that the deed becomes operative upon the delivery by the depository after the death of the grantor, and that such delivery relates back to the first delivery for the purpose of carrying title. Section 767 of the Civil Code provides that a freehold may commence in futuro, and for that reason we are inclined to recognize the views of Chief Justice Dixon in *Prutsman v. Baker*, supra, as the true rule applicable to this class of cases in this state. We know of nothing in the Codes forbidding the doctrine announced in that case, to wit, that the grantor, upon the irrevocable delivery of the deed to the depository, thereupon constitutes such depository the trustee of the grantee, and creates in himself a tenancy for life.

Appellant offered in evidence a deed from M. A. Hinkson to A. C. Hinkson, and a deed back to M. A., of the realty here involved. These deeds were made subsequent to the deed which we have had under consideration, and were offered as tending to show

the grantor's intentions at the time he made the original deed. The proposed evidence was rejected, and rightly so. The consideration in both deeds was nominal. They were executed about the same time, and were recorded upon the same day. It was a very poor attempt upon the part of the grantor to create evidence in his own favor. Neither was the grantor's order upon the depository to redeliver the deed to him proper evidence. If offered as tending to show a revocation of agency, it was immaterial, as the fact of revocation was not involved in the case. The question involved was the power of the grantor to revoke or recall the deed.

Appellant also offered in evidence a trust deed to the Sacramento bank, made some months subsequent to the delivery of the deed to Hazen, as tending to show the grantor's intentions in making the original deed; and it is now claimed that such an act upon the part of the grantor would be so inconsistent with an intention on his part to part with the title when he made the original deed that it should be admitted as throwing light upon that transaction. It was not even shown that the deed to the bank was a bona fide one, but, aside from that, a grantor cannot be allowed to undermine his deed either by words or acts. His declarations and acts made and done, in his own interest, months after the deed was delivered, are not admissible as indicating his intentions in delivering the deed. We think this principle elementary, and there is nothing in *Dean v. Parker*, 88 Cal. 283, 26 Pac. Rep. 91, trespassing upon that doctrine. For the foregoing reasons, let the judgment and order be affirmed.

We concur: HARRISON, J.; FITZGERALD, J.; PATERSON, J.

McFARLAND, J. I dissent. In the first place, I think the evidence fails to show that when Hinkson handed the deed to Hazen he parted with all control over it, etc., and also that the court erred in ruling out certain evidence offered for the purpose of showing what Hinkson's intention was. Furthermore, there was no delivery of the deed to the grantees named therein while the grantor was alive, and there could have been none after he was dead. It is contended that giving the deed to Hazen was a present delivery to the grantees; but the express instruction was that he was to keep it until after Hazen's death, and then to deliver it to the grantees, so that the delivery to the grantees was not to take place during Hinkson's lifetime. Hazen was not a grantee, and had no interest in the grant. He was a mere agent of Hinkson, and upon the death of the latter the agency ceased. The deed was a mere attempt at testamentary disposition of property, and, not being in the form prescribed for the execution of a will, was void. He ordered his agent to return the deed to him, and the agent should have obeyed, for, if it

was of any value, he had as much right to revoke it as he would have had to revoke a will. But it was of no value, for it provided for an impossible thing,—the delivery of a deed by an agent after the death of his principal. If one desires to avoid the administration of his estate in probate, he may grant his property to a trustee, to whom a present delivery of the deed must be made, or he may grant his property, reserving a life estate, but there must be a present delivery of the deed to the grantees. The method of doing so, claimed to be effective in the case at bar, would not only lead to innumerable frauds, but is inconsistent with the fundamental principle that a dead man can do no act, and can have no agent to act for him. There are authorities, no doubt, holding differently from the views above expressed, but in my opinion they do not correctly declare the law, and should not be followed.

I think the judgment should be reversed.

4 Cal. Unrep. 10

WEINBURG v. SOMPS. (No. 14,748.)

(Supreme Court of California. June 9, 1893.)

TRIAL—INSTRUCTIONS—EXAMINATION OF WITNESSES—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—SUFFICIENCY OF APPLICATION—MISCONDUCT OF JURY—HOW SHOWN.

1. The mere failure to instruct the jury on a point cannot be assigned as a refusal so to do where there was no request for such instruction.

2. Where a witness is called in rebuttal, and then fully cross-examined as to a matter to which an objection was sustained when witness was first called, the error, if any, in sustaining the objection, is cured.

3. The application for a new trial because of the newly-discovered evidence of three witnesses showed that the materiality of their testimony appeared from the testimony of plaintiff, who testified in the morning of the first day of the trial, and that the trial closed at 1:30 on the second day; that a messenger was sent for one of the witnesses on the morning of the second day, but witness was away from home. No subpoena was issued for any of these witnesses, and no application was made for time to procure their attendance. *Held*, that the application failed to show reasonable diligence.

4. Where the jury agree that each shall write out the sum he thinks plaintiff is entitled to recover, and then divide the aggregate of such sums by 12, and that the quotient shall be the amount of the verdict, such verdict is determined by chance, within the meaning of Code Civil Proc. § 657, subd. 2, providing that such misconduct of the jury may be shown by the affidavit of any of the jurors. *Dixon v. Plums*, (Cal.) 33 Pac. Rep. 268, followed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action for malicious prosecution by Moritz Weinburg against P. G. Somps. Plaintiff had judgment, and from an order denying a new trial, defendant appeals. Reversed.

Gordon & Young, for appellant. J. G. Maguire and H. K. McJunkin, for respondent.

VANCLIEF, C. Action for malicious prosecution of the plaintiff on a charge of having

bought and received stolen property, for which he was tried in the police court and discharged. The jury returned a verdict for plaintiff, assessing his damages at \$3,333, for which sum judgment was rendered. The defendant brings this appeal from an order denying his motion for a new trial.

1. Counsel for appellant contend that the court erred in its instruction to the jury as to what constitutes probable cause for the criminal prosecution complained of. The exception upon which this point rests was taken at the close of the instructions given, and was in the following language: "I desire to except * * * to your instruction to the jury as to what constitutes probable cause, and your refusal to instruct the jury that it is for the court to determine what probable cause is, and not for the jury." Waiving the indefiniteness of the exception, it is a sufficient answer to this point that the court did instruct the jury as to what would constitute probable cause substantially as requested by defendant's counsel, and very nearly in the same language. Besides, the court was not requested to instruct that it was for the court, and not the jury, to determine what is probable cause; and consequently did not refuse so to instruct.

2. It is claimed that the evidence does not justify the finding of malice on the part of the defendant in causing plaintiff to be arrested, for the reason that the defendant acted on the advice of a police officer. But the evidence tends to prove that defendant did not state to that officer all the material facts within his knowledge bearing upon the question of malice, and that the officer did not know all such facts. It is, therefore, unnecessary to decide whether the advice of the police officer would have shielded the defendant from the charge of malice under any circumstances.

3. It is claimed that the court erred in sustaining an objection to a question asked plaintiff by defendant's counsel on cross-examination. But afterwards, when the plaintiff was called in rebuttal, he was fully examined by defendant's counsel as to the same matter in relation to which the objection had been sustained. This cured the alleged error, if it was error.

4. One of the grounds for a new trial was that of newly-discovered evidence, viz. the testimony of three witnesses, all residents of the city of San Francisco, (the place of trial,) whose testimony, as appears by their affidavits, will contradict a part of the testimony of the plaintiff on his own behalf as to special damages to his business. The proposed new testimony contradicts very little of the material testimony of the plaintiff, and probably would not have effected a change of the verdict. But, however this may be, I think it is not made to appear that defendant could not, with reasonable diligence, have discovered and produced at the trial the alleged new evidence. It ap-

pears that the trial was commenced on the morning of March 24th, and closed the next day about 1:30 p. m.; that plaintiff was the first witness examined, and that he gave the testimony sought to be contradicted before noon of the first day of the trial; that such testimony of the plaintiff related solely to his relations, dealings, and conversations with the newly-discovered witnesses,—Hartzman, Lachman, and Kuhn,—who must have known, and very probably remembered, whether plaintiff's testimony as to his relations, dealings, and conversations with them was true or false; that, after the adjournment of the court on March 24th, defendant was advised by his attorney to find out from Hartzman whether plaintiff's statements were true or false. Thereupon defendant instructed one of his employees, Morris Lewin, to find Hartzman, and make inquiries as to the truth of plaintiff's testimony. The affidavit of Lewin states that he was instructed to find Hartzman in the afternoon of March 24th; that about 8 o'clock next morning he found the residence of Hartzman, and then learned that he had gone to Alameda on business, and was not expected to return before evening of that day; that he waited around Hartzman's house several hours, hoping that he might return sooner than expected, but he did not; that he then returned to the court room about noon, when he learned that the evidence in the case was closed. He does not state that he had any difficulty in finding Hartzman's house, or that he tried to find it before the morning of March 25th. It does not appear that any effort was made to find either of the other two witnesses Lachman and Kuhn until some four or five days after the trial. No subpoena was issued for any of these witnesses, and no application was made to the court for time to procure their attendance. Do the affidavits of defendant and Lewin show that the new evidence could not, with reasonable diligence, have been discovered before the close of the trial? I think they do not since they fail to prove due diligence. That defendant did not know what the new witness would testify is no excuse. He had been notified by plaintiff's testimony that these witnesses knew the truth of the matters as to which plaintiff had testified, and would contradict him if his testimony was false. *People v. Sutton*, 73 Cal. 248, 15 Pac. Rep. 86; *Klockenbaum v. Pierson*, 22 Cal. 160; *Stoakes v. Monroe*, 36 Cal. 384. The case of *Kenezleber v. Wahl*, 92 Cal. 202, 28 Pac. Rep. 225, cited by respondent's counsel, does not answer their purpose, as that was an appeal from an order granting a new trial. In that case, as in this, the necessity for the newly-discovered evidence was first discovered at the trial, but the new witnesses resided 100 miles from the place of trial. And as to the means of discovering the new evidence the court said: "It is therefore evident that the plaintiff possessed

no means by which he could discover the evidence which is alleged to be newly discovered, and that he had no knowledge of the evidence or of the witnesses by whom it could be established until after the trial." Besides, the usual deference was expressly paid to the discretion exercised by the judge who tried the case in granting the new trial.

5. Another ground upon which a new trial is asked is that of misconduct of the jury, in that 11 of the jurors were induced to assent to the verdict by a resort to the determination of chance. This point is supported by the following affidavit of a juror, to which there is no counter affidavit:

"[Title of court and cause.] State of California, City and County of San Francisco—ss.: J. P. Larsen, being first duly sworn, says on oath: I am one of the jurors who were impealed to try the above-entitled action. Said cause came on for trial on the 24th day of March, A. D. 1890, and was submitted to the jury for their verdict on the 25th day of March, A. D. 1890. Eleven of said jurors rendered their verdict in favor of plaintiff for the sum of \$3,333 on the said last-mentioned day. When the jury retired under the charge of the sheriff to consider their verdict in said case, some of the jurors considered the propriety of giving the sum of \$10,000 damages, and one was in favor of rendering a verdict of \$1 in favor of plaintiff. Being unable to agree as to the amount of their verdict, it was then agreed by and between said jurors that their verdict should be arrived at in the following manner, and that they should be bound by the result, to wit: That each juror should write on a slip of paper the amount to which he thought plaintiff was entitled, and, after doing so, their amounts should be added together and divided by twelve, and the quotient resulting therefrom, whatever the same should be, should be the verdict of said jury. That thereupon each of said jurors other than H. McCabe wrote down on a slip of paper the amount which he thought plaintiff was entitled. Some amounts of which were in excess of \$5,000, the amount demanded by plaintiff. Said amounts were then added together and divided by twelve, the result of said division being the sum of \$3,333, the amount of verdict by said jury. That when the division aforesaid resulted in a quotient of \$3,333, such was taken as their verdict, in pursuance of said prior arrangement to be bound by said result, without further consultation or assent among them. J. P. Larsen."

"Subscribed and sworn to before me, this 10th day of May, A. D. 1890. H. P. Tricou, Notary Public."

On the authority of the late case of *Dixon v. Pluns*, decided by the court in bank, and filed May 31, 1893, 33 Pac. Rep. 268, I think this affidavit shows that the verdict was determined by chance, in the sense of the second subdivision of section 657 of the Code of Civil Procedure, and, therefore, that the

affidavit of the juror was admissible as evidence of the fact. But, inasmuch as the case of *Dixon v. Plums*, *supra*, overrules the case of *Turner v. Water Co.*, 25 Cal. 397, on the authority of which respondent's counsel appear to have confidently relied, I think respondent should have an opportunity to file counter affidavits to that of the juror Larsen, and that the motion for new trial should be reheard and decided solely upon the alleged ground of misconduct of the jury, and upon such additional affidavits as may be offered by either party. To this end I think the order refusing a new trial should be reversed, the cause remanded, and the lower court instructed to rehear and decide the motion for new trial on the alleged ground of misconduct of the jury alone; and, upon such rehearing, to admit and consider such additional pertinent affidavits as may be filed by either party within 20 days after the filing of the remittitur.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order refusing a new trial is reversed, the cause remanded, and the lower court instructed to rehear and decide the motion for new trial on the alleged ground of misconduct of the jury alone, and upon such rehearing to admit and consider such additional pertinent affidavits as may be filed by either party within 20 days after the filing of the remittitur.

(4 Cal. Unrep. 1)

VALLEY LUMBER CO. v. WOOD. (No. 18,056.)

(Supreme Court of California. June 3, 1893.)

COUNTERCLAIM—SUFFICIENCY OF PLEA—EVIDENCE.

1. In an action for goods sold and delivered, the allegation of a counterclaim of \$1,700 for 171,000 bricks sold and delivered by defendant to plaintiff, no part of which has been paid, states sufficient facts to support a judgment for defendant.

2. In an action to which defendant pleaded a counterclaim for brick alleged to have been delivered to plaintiff corporation, the evidence was undisputed that the bricks mentioned in the answer were to be used in a certain building in which plaintiff had no interest. The contractor for the erection of the building testified that he ordered the bricks from defendant, while defendant testified that they were ordered by a member of an agency who were managing agents for plaintiff corporation, but there was no evidence to connect plaintiff with this transaction through the agency. *Held*, that the evidence did not justify a verdict for defendant on the counterclaim.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the Valley Lumber Company, a corporation, against R. G. Wood. Defendant had judgment on a counterclaim, and plaintiff appeals. Reversed.

L. L. Cory, for appellant. Hinds & Merriam and F. H. Short, for respondent.

VANCLIEF, C. Action to recover \$586.39 for goods sold and delivered. The complaint is in two counts,—the first for \$503.19 for goods sold and delivered by plaintiff; and the second for \$83.20 on account of goods sold and delivered to defendant by Prescott & Pierce, copartners, assigned to plaintiff. The defendant made no denial of the first count, but denied that he was indebted to Prescott & Pierce in any sum exceeding \$81.20; and further denied the alleged assignment by Prescott & Pierce to plaintiff. In addition to these denials, the defendant alleged, in substance, the following affirmative matters: (1) A counterclaim of \$1,710 to the first count, for 171,000 bricks alleged to have been sold and delivered by defendant to the plaintiff in May, 1889, no part of which has been paid. (2) A counterclaim to the second count for 171,000 bricks, of the value of \$1,710, alleged to have been sold and delivered by defendant to Prescott & Pierce in May, 1889, no part of which has been paid. (3) "And for a third and separate answer and defense to both alleged causes of action, and by way of counterclaim and cross complaint, defendant alleges" that in May, 1889, he sold and delivered to Prescott & Pierce 171,000 bricks, of the value of \$1,710; and that in making the purchase of said bricks Prescott & Pierce were acting as agents of plaintiff, and made the purchase for the benefit of plaintiff, as defendant has since been informed and believes, though he had no knowledge of such agency at the time of the transaction. He therefore avers that Prescott & Pierce are necessary parties to the action, and prays for judgment against the plaintiff for \$1,710 and such further relief, etc. (4) "For a further and separate answer and defense, and by way of counterclaim and for a cross complaint herein, defendant alleges" that in May, 1889, he sold, delivered, and furnished to Prescott & Pierce 171,000 bricks, of the value of \$1,710, at their instance and request; and further avers that he is informed and believes the plaintiff was jointly interested in the transaction by which said bricks were sold as aforesaid, and interested in the profits of such transaction, if any there were; but at the time of the transaction defendant did not know that plaintiff was interested with Prescott & Pierce in the purchase; "wherefore defendant prays that said Prescott & Pierce be made parties hereto, and be duly cited to appear and to answer the cross complaint herein;" and further prays for a joint judgment against Prescott & Pierce and the plaintiff for the sum of \$1,710 and costs, and such further relief, etc. There was no demurrer to any of these answers, and no motion to strike out, nor to require defendant to elect upon which of the inconsistent answers he would rely at the trial.

The plaintiff answered the so-called "cross complaints" by denying all the allegations thereof. All the pleadings were verified. The cause was tried by a jury, whose verdict was in favor of the defendant for the sum of \$1,123.61, upon which judgment was rendered against the plaintiff. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

1. Appellant contends that none of the affirmative answers of the defendant states facts sufficient to constitute either a counterclaim or cross complaint, and that the judgment should be reversed for this reason. While it is clear that the facts stated do not constitute a cross complaint, I think the first plea states the substance of a valid counterclaim to the first count of the complaint, which, if proved, would have supported the verdict, since it exceeds the amount of both counts of the complaint by \$1,123.61, which is just equal to the verdict. The record shows no ground upon which the apparent inconsistencies of the defenses can be considered here. *Buhne v. Corbett*, 43 Cal. 264; *Uridias v. Morrell*, 25 Cal. 31.

It is further contended that the evidence does not justify the verdict, in that it does not tend to prove that defendant ever sold or delivered any bricks to the plaintiff through the agency of Prescott & Pierce or otherwise; and it seems clear that this point should be sustained. It appears without controversy that all the bricks mentioned in the answers were to be used in the erection of a building known as the "Chamber of Commerce Building," owned by a stock company, in which the plaintiff was not interested; that one Joe Smith was the contractor for the erection of the building; that the bricks were delivered by defendant at the site of that building, and were used by the contractor in the erection of the building; that the company owning the building (the Chamber of Commerce Association) failed before the building was completed, having mortgaged the building for more than its value; that the work on the building was abandoned by the contractor; and that the building has not been completed. There is also undisputed testimony that the filing of liens by the contractor and material men would have been useless, because of the prior mortgage for more than the value of the property. It appears that Prescott & Pierce were copartners, principally engaged in dealing in grain, and that they were also managing agents for the plaintiff corporation, which had furnished lumber and lime used in the construction of the building of the value of \$1,500 to \$1,600, for which it had not been paid. It also appears that the 171,000 bricks mentioned in the different answers were the same that were used in the Chamber of Commerce Building, and that defendant delivered no other bricks. The contractor, Joe Smith, testified that he ordered the

bricks from defendant; but the defendant flatly contradicted this, and testified that Prescott alone ordered the bricks. Prescott testified positively that he neither individually nor as agent for the plaintiff ever ordered the bricks, or promised to pay for them; and there is no testimony or circumstance to connect the plaintiff with the transaction through any agency. The testimony of the defendant tended to prove only that he sold the bricks to Prescott, or to Prescott & Pierce. I think the order and judgment should be reversed, and a new trial granted.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

4 Cal. Unrep. 47

WHELAN v. BRICKELL et al. (No. 15,074.)(Supreme Court of California. June 10, 1893.)
HUSBAND AND WIFE — OCCUPATION OF GOVERNMENT LAND — BONA FIDE POSSESSOR — TRUST — ESTOPPEL.

1. In 1860 a married man went into possession of part of the government land known as the "outside lands" of San Francisco. In 1863 he died, and his wife, with their children, continued in possession, and was in possession at the passage of Act Cong. March 8, 1866, (14 Stat. 4,) relinquishing and granting the right and title of the United States in said lands to the city of San Francisco, in trust to be "disposed of and conveyed by said city, to parties in the bona fide actual possession thereof by themselves or tenants on the passage of this act," on such terms as the legislature should prescribe. While the husband and wife were in possession, they executed a declaration of homestead on the land under the California

homestead act of 1862, by which the homestead estate, on the death of either, vested absolutely in the survivor. Thereafter the city ceded the land to the widow, she having complied with the various ordinances and legislative acts relative thereto. *Held*, that as she had bona fide actual possession at the passage of the act, no trust arose under the conveyance to her in favor of said children. *Baker v. Brickell*, 25 Pac. Rep. 489, 1067, 87 Cal. 329, followed.

2. Where land belongs to a wife, the fact that she, as administratrix of her husband, returned said land as assets of his estate, is immaterial, and does not estop her to claim it as her own. *Baker v. Brickell*, 25 Pac. Rep. 489, 1067, 87 Cal. 329, followed.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Fairfax H. Whelan, administrator, against John Brickell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

F. R. King, for appellant. A. N. Drown, for respondents.

McFARLAND, J. This case has been here in various forms several times. *Brickell v. Batchelder*, 62 Cal. 623; *Batchelder v. Brickell*, 75 Cal. 373, 17 Pac. Rep. 441; *Batchelder v. Baker*, 79 Cal. 266, 21 Pac. Rep. 754; and *Baker v. Brickell*, 87 Cal. 329, 25 Pac. Rep. 489, 1067. The case at bar must be affirmed upon the authority of the case last above mentioned,—87 Cal. 329, 25 Pac. Rep. 489, 1067. That case, it is true, was decided upon its merits, after a full trial, while in the case at bar judgment was rendered for defendants upon the sustaining of a demurrer to the complaint. There is an effort here to give the case a somewhat different phase, but it readily appears upon the face of the complaint that the material facts stated are the same as those passed upon in *Baker v. Brickell*. After a careful consideration of the briefs of counsel for appellants, we are satisfied that the complaint does not state facts sufficient to constitute a cause of action, and we do not think that further discussion of the case is necessary.

The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

98 Cal. 400

McFAUL v. PFANKUCH et al. (No. 15,038.)

(Supreme Court of California. June 3, 1893.)

SCHOOL LANDS — RIGHTS TO PURCHASE CERTIFICATE — PLEADING — GENERAL DEMURRER.

1. A certificate for purchase of school lands is not conclusive of title in the holder, and is no bar to an action to contest the right of the holder to purchase such lands. *Jacobs v. Walker*, 18 Pac. Rep. 129, 76 Cal. 175, followed.

2. Though Pol. Code, § 3514, provides that a certificate of purchase of land by the register shall be prima facie evidence of title, such statute does not conclude the state, nor any one authorized by statute, from contesting it.

3. A person contesting the right to purchase of a holder of such certificate need not refund to him the money he has paid.

4. A complaint in an action to contest a certificate of purchase, which alleges that plaintiff's application to purchase, filed in the office of the surveyor general, contained the statement that plaintiff desired to purchase the land held by the person whose certificate of purchase he is contesting, and that he had made no contract to sell the same, and which further alleges that at the time such application was made the matters therein stated were true, sufficiently alleges that plaintiff desires to purchase the land, and that he has made no contract to sell the same.

5. Even though the complaint did not sufficiently allege such facts, an objection thereto should have been taken on the ground of uncertainty or indebtedness, and is not reached by general demurrer.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; Robert McGarvey, Judge.

Action by W. E. McFaul against Frederic Pfankuch and others to contest Pfankuch's right to purchase certain school lands for which he held a certificate of purchase. There was judgment for defendants on demurrer to the complaint, and plaintiff and Thomas P. Woodward, one of the defendants, appeal. Reversed.

T. L. Carothers and Carl T. Graef, for appellants.

J. A. Cooper, for respondents, on behalf of the proposition that when school land is purchased and paid for it is no longer the property of the state, cited *Carroll v. Safford*, 3 How. 461; *Witherspoon v. Duncan*, 4 Wall. 218.

HAYNES, C. Respondent Pfankuch, on January 6, 1882, applied to purchase certain school lands from the state. His application was approved March 15, 1883, and on August 28, 1883, a certificate of purchase was issued to him. On August 7, 1891, appellant Woodward applied to purchase the same lands, and on October 5, 1891, appellant McFaul also applied to purchase said lands. Protests were filed by McFaul and Woodward, respectively, against the right of Pfankuch to purchase, and the surveyor general referred the contests to the superior court of Mendocino county, and McFaul, in proper time, filed his complaint to determine the rights of the several parties to purchase. Woodward answered, and filed a cross complaint against all the other parties. Reid and wife and Pfankuch demurred to McFaul's complaint and Woodward's cross complaint. The demurrers were sustained, and judgment entered dismissing the said complaint and cross complaint. The Reids are alleged to have or claim some interest as assignees or purchasers from Pfankuch. The demurrers allege insufficiency of facts and the several statutes of limitation.

It is contended by respondents that McFaul and Woodward are not in privity with the paramount source of title, and are, there-

fore, barred by the statute. Section 3414 of the Political Code expressly recognizes contests "concerning a certificate of purchase or other evidence of title." That contests of this character may be maintained after such certificate is issued has been repeatedly decided. *Gilson v. Robinson*, 68 Cal. 539, 10 Pac. Rep. 193; *Gould v. Lanterman*, 70 Cal. 247, 11 Pac. Rep. 709; *Jacobs v. Walker*, 76 Cal. 175, 18 Pac. Rep. 129. It has been held that a contest cannot be made before the surveyor general in respect to the right to purchase land for which a patent has issued to one of the parties. *Somo v. Oliver*, 52 Cal. 378. Whether there is any other limitation than that arising from the issuance of the patent does not appear to have been decided.

Whether the state could be barred by lapse of time, where the patent has not been issued, it is not necessary to determine, as the statutory period for barring actions brought by the state had not expired. Code Civil Proc. § 315. The state was, therefore, not barred from maintaining an action to cancel the certificate of purchase issued to Pfankuch, if sufficient grounds existed therefor. It is obvious that, if the state is not barred, it is at liberty to grant the lands to any one who has a right to purchase, and conforms to the requirements of the statute in that behalf, if it shall be found that the prior applicant was not entitled to purchase under his application; nor is the state a necessary party to an action to determine that question. *Cunningham v. Crowley*, 51 Cal. 132, 133. The statute provides how that question shall be determined. It is not a question that the plaintiff may litigate of his own mere volition. A preliminary step must be taken by invoking the action of the surveyor general, and the order of that officer, referring the rights of the parties to the determination of the superior court, is not only necessary to enable the plaintiff to invoke the action of the court, but without such order the court has no jurisdiction to hear or determine the rights of the parties. Pol. Code, § 3415; *Allen v. Dake*, 50 Cal. 80; *Keema v. Doherty*, 51 Cal. 3; *Vance v. Evans*, 52 Cal. 93; *Danielwitz v. Temple*, 55 Cal. 42. The order made by the surveyor general is in the nature of a bill of interpleader, and binds the state by the result of the action, in which each of the applicants to purchase becomes an actor, and must establish his right to purchase to entitle him to judgment; and the surveyor general or register, as the case may be, must issue the certificate of purchase or other evidence of title, in accordance with the judgment. Pol. Code, § 3416. If by lapse of time the first applicant has acquired a right to the land, which, although invalid in its inception, the state could not resist, he must prevail; but if the state is not barred from asserting the invalidity of his application and the certificate based thereon, it does not lie in his mouth to say that the state shall not

grant it to a subsequent applicant. Respondent's contention would, therefore, result in applying the statute of limitations prescribed for the individual in matters in which the state has no concern, and bar the state in a shorter period than that which it has prescribed for itself.

But it is further contended that appellants are not in privity with the state, which is the paramount source of title. That is, however, an immaterial question; for though they have no common-law right of action based upon their relation to the state or to the land, they have a statutory right, the statute itself being based upon a sound public policy, making the self-interest of the citizen the most effectual guard against fraud the state could devise.

Again, it is argued, in effect, that the certificate given to Pfankuch vested the title in him; that when the land is purchased and paid for it is no longer the property of the state; and to the last part of this proposition cases from the supreme court of the United States are cited. But these decisions are based upon a different statute. There a certificate of purchase is not given until proof is made that the law has been complied with, and the full amount of the purchase paid. Here the certificate is based upon the application to purchase and the payment of the first installment of the purchase money. Pol. Code, § 3514. This section, it is true, makes the certificate prima facie evidence of title; a title sufficient to protect the purchaser against a mere intruder, but which does not conclude the state, nor any one authorized by the statute, to contest it. Appellants, if they have brought themselves within the statute, cannot be obnoxious to respondent's charge that they are "mere intruders." To hold that they are concluded by the issuance of the certificate to Pfankuch would be to nullify the statute; while to make it prima facie evidence of title in a collateral proceeding, as in ejectment against an intruder, or in an action of trespass, is consistent with and sustains the statute. *People v. Shearer*, 30 Cal. 648, cited by respondents, involved the question of the right of the state to tax the lands of a pre-emptioner under the United States prior to the purchase, and has no application here. *Churchill v. Anderson*, 56 Cal. 56, also cited by respondents, is not in point. There a patent had issued to the plaintiff, and defendants' application to purchase had been denied. The action, therefore, could not be under this statute, and the court held that he did not, by his application to purchase, filed and rejected after the patent had issued, acquire such status as authorized him to claim that the legal title which had passed to plaintiff by the patent should be held in trust for him.

Again, it is contended that the fraud of Pfankuch did not injure appellants, and therefore furnishes no ground of relief. As an abstract proposition of law, it is true that

fraud without injury furnishes no ground of relief. But it is quite sufficient to say in reply that the statute gives the right of action; nor is it quite clear that a citizen of the state, who has the right under the statute to purchase a certain parcel of land, and desires to purchase it, is not injured if he is prevented from doing so by a prior fraudulent attempt of another to purchase the same land.

Again, it is urged that neither the complaint nor the cross complaint contains any offer to return the purchase money paid by Pfankuch. The statute does not make it the duty of the contestant to refund to him the money he has paid, nor offer to credit appellants with such payment, and therefore, if appellants reimbursed him, they would, in effect, be required to pay a greater price for the land than that fixed by the state, and at which they were entitled to purchase. Neither of the appellants received any money from Pfankuch or the Reids, nor any credit or right of credit from the state upon their proposed purchase, and therefore the cases cited by respondents (*U. S. v. White*, 9 Sawy. 131, 17 Fed. Rep. 561, and *People v. Bryan*, 73 Cal. 377, 14 Pac. Rep. 893) have no application. Those were actions to annul patents brought by the United States and this state, respectively, who had issued them, and who had received, and then had, the money paid by the defendants.

Respondents further insist that there are other defects in said complaint and cross complaint which are fatal to their sufficiency. As to the complaint, it is said that there is no allegation that plaintiff desires to purchase the land for his own use and benefit, nor that he has made no contract or agreement to sell the same, etc. All these matters, it is conceded, are alleged in paragraph 3 of the complaint to have been stated in plaintiff's affidavit, made October 6, 1891, and filed in the office of the surveyor general, and which constituted his application to purchase; and in paragraph 4 of the complaint it is alleged "that at the time of making said affidavit and application all the matters and things therein stated were, ever since have been, and now are, true." This, it is said, does not show that on December 9th, the day the complaint was filed, he was an actual settler upon said land, or that he then desired to purchase for his own use and benefit, etc. We think the complaint is not justly subject to the criticism made. But, even if it were, such objection should have been taken upon the ground of uncertainty or indefiniteness, and is not reached by a general demurrer. It is required by the Code that special objections of this character shall be directly called to the attention of the court and the pleader, so that, if deemed defective in point of form or of certainty, an amendment may be made. The objections to the cross complaint are entirely similar. The affidavit and application of purchase were attached as exhibits, and in the body of the cross com-

plaint were properly referred to and averred to be true at the dates of making and filing and ever since.

The judgments appealed from should be reversed, and the court below directed to overrule both demurrers, with leave to answer.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. The judgments appealed from are reversed, and the court below is directed to overrule both demurrers, with leave to answer.

4 Cal. Unrep. 15

WHITE v. WHITE. (No. 14,848.)

(Supreme Court of California. June 9, 1893.)

DIVORCE—ALIMONY AND COSTS.

1. Under a judgment in a divorce proceeding, requiring "all costs, expenses, and disbursements provided for and contemplated in this decree or judgment" to be paid by the plaintiff exclusively out of his separate property, defendant has no right to include in her cost bills items not taxable as costs.

2. Motions in a divorce proceeding for the payment to defendant of her costs and disbursements, and for permission to plaintiff to mortgage his property in order to pay alimony, counsel fees, and other expenses of the litigation, are addressed to the discretion of the court.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene Garber, Judge.

Action by George E. White against Frankie White for a divorce. From certain orders in favor of plaintiff, defendant appeals. Affirmed.

Henry E. Highton, H. C. McPike, and J. A. Cooper, for appellant. Barclay Henly and E. D. Wheeler, for respondent.

BELCHER, C. The transcript in this case presents three appeals, based upon three separate bills of exceptions; the first from an order striking out certain items in two of defendant's bills of costs, the second from an order denying defendant's application for a further allowance for costs and expenses, and the third from an order allowing the plaintiff to mortgage his property. Each of the orders appealed from was made on the 24th day of June, 1891. In order that there may be a proper understanding of the questions involved in these appeals, a brief history of the case should be stated. The plaintiff commenced the action in December, 1885, to obtain a divorce from the defendant. The defendant answered, denying the charges made against her, and also filed a cross complaint, in which she stated facts entitling her to a divorce, and prayed that she be granted a divorce from the plaintiff. While the case was pending in the trial court, on application of defendant, an order was made requiring the plaintiff to pay to her sums of money aggregating \$3,850, for costs

and expenses, alimony and counsel fees; the item for costs and expenses being \$250. From this order an appeal was taken by the plaintiff to this court, and the order was affirmed in July, 1887. 73 Cal. 105, 14 Pac. Rep. 393. In October and November, 1887, two other orders were made, requiring the plaintiff to pay to defendant the further sums of \$250 and \$518, for costs and expenses. The case was tried in April, 1888, and after it was submitted for decision the court made another order, requiring the plaintiff to pay to defendant the sum of \$1,263.65 for additional costs and expenses. On May 15, 1889, judgment was entered denying a divorce to the plaintiff and granting one to the defendant. From this judgment the plaintiff appealed to this court, and the judgment was affirmed in October, 1890. 86 Cal. 219, 24 Pac. Rep. 996. The plaintiff also appealed from an order denying his motion for a new trial of the case, and that appeal was subsequently dismissed. There were two other appeals from orders relating to attorneys' fees, and the decisions are reported in 86 Cal., at pages 212 and 216, 24 Pac. Rep., at pages 1030 and 1031. Afterwards, in December, 1890, an order was made requiring the plaintiff to pay to defendant the sum of \$7,500 for attorneys' fees. The plaintiff appealed from this order, and his appeal was dismissed on March 24, 1891. 88 Cal. 429, 26 Pac. Rep. 236.

The facts leading up to the present appeals are as follows:

1. Upon the dismissal of plaintiff's appeal from the order denying his motion for a new trial, and within the time allowed by law, defendant served and filed her bill of costs on the appeal, which contained the following item: "Printing respondent's points and authorities, filed February 23, 1891, \$125.00." And again, upon the dismissal of the appeal from the order of December, 1890, and in proper time, defendant served and filed another bill of costs, containing this item: "Printing of defendant's brief on her motion to dismiss, March 5, 1891." Subsequently the plaintiff moved that each of these items be stricken out of the cost bills upon the ground that it "is not a proper item of the same, and that the amount is unreasonable, and excessive." The court granted the motion, and hence the first appeal.

It is admitted by appellant that the items stricken out were not properly taxable costs, but it is claimed that they were necessary expenses in the case, which the plaintiff, by the express provisions of the judgment, was required to pay, and hence that it was error to strike them out of the cost bills. The clause of the judgment referred to is, "that all costs, expenses, and disbursements provided for and contemplated in this decree or judgment be borne and paid by the plaintiff exclusively out of his separate property." There was no error in the rulings complained of. Under the clause of the judgment

quoted, the appellant had no right to include in her cost bills items not taxable as costs. If they were necessary expenses, and not already sufficiently provided for, application should have been made to the court for a further or additional allowance for that purpose.

2. On May 2, 1891, counsel for defendant served notice on the plaintiff that they would move the court for an order requiring the plaintiff to pay to defendant an additional sum of \$2,510, to reimburse and enable her to pay her costs and disbursements from April 20, 1888, (the date of her last allowance for costs,) to date; and also for an order requiring the plaintiff to pay her the sum of \$500, to enable her to prosecute the action. The notice stated that the motion would be made upon the ground that the defendant had no means whatever to prosecute the action; that by the terms of the decree entered in the case plaintiff was required to pay all costs and disbursements out of his separate property; and that the sums asked for were reasonable and necessary to bring the litigation to a close. The motion was submitted, and, after consideration, denied by the court, and hence the second appeal.

It is claimed for appellant that this ruling was erroneous because it clearly appeared from the affidavits made by her and read on the hearing that all the items forming the larger sum asked for had been expended by her in connection with the case, and not before allowed, and that they were necessary expenses and disbursements; and also that the smaller sum asked for was necessary to enable her to protect her rights, and have the litigation brought to an end. On the other hand, it is claimed for respondent that the affidavit made by him and read on the hearing effectually controverted all the material facts stated in appellant's affidavits, and fully justified the ruling. We think respondent's claim in this regard must be sustained. The motion was addressed to the discretion of the court, and such an order will not be reversed on appeal, unless it clearly appears that that discretion was abused. After carefully reading the affidavits and other proofs brought up in the record, we are unable to see any such abuse of discretion as would justify a reversal here.

3. In May, 1891, a motion was made that plaintiff be permitted to mortgage his property to the extent of \$8,000, "to enable him to pay alimony and counsel fees and other expenses necessary to the carrying on of the litigation between plaintiff and defendant." The motion was made and contested upon affidavits of the respective parties, and, after consideration, an order was entered permitting the plaintiff to mortgage his property to the extent of \$6,000; and hence the third appeal here presented.

It is claimed that this order was erroneous, because (1) by the decree of divorce all of the community property of the parties was

awarded to the defendant; (2) at the date of the making of the order no segregation of the property had taken place, and presumptively all property acquired by the plaintiff subsequent to the date of his marriage was community property; and (3) the mortgage was desired by the plaintiff solely for the purpose of incumbering property involved in the action, and hindering and delaying the defendant from recovering any and all property which, under the decree, she was or might be justly entitled to. The motion was also, in our opinion, addressed to the discretion of the court, and upon the showing made the order cannot be reversed. It is unnecessary to state the facts. See *White v. White*, (Cal.) 32 Pac. Rep. 600, where a similar order was affirmed.

It follows that each of the orders appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are affirmed.

98 Cal. 427

CAPRON v. HITCHCOCK et al. (No. 19,092.)

(Supreme Court of California. June 3, 1893.)

MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—CONTRACT WITH OFFICER—VALIDITY.

1. No valid assessment can be made for street work done under a contract which is void under Act March 13, 1883, § 628, providing that no officer of a city of the fourth class, organized under said act, shall be interested in a contract to which the city is a party, and that any contract contrary to the provisions thereof shall be void.

2. Such a contract does not become valid by reason of a failure to file a petition of remonstrance under Act March 13, 1885, § 3.

3. Act March 13, 1883, § 628, forbidding any officer of a city of the fourth class to be interested in a contract with the city, is not impliedly repealed by Act March 13, 1885, § 5, providing that under certain circumstances a street contract shall be awarded to the owners of a majority of the frontage on the street to be improved.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by John G. Capron against George N. Hitchcock and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

William Darby and Oscar A. Trippett, for appellants. Collier & Haines, for respondent.

VANCLIEF, C. Action to enforce the lien of an assessment on the lot of defendants in

the city of San Diego for street work alleged to have been done by plaintiff under a contract awarded to him by the city council, and executed on the part of the city by the superintendent of streets. The complaint is in the usual form. The answer, after denying the alleged contract, averred, and the court found, "that at all the times mentioned in plaintiff's complaint the city of San Diego was a municipal corporation of the fourth class, organized and existing under an act of the legislature of the state of California entitled 'An act to provide for the organization, incorporation, and government of municipal corporations,' approved March 13, 1883; that, at all times mentioned in the plaintiff's complaint herein, said plaintiff, John G. Capron, was a school trustee of the said city of San Diego, duly elected, qualified, and acting as such school trustee for the Third ward of the city of San Diego." The court also found, generally, that all the allegations of the complaint were true, and gave judgment for plaintiff. The defendants have appealed from the judgment, and also from an order denying their motion for a new trial.

On the appeal from the judgment, appellants contend that on the findings of fact the judgment should have been in their favor, "or the reason that the alleged contract was prohibited and made void by section 628 of the said act of the legislature of March 13, 1883, which provides that no officer of a city of the fourth class, organized under said act, "shall be interested in any contract to which the city is a party, and any contract contrary to the provisions hereof shall be void." Substantially the same point is made on the appeal from the order denying a new trial, by exception to the finding of the alleged contract; the evidence, without conflict, showing that the plaintiff was an officer of the city, namely, school trustee, at all the times mentioned in the complaint, as specially found by the court. But since this special finding of the official character of the plaintiff, so far as it affects the validity of the contract, is a controlling qualification of the general finding "that each and all the allegations of the complaint are true," the ground upon which the point is made sufficiently appears upon the judgment roll. I think the point is well taken on the appeal from the judgment and should be sustained. The alleged contract of the city with plaintiff was plainly prohibited and declared void by section 628 of the municipal corporation act of March 13, 1883. Therefore, there was no contract to support the subsequent proceedings, and consequently no valid assessment upon the lot of the defendants. *Manning v. Den*, 90 Cal. 610, 27 Pac. Rep. 435; *Burke v. Turney*, 54 Cal. 486; *Daly v. San Francisco*, 72 Cal. 154, 13 Pac. Rep. 321; *Dougherty v. Hitchcock*, 35 Cal. 512. The city council being prohibited from awarding the contract, the award

of it to the plaintiff was a nullity, and did not authorize its execution by the superintendent of streets, whose power to that end must come from a valid award of the contract by the city council.

Counsel for respondent contend, however, that the award of the contract was not a nullity, since the "qualifications and eligibility of bidders are matters to be passed upon and determined by the council, with the single limitation that they must reject all bids other than the lowest regular bid of any responsible bidder." The ready answer to all this is that the "limitation" mentioned is not the only limitation upon the power of the council. They are also required to reject all bids of city officers, and the express statutory penalty of transgressing this limitation is that the contract "shall be void."

It is further contended by respondent that the exclusive remedy for the error of the city council in awarding the contract to an officer of the city was by petition of remonstrance provided for in section 3 of the act of March 18, 1885, (St. 1885, p. 147,) as follows: "At any time before issuance of the assessment roll, all owners of lots or lands liable to assessment therein, who, after the first publication of said resolution of intention, [to do the work,] may feel aggrieved, or who may have objections to any of the subsequent proceedings of the said council in relation to the performance of the work mentioned in said notice of intention, shall file with the clerk a petition of remonstrance, wherein they shall state in what respect they feel aggrieved, or the proceedings to which they object. Such petition or remonstrance shall be passed upon by the said city council, and its decisions therein shall be final and conclusive." In *Manning v. Den*, supra, it was said, in relation to the effect of a failure to appeal to the council under section 11 of said act, "that which was void does not become valid by reason of a failure to appeal." By parity of reason it would seem that neither a void award of a street contract, nor a void contract upon such award, would become valid by failure to file a petition of remonstrance under section 3 of the act, and, if not, that all subsequent proceedings dependent upon a valid contract must also be invalid. Besides, the construction of the provision for petition of remonstrance contended for by counsel for respondent would necessarily result in nullifying all limitations of the power of the council in regard to contracts for street work. If, in cases of this kind, the lot owners have no other remedy than by petition of remonstrance, and the decision of the council upon such petition is final and conclusive, it surely follows that the council have power to award all street contracts to its own members, and then, upon this *coram nobis* process, to conclusively affirm its own award. The possibility of such a result could not

have been contemplated or intended by the legislature. Nor would it follow from a proper application of the provision of the Code. The provision authorizing a petition of remonstrance against the acts and proceedings of the city council was intended to be applicable only to acts and proceedings within the power of the council. Thus limited in its application, the provision has ample scope for operation and effect, without the possibility of any absurd consequence. The case of *Manning v. Den*, supra, fully answers the contention that the defendants had an adequate remedy by appeal from the subsequent acts and proceedings of the superintendent of streets.

It is further contended that the act of March 18, 1885, provides a complete system of street improvement, and was therefore intended to supersede and repeal all such parts of the municipal corporation act of 1883 as pertain to contracts for street improvements. While the act of 1883 embraces many more topics than that of 1885, both are general acts, and the latter does not expressly repeal any part of the former. Nor is it pretended that the giving of full effect to section 628 of the former act in this case would be inconsistent with any provision of the act of 1885. But it is claimed that section 628 of the former act is inconsistent with that part of section 5 of the act of 1885 which provides that under the circumstances therein specified a street contract shall be awarded to the owners of a majority of the frontage upon the street to be improved, since it would prevent such award of the contract in case any one of the owners of a majority of the frontage happened to be an officer of the city. The question whether this alleged inconsistency exists is not involved in this case, and need not be decided, for, conceding the alleged inconsistency, it could effect a repeal of the former act by implication only to the extent of the conflict. An implied repeal to that extent would only make an exception to the rule that no officer of a city shall be interested in a contract to which the city is a party, which exception might have been expressly incorporated in section 628 of the act of 1883. This case would still remain within the rule, and not within the exception. *Ex parte Smith*, 40 Cal. 419; *People v. Fair*, 43 Cal. 154. The repeal of statutes by implication is not favored. "In order for a subsequent act to repeal a former it should appear from the last act that it was intended to take the place of, or repeal, the former, or that the two acts are so inconsistent that force and effect cannot be given to both." *In re Yick Wo*, 68 Cal. 304, 9 Pac. Rep. 139; *Christy v. Board*, 39 Cal. 10. Full force and effect can be given to section 628 of the act of 1883 in this case without the slightest conflict or interference with any part of the act of 1885; and it does not appear that it was the intention of the legislature that any

part of section 628 of the former should be superseded by the latter. While the latter act regulates the manner in which contracts for street improvements shall be awarded, and the work shall be done, it does not purport to define or treat of the eligibility or disqualifications of contractors. Evidently, these were supposed to have been sufficiently provided for by former acts, viz. Pol. Code, §§ 920, 922, and the act of March 13, 1883, which are perfectly consistent with each other, although the latter contains provisions in addition to those found in the former. If the eligibility of contractors is at all affected by the latter act, as contended by counsel, it is so only by implication from an incidental contingency, which has not happened in this case, and probably was not contemplated by the legislature as liable to happen in any case. I think the judgment and order should be reversed, and the court below directed to render judgment on the findings for defendants.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the court below is directed to render judgment on the findings for defendants.

98 Cal. 390

RANDAL v. TATUM et al. (No. 14,391.)
(Supreme Court of California. June 3, 1893.)
LANDLORD AND TENANT—CONDITION OF LEASE—
BREACH—SURETIES—TENDER.

1. A lease provided that the same should not be assigned without the lessor's consent, and that, if default be made, the lessor might declare the lease forfeited. *Held* that, where the lessor accepted rent of the tenant under an assignment of the lease to which he did not consent, he could not afterwards declare the assignment void, and hold the lessee's sureties liable as for a breach of the lease.

2. Where the landlord refuses to accept rent from the tenant, though the offer to pay is not continued by a deposit of the amount, and notice thereof to the landlord, pursuant to Civil Code, § 1500, providing for the extinguishment of an obligation by a tender of performance, the offer of the tenant is a sufficient tender of performance under section 2839 to release the tenant's sureties.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by James B. Randal against H. L. Tatum and J. J. Bowen to recover rent of certain premises as sureties for the lessee. Defendants had judgment, and plaintiff appeals. Affirmed.

Pringle, Hayne & Boyd, for appellant. Langhorne & Miller, for respondents.

TEMPLE, C. Plaintiff appeals from an order granting defendants a new trial. The action is against sureties upon a bond given by the lessee, to recover rent for the period

of nine months, in the payment of which it is alleged default has been made. Defendants claim that the rent has been duly tendered, month by month, as it fell due, and therefore there has been no default. There was a covenant in the lease to the effect that the lessee would not assign without the written consent of the lessor; also a condition that, if default were made, the landlord might re-enter and take possession without previous notice or demand. The bond was conditioned that the lessee "shall in all things stand to and abide by and well and truly keep and perform the covenants, conditions, and agreements in the written lease contained on his or their part to be kept and performed at the time and in the manner and form therein specified," etc. The lease bore date July 17, 1882, and was for the term of 10 years. March 4, 1885, the lessor gave the tenants, George A. Davis & Co., written permission to assign to H. L. Tatum, who was one of the sureties, and is a defendant herein; and the lease was assigned in accordance with the permission on the same day. Tatum did not take possession of the demised premises, and it was evidently not expected that he would; for plaintiff testified that he understood that Davis was financially embarrassed, and that Tatum, as surety, desired the assignment, so that he might have no trouble with the creditors of Davis. June 9, 1885, Tatum assigned to H. G. Billings, who entered under the lease and took possession of the premises, and on the 18th of the same month assigned to his wife, E. A. Billings. The last two assignments were made without the consent of the lessor in writing or otherwise. E. A. Billings carried on the business of selling agricultural implements, which were stored on the demised premises which was a warehouse. The Gloster & Davis Implement Company was a copartnership composed of D. M. Gloster and M. F. Lauden. They acted as the agents of E. A. Billings in the sale of the goods kept by her at the warehouse. Davis had no interest in the business, but his name was retained to secure the good will of the business formerly conducted by George A. Davis & Co., and Davis was employed for a few months as clerk. The agents were not let into possession of the warehouse, but were furnished with duplicate keys, so that they could have access to it when necessary. It was understood that E. A. Billings retained possession, and H. E. Billings attended to her part of the business as her agent. Rents were paid by E. A. Billings regularly as they fell due until April 15, 1887, either by H. E. Billings, as her agent, or by the Gloster & Davis Implement Company, and by them charged to her. Receipts were given in the name of George A. Davis & Co., until February 15, 1886, and thereafter, until December, 1886, in the name of the Gloster & Davis Implement Company, and there-

after, until April, 1887, in the name of H. G. Billings, agent, and thereafter until September, 1887, in the name of D. M. Gloster.

The plaintiff claims, and the court found, that plaintiff supposed that Davis was a member of the firm of the Gloster & Davis Implement Company until April, 1887, when he admits that he was informed of the assignments and the claim of E. A. Billings. The rents sued for accrued after that time. H. E. Billings testified that he informed plaintiff of the facts as early as December, 1886, and the finding of the court that plaintiff did not know that Davis was not a member of the firm is not attacked on the motion for a new trial as unsupported by the evidence. The partnership styled the Gloster & Davis Implement Company was dissolved about March, 1887, and Gloster, in the nighttime, forcibly entered and took possession of the warehouse, ousting E. A. Billings, and kept possession until June, 1888, when E. A. Billings recovered possession through legal proceedings, in which she claimed under the lease from plaintiff. The rent due in April, 1887, was paid by D. M. Gloster, and also by E. A. Billings through H. G. Billings, agent. The first payment was by Gloster, and then Billings tendered the rent to Randal, showed him the lease and the various assignments, and was told by Randal, in ignorance that the rent had already been paid, to pay it to his clerk, which was done. Upon discovering the fact of the double payment, plaintiff offered to return to Billings the rent he had paid, and, when Billings refused to receive it, deposited the amount in a bank, and notified Billings of the fact in writing, stating that he had never recognized Billings except as the messenger of the Gloster & Davis Implement Company, or of D. M. Gloster, and did not wish to deal with him in the future in any capacity, adding: "The Gloster & Davis Implement Co., and D. M. Gloster, as the successor of said company, are the only ones whom I have and do now recognize as my tenants," etc. As a matter of fact, neither the company nor Gloster had any interest under the lease, or any color of right, but Billings was the real owner of the term, and had paid the rent up to that month, when Gloster forcibly took possession. He claimed, however, that the partnership had been in possession, and had paid the rent, and that he had succeeded to the rights of the partnership. Plaintiff claims that in accepting rents prior to April, 1886, he did so in ignorance of the fact that there had been a second assignment; but there is no question but that he was fully advised at that time. He nevertheless continued to receive rents from Gloster, and to refuse them from E. A. Billings, until August, 1888, when Gloster, having been sued by Billings to recover possession, ceased to pay. E. A. Billings, however, notwithstanding the refusal and the notice that plaintiff

would not recognize her or receive rents from her, continued month by month to tender the rent to plaintiff at the time it fell due under the terms of the lease, during the entire period in which the rent sued for accrued. Plaintiff invariably refused to accept it from her, saying that he would receive rents only from Gloster, because he was in possession. E. A. Billings did not, when plaintiff refused to receive her money in payment of rents, deposit the same or any of it in a bank or elsewhere, in compliance with the provisions of section 1500, Civil Code.

Motion for a new trial was made by defendants upon several grounds, including the claim that the findings are not sustained by the evidence, under which head many specifications are made. Also upon the ground that the judgment upon the findings should have been for defendants. One specification in respect to the insufficiency of the evidence was the finding to the effect that plaintiff, when he received rents from Billings as agent, and from the Gloster & Davis Implement Company, believed that Davis was a member of that company, and that Billings was agent of the company or of Gloster. It cannot be denied that the evidence on this point is conflicting. Upon the theory adopted by counsel on both sides, and by the court, it was most material, for it tended to show that the plaintiff had not recognized the lease as continuing after knowledge of the second assignment. Indeed, the findings consist solely of probative facts, except as to finding No. 1, to the effect that all the allegations of the complaint are true. This, therefore, stands in the place of a finding that E. A. Billings, when she tendered the rent, was not the owner of the term. Upon the theory adopted by all parties, this was the turning point in the case. Appellant's counsel say it is but a probative fact, tending to establish the ultimate fact, that plaintiff did not intend by the receipt of rent to release the sureties; but there was no issue in the case as to whether plaintiff intended to release the sureties. It was not claimed that he did, nor did it matter. It seems to me that, if he accepted rent from any one *eo nomine*, as he admits he did after knowledge of the second assignment, it was enough; but that was not the view adopted below. As we must presume, therefore, that the court below concluded that one of the findings upon which judgment was based was unsupported by the evidence, and has granted a new trial, the order ought not to be reversed here, at least unless we are convinced that the other findings will support the judgment.

As the plaintiff did not attempt to forfeit the lease, but, on the contrary, affirmed its continuance by bringing this suit to recover rents which accrued under it, he could not claim that the second assignee acquired nothing by the assignment. The lessor did

not have the option of declaring the assignment void, but it was his privilege, if he desired to avail himself of it, to forfeit the lease, and end the term; that is, if the condition continued after the first assignment. Whether it was renewed by the first assignment, made with the consent of the landlord, we do not, therefore, inquire. The lease, as we have seen, contained both a condition that the term might be forfeited if assigned without consent and a covenant not to assign. But an assignment in violation of the covenant was not absolutely void. If so, it would not be also a condition, for that would be the creation of an estate conditioned upon an impossible event. But, if authority is needed on such a proposition, it can be had. The point was expressly adjudged in *Paul v. Nurse*, 8 Barn. & C. 486. The effect of this decision is thus set out in *Smith, Landl. & Ten.* 117: "The landlord sued the assignee of the lessee for nonpayment of rent. The defendant pleaded that before the rent became due he had assigned to a third person, and to this the plaintiff replied that there was a covenant in the lease by which the lessee had covenanted for himself, his executors, administrators, and assigns, not to assign without the consent of the lessor, and that no consent had been given. It was held that this replication was bad on demurrer, since the covenant by the lessee did not render the assignment by the assignee void, and the liability of the defendant as assignee was at an end when he parted with the estate. The court intimated that the landlord's remedy might be on the covenant not to assign, meaning apparently that the lessee might be sued on it in respect of the assignment by the assignee, if this assignment could be brought within the terms of the covenant, by which the lessee only covenanted for himself, his executors, administrators, and assigns, that he, his executors or administrators, would not assign." In *Webster v. Nichols*, 104 Ill. 160, it is said: "The clause in the lease providing that the premises shall not be assigned without the written consent of the lessors is clearly for the benefit of the lessors. It does not render the assignment, when otherwise made, absolutely void, but voidable only, at the option of the lessors or their representatives. But even if the lessors, instead of here attempting, as they now are, to enforce rights under an assignment otherwise made, were attempting to have such an assignment declared void, they could not succeed. They have knowingly accepted rent from Abiah G. Webster since she has been in possession as purchaser from Gage, and this concludes them, for it is well settled that 'any act done by a landlord knowing of a cause of forfeiture by his tenant, affirming the existence of the lease, and recognizing the lessee as his tenant, is a waiver of such forfeiture.'" Although in that case the court

uses the expression that the landlord has the option to avoid the assignment, the whole quotation shows that the meaning is that the landlord may end the term. The question was whether the assignment was valid. The landlord not only refused to consent to the assignment, but refused to recognize the assignees as her tenants, and received rent from them only as subtenants. In *Den v. Post*, 25 N. J. Law, 289, the tenant having assigned in violation of such a covenant, the landlord re-entered and took possession. There was no stipulation that the landlord might so enter on the breach of the covenant. It was held that the assignee could recover possession from the landlord, who contended that the assignment was void. The court said: "No ejectment can be maintained by the landlord for a mere breach of the covenant not coupled with a proviso for a re-entry. His only remedy would be an action for breach of covenant. Neither the lease nor the assignment is avoided by reason of the breach of covenant." *Wilson v. Phillips*, 2 Bing. 13; *Platt*, Cov. 424.

Plaintiff's counsel do not really contend that the assignment was void, and did not pass the term. Their contention seems to be, although not so expressed, that the sureties cannot rely upon an offer to perform, made by one who could have no rights under the lease save by a violation of its covenants. But the first question here is, has there been a failure on the part of the tenant to perform the covenant to pay rent? If E. A. Billings was the legal owner of the term, she was the proper person to pay the rent, and if her offer was performance there has been no breach of that condition or covenant. Has there been then such breach of the covenant to pay rent as will make the sureties liable? Admitting that E. A. Billings was the owner of the term, (and we have concluded she was,) there seems hardly room for doubt upon this point. Leaving out of view any right plaintiff may have had to avoid the lease for the violation of the covenant not to assign, could he have ousted the tenant because she did not deposit the money in a bank, and notify him of the fact? No one, I think, would have the hardihood to contend that he could. If he could not, then it must follow that there has been no breach of the covenant to pay rent, and the sureties are not liable. We are not now treating of a tender which would extinguish a debt, nor inquiring whether there has been such a tender of money due as will relieve sureties from liability, but whether there has been a breach of a covenant. Plaintiff's contention is founded upon the wording of our Code, which he claims has changed the common-law rule. It is admitted that, independently of the lease, an offer to pay and a refusal by the creditor will release the sureties, although the tender were not kept

good. Keeping this common-law rule in mind, and that the Code is, in general, intended to declare existing rules, I think it plain that the Code has not changed the rule in this respect. Section 2839, Civil Code, is as follows: "Performance of the principal obligation, or an offer of such performance, duly made, as provided in this Code, exonerates a surety." It is claimed that the phrase "duly made as provided in this Code," refers to section 1500, in regard to tender, and necessitates a deposit, or it will not amount to an offer. Section 1500 does not provide what shall be sufficient as an offer of performance of a contract. It is an advance upon the common-law rule that a debtor must keep his offer good, but cannot extinguish the obligation in providing a mode for the absolute extinguishment of the debt. The other sections of the chapter define what shall constitute such performance or offer to perform as will prevent the person making the offer from being in default in the performance of his contract, and will give a right of action in case performance is not accepted. But section 1500 itself, read in the light of the prevailing rule, clearly shows that the deposit is no part of the offer. The offer shall have a certain effect if the deposit is made. This is made more obvious by the other provisions in regard to an offer. Section 1502, for instance, provides that the title to the thing offered passes to the creditor if the debtor at the time signifies that such was his intention. Section 1504: The offer of payment duly made, though the title of the thing offered be not transferred, stops the running of interest. Section 1511: As to what will excuse an offer. Certainly the existence of such reasons would not extinguish an obligation to pay money. Section 1515: A refusal is equivalent to an offer of performance. It could not be equivalent to an offer followed by a deposit as provided in section 1500. Even if the obligation of defendants must be regarded as that of sureties for the payment of a debt, still I think the tender sufficient to discharge the sureties. I recommend that the order be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(4 Cal. Unrep. 49)

PETERSEN v. TAYLOR. (No. 15,116.)¹

(Supreme Court of California. June 12, 1893.)

ACTION FOR TRUST FUNDS—SUFFICIENCY OF EVIDENCE—LIMITATIONS—ACCRUAL OF CAUSE OF ACTION.

1. Plaintiff alleged that defendant collected money belonging to another, and agreed to hold it till a dispute as to its ownership was settled, giving a written acknowledgment that

¹ Reversed in banc. 34 Pac. 724.

he so held it; that such dispute was settled; and the assignment of claimants' rights to plaintiff. Defendant's answer admitted receipt of the money, but denied plaintiff's other averments. Defendant also pleaded a former judgment on the same cause of action. Plaintiff put in evidence defendant's written acknowledgment and the assignments to himself, and one of his assignors testified that defendant had not paid the money. Defendant did not put in evidence any memorandum of settlement, nor the judgment pleaded by him. He admitted his signature to the acknowledgment, but said that he had no memory of the matter, and he failed to contradict any of plaintiff's testimony. *Held*, that a verdict for defendant was not justified.

2. A certificate that the maker thereof holds certain money to abide settlement of disputes as to its ownership creates an express trust, with no definite time fixed for its termination by payment, and hence limitations will not run against a claim on such certificate until the true owner has been ascertained, and a demand made by one showing a right to the money.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by H. M. Petersen against Joseph W. Taylor. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Nagle & Nagle, for appellant. J. C. Bates, for respondent.

HAYNES, C. Appeal from judgment and from an order denying a new trial. The complaint states three causes of action, the second and third, however, being different counts upon the same matter. The first cause of action is to recover \$125, moneys alleged to have been received by defendant for the use of plaintiff on the — day of December, 1887. The first count on the second cause of action is for moneys had and received, amounting to \$655, and the second count is for the same sum, alleging the facts substantially as follows: That on July 2, 1884, defendant collected from the city of San Francisco said sum on two certain judgments, one in favor of B. Bonnett, and the other of C. H. Parker; that defendant agreed to hold said money until certain disputes should be settled between B. Bonnett and Eli Bonnett as to which was entitled to the money, whereupon defendant signed and delivered to Eli Bonnett, for the benefit of all parties, the following paper: "This is to certify that I have the sum of \$655, collected from the city and county of San Francisco in the suits of B. Bonnett and C. H. Parker against the city and county of San Francisco, claimed by Eli Bonnett, but attached in the suits of Petersen vs. Bonnett, as the money of B. Bonnett, to abide settlement or suit against me to determine the ownership of said sum. [Signed] Jos. W. Taylor. July 2, 1884." It was further alleged that all disputes about the ownership had been settled, and all claims of Eli and B. Bonnett there-to had been sold and assigned to plaintiff, and on or about December 1, 1887, plaintiff

notified defendant thereof, and demanded payment. To the first cause of action the defendant answered, denying the facts alleged, and pleaded the statute of limitations, and made a like answer and plea to the first count of the second cause of action. To the second count he answered, admitting that on July 2, 1884, he collected in his own right in the cases mentioned \$12,000, but denied that he agreed to hold the \$655 until certain or any disputes should be settled between the Bonnetts; admitted that he signed and delivered the writing set forth in the complaint; alleged that all disputes concerning the same were settled July 8, 1884, by release in writing, as follows: "We have this day settled all our affairs, and the judgments in the actions of B. Bonnett vs. The City and County of San Francisco, and C. H. Parker vs. The City and County of San Francisco, belong to Jos. W. Taylor. [Signed] B. Bonnett. Eli Bonnett. Joseph W. Taylor." He also denied the assignment of the claims of said money to plaintiff, or that anything was due under it, and pleaded the statute of limitations. For a separate defense defendant pleaded two several judgments in his favor against the plaintiff in actions brought by the plaintiff against him upon the same cause of action. The cause was tried without a jury, findings were waived, and judgment went in favor of defendant for costs.

Appellant contends that the evidence does not justify the decision, specifying several particulars. As to the first cause of action the testimony was confused, indefinite, and conflicting. We cannot say that the conclusion reached by the court as to that cause of action is not justified by the evidence. As to the remaining cause of action we come to the opposite conclusion. Plaintiff put in evidence the paper set out in the complaint, and the several assignments from Eli and B. Bonnett indorsed thereon, showing that he had the sole ownership thereof, and of all moneys mentioned therein. This, of itself, made a prima facie case for the plaintiff; but, in addition, B. Bonnett (called by the plaintiff) testified to the facts and circumstances of the transaction, and that said sum had not been paid. The defendant did not put in evidence the memorandum of settlement made by him with the Bonnetts, nor give any testimony tending to show that it included the money in question, nor did he put in evidence either of the judgments pleaded in bar of the action. These averments in the answer are deemed denied, and the burden was on defendant to prove them. Neither the answer nor the copy of any paper therein is evidence for any purpose. The defendant was examined as a witness in his own behalf, and admitted his signature to the paper set out in the complaint, and said, in substance, that he knew nothing about the suits mentioned in it; did not remember that he had anything to do with them, or

whether the money was attached in his hands. This was all the testimony on the part of the defendant as to either count of the second cause of action. He did not in any manner refer to the testimony of B. Bonnett, nor contradict nor explain any of the facts or circumstances testified to by him, and which, with the written instrument referred to, was quite sufficient to require a judgment for the plaintiff. Nor does it appear that this cause of action was barred by the statute. The evidence discloses the fact that a contract for street work was assigned to defendant by Eli Bonnett, upon which defendant had advanced some \$4,000; and when the money was collected by defendant there was a balance in his hands of about \$3,500. An attachment had been served on \$655 of it, based upon a claim that it, the money attached, belonged to B. Bonnett. Defendant paid Eli Bonnett the balance in his hands except \$655, and executed the paper set out in the complaint. This money was retained by defendant with the consent of Eli Bonnett, and, as the testimony shows, actually belonged to him, though claimed by Petersen, the plaintiff here, as well as the defendant, to belong to B. Bonnett, against whom the attachment was issued. Whether the circumstances under which defendant originally received the money constituted him a trustee or not, the instrument signed by him constituted an express trust, with no definite time fixed for its termination by payment. The statute therefore did not run until notice of the settlement and demand of payment. *Wright v. Ross*, 36 Cal. 433. By the terms of the instrument he was a mere custodian of the money until the true owner was ascertained, and not until a demand made by one who showed a right to the money was he in default; nor is he chargeable with interest prior to the date of the demand and refusal. The judgment and order appealed from should be reversed, and a new trial granted as to the second and third causes of action only.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial is granted as to the second and third causes of action only.

4 Cal. Unrep. 8

APPLEBY v. JANSEN'S HEIRS et al. (No. 15,121.)

(Supreme Court of California. June 7, 1893.)

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by William Appleby against the heirs and assigns of Charles J. Jansen, the German Savings & Loan Society, and others, to set aside a sale of a leasehold interest

claimed by plaintiff in certain land, and for an accounting as to the rents and profits. From a judgment for defendants, entered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Henry I. Kowalsky, for appellant. Jarboe & Jarboe and Robert H. Countryman, for respondents.

SEARLS, C. This is an appeal from a final judgment in favor of the defendant the German Savings & Loan Society. The action is brought for the purpose of setting aside a sale of a leasehold interest held by the plaintiff in a lot of land situate in San Francisco, and for an accounting as to the rents and profits. The sale sought to be set aside was made January 24, 1876. Plaintiff claims that he was defrauded into making the sale. The only defendant served, so far as appears from the record, was the German Savings & Loan Society, which defendant demurred to the complaint upon the grounds (1) that the complaint did not constitute a cause of action against said defendant, etc.; (2) that plaintiff's cause of action was barred by the statute of limitations, using apt terms to designate the sections of the statute under which the bar occurred. The demurrer was sustained, and judgment entered in favor of defendant. The complaint was probably prepared by the plaintiff, as he did not appear by attorney. To quote from the pleading, for the purpose of showing its utter insufficiency, would seem unkind to plaintiff, and I shall content myself with saying (1) it does not state a cause of action against the defendant; (2) the complaint shows upon its face that the cause of action is barred by lapse of time,—for which reasons the judgment appealed from should be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

FISHER v. HOPKINS. (No. 13,171.)
(Supreme Court of California. June 8, 1893.)
REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

Where, on appeal, the evidence is found sufficient to justify the findings of the trial court, the judgment of that court will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; James G. Maguire, Judge.

Action by Ann Fisher against Peter Hopkins for the conversion of certain household furniture. Judgment for plaintiff. Defendant appeals. Affirmed.

James F. Smith, for appellant. T. J. Crowley and P. J. Morgan, for respondent.

VANCLIEF, C. It is alleged in the complaint that while plaintiff was the owner, and entitled to the possession, of certain

personal property, (household furniture,) the defendant wrongfully converted the same to his own use, to the damage of the plaintiff in the sum of \$2,000. The defendant denies the alleged title of the plaintiff, and justifies the taking and alleged conversion of the property under writs of attachment and execution against one Minerva Button, issued to him as sheriff, alleging that the furniture in question was the property of Minerva Button. The case was tried by the court, and judgment rendered in favor of the plaintiff for \$951.95 and costs. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

The only grounds upon which a reversal of the order and judgment is asked are that the findings of fact are not justified by the evidence. The plaintiff claims to derive her title to the property from Minerva Button, through an absolute bill of sale and delivery of possession from Mrs. Button to Josiah Lean, Robert Peoples, and Lydia Peoples, executed prior to the issuance of the writs by virtue of which the defendant took and sold the property, and a bill of sale from Lean and Peoples to the plaintiff. The findings excepted to relate principally to the considerations paid for the bills of sale, and to the questions whether there was an actual and immediate delivery of the property, followed by a continuous change of possession. After a careful examination of the 200 pages of conflicting evidence contained in the statement on motion for a new trial, I think, under the well-settled rule in such cases, that the evidence is sufficient to justify all the findings, and that the judgment and order should be affirmed.

We concur: HAYNES, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

98 Cal. 431
COWGILL v. DINWIDDIE et al. (No. 15-161.)

(Supreme Court of California. June 8, 1893.)

CLAIMS AGAINST DECEDENT'S ESTATE—TIME FOR BRINGING SUIT.

Code Civil Proc. § 1496, requires an executor to indorse on a claim its acceptance or rejection, and, if not done within 10 days, provides that the neglect may, "at the option of the claimant," be considered a rejection. Plaintiff's claim was presented January 16, 1891. Her attorneys were told that nothing had been done with it, and on February 7, 1891, were told they could consider it rejected. It was in fact indorsed "Rejected" February 2, 1891, though the fact was concealed from plaintiff. Held, that plaintiff had the right to consider the claim rejected February 7, 1891, and an action thereon within three months from that date was within Code Civil Proc. § 1498, providing for a suit on a claim within three months from its rejection.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by Louise Cowgill against J. L. Dinwiddie and Daniel Brown, executors of Thomas Rochford, deceased, to recover on a claim against decedent. Judgment for plaintiff. Defendants appeal. Affirmed.

Haskell & Meyer, for appellants. Lippitt & Lippitt, for respondent.

SEARLS, C. Appeal from a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial. The action was brought to recover \$1,000 upon an instrument in writing executed by Thomas Rochford, deceased, on the 3d day of December, 1886, to be paid by his executors after his death, to the plaintiff, provided said sum is not left for her use in his last will. The demand was presented to the executors January 16, 1891, and, as plaintiff avers, rejected on the 7th day of February, 1891. Suit was brought within three months thereafter. The answer denies that the claim was rejected on the 7th day of February, 1891, but avers that it was so rejected February 2, 1891, and claims that the action was brought within three months thereafter. The principal contention at the trial seems to have been over the question of the rejection of the claim. The errors assigned by appellants are as follows: (1) That the findings in this case are contrary to the issues and admissions of the pleadings; (2) that the findings do not respond to all the issues; (3) that the findings contain evidence, instead of ultimate facts. The three objections are in their essential elements so blended that they may properly be considered together, and the findings of fact which illustrate them may be summarized in part, and stated at length, where deemed necessary, as follows: (1) Notice to creditors was given by defendants, as executors, September 29, 1890, in which such creditors were directed to present their claims to them at the law office of Haskell & Meyer, etc., within 10 months. (2) Plaintiff's claim was presented on January 16, 1891, by her attorneys. (3) That thereafter plaintiff's attorneys called several times, and made inquiry as to action by the executors on the claim, and were told that no action had been taken thereon. (4) "That on the 7th day of February, 1891, Frank K. Lippitt, one of the attorneys for the plaintiff, called again at the office of said Haskell & Meyer to learn what action had been taken by said executors, and was told by one of the attorneys for said executors that he might consider the claim rejected on that day, and that plaintiff commenced this action within three months from the said 7th day of February, 1891." (5) "That on said 7th day of February, 1891, the said attorneys-

for said defendants had the said claim in their said office, and that the same in fact had been indorsed 'Rejected' on February 2, 1891." "That the said attorneys refused to allow the attorneys for plaintiff to see the claim, with the indorsement of the rejection thereon, or to return the same to them, though the same was demanded of them." It will be seen by the foregoing that the court found that the claim had in fact been indorsed "Rejected" on February 2, 1891. The additional facts, as found, were doubtless stated for one or two reasons, viz. either to show that, while secretly indorsed as rejected on that day, the indorsement was not operative as a rejection, because withheld from the plaintiff, or because, while in fact rejected February 2, 1891, defendants were estopped by the acts of their attorneys, who misled plaintiff, from setting up the rejection as of an earlier date than February 2, 1891. It will be observed that the fact of rejection is admitted by the pleadings. The only question in issue is the date.

Section 1496 of the Code of Civil Procedure requires the executor or administrator to whom a claim is presented to indorse thereon his allowance or rejection, with the day and date thereof. It does not, in terms, specify the time within which this must be done. If not so indorsed within 10 days the "refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day." As this is optional with the claimant, he need not so deem it unless he chooses. *Bank v. Shoemaker*, 67 Cal. 148, 7 Pac. Rep. 420. A claimant may well suppose, in many instances, that his demand, although not allowed within 10 days, will ultimately be approved, and hence that an action to establish its validity will be unnecessary. Whatever the motive may have been, it is made evident by the inquiries of plaintiff's attorneys, as late as February 7th, that they had not elected to deem the claim as rejected on the tenth day after its presentation. When a claim is allowed by the executor or administrator, and approved by a judge of the superior court, it must be filed in the court within 30 days, but as to rejected claims there is no such provision. Manifestly, it is the duty of the executor or administrator, on demand, to return a rejected claim to the claimant, with his official action indorsed thereon. Such indorsement is evidence of his action, necessary to the claimant in bringing and maintaining an action to establish the claim; and if he secretly rejects the claim, and refuses to deliver it to the claimant, or to inform him of the action taken thereon, it operates, or may operate, as a fraud upon the claimant, and becomes inoperative as a rejection. In *Steward v. Hinkel*, 72 Cal. 191, 13 Pac. Rep. 494,—a case in which the executors had rejected a claim, and thereafter refused to give the claimant any information as to the action taken,—

Temple, J., in a concurring opinion, held the following language: "But in this case, inasmuch as the executors not only failed to inform the creditor of their action, but refused to do so, we may regard the case as though they had not acted at all. * * * Secret action, which the creditor has no means of knowing, is equivalent to no action at all." Under the notice given by the executors the claim was properly presented at the office of Haskell & Meyer. *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. Rep. 375; *Roddan v. Doane*, 92 Cal. 555, 23 Pac. Rep. 604. Allowing or rejecting a claim is an official act, which the attorneys of the executors had not the power to perform; but the delivery of a rejected claim to the owner thereof, upon demand, when in their possession, was a mere ministerial act, which, as attorneys of the executors, they had a right to perform, and their action therein bound the executors. I am therefore of opinion that on the facts, as presented in this case, there had not been, in contemplation of law, any rejection of the claim in question up to the 7th day of February, 1891. The apparent rejection on February 2d, having been secret, and knowledge thereof having been denied to plaintiff by a refusal to deliver to her the claim, or to furnish information, might be disregarded by the plaintiff. Under such circumstances it was, under the doctrine of *Bank v. Shoemaker*, 67 Cal. 148, 7 Pac. Rep. 420, the right of plaintiff to elect to consider the claim as rejected, as she did so on the 7th of March following. In the case versus *Shoemaker*, cited supra, the claim was presented to the executor October 19, 1881, and the action was commenced July 1, 1882. The complaint averred the presentation; that the executrix "did refuse and neglect, for the space of ten days thereafter, to indorse her allowance or rejection thereon, and has ever since so refused and neglected." Wherefore, the plaintiff demands judgment." A demurrer was interposed to the complaint setting forth the bar of the statute under sections 1496, 1498, Code Civil Proc. The demurrer was sustained by the superior court, and final judgment rendered in favor of defendant. On an appeal to this court, respondent contended that, if plaintiff had elected to consider its claim as rejected on the tenth day after presentation, then the action, not having been brought within three months thereafter, was barred by section 1498, Id. (2) That if it did not so elect, as there was no allegation of an actual rejection of the claim, the action could not be maintained, because never rejected. The contention of appellant was that, when the executor fails to avail himself of his privilege to accept or reject a claim in 10 days after presentation, the claimant may at any time thereafter elect to regard such nonaction as rejection, and it is only when he does so that the bar provided for by section 1498 is set in motion. From the decision reversing the case, it will be seen the court upheld the

position of the appellant. The case, as reported, contains no full statement of facts, but by reference to the record on file the questions orally presented are readily attained. The doctrine of that case would seem to comport with justice, and does no violence to the provisions of the Code. Section 1498, which requires an action to be brought upon a claim within three months after its rejection, otherwise it shall be barred, is a statute of limitations, in favor of, and in the interests of, estates. It tends to an early settlement, and to the rejection of stale claims. The representative of the estate always has it in his power to set the statute in motion by an early rejection of claims presented to him. If he fails to do so, it would seem hardly just to a claimant who has not exercised his option, at the end of 10 days, to consider the claim rejected, to hold him to have set the statute in motion as of that date, when he afterwards brings an action on the claim.

No action can be maintained on a claim until it is first presented, save in the excepted cases. Section 1500, Code Civil Proc. The statute does not, in terms, hold that the executor or administrator must reject a claim before an action can be maintained upon it. Under what is believed to be the rule established by *Bank v. Shoemaker*, it is held that a claimant who has not elected to consider his claim rejected upon the tenth day after presentation may subsequently thereto, and at any time before official action by the executor or administrator thereon, elect, at his option, to consider his claim as rejected, and may, under section 1498, bring an action thereon within three months thereafter, and, in the absence of other proof, suit brought is conclusive evidence of such election, and notice thereof.

In this view of the case the findings are not contrary to the issues, and they respond to all the issues made in the case. What is claimed by the appellants as a statement of evidence, instead of a finding of the ultimate facts in the case, as to the refusal of defendants' attorneys to deliver the rejected claim to the attorneys of plaintiff, etc., is but a statement of such collateral facts as show that the apparent rejection of the claim on the 2d day of February, 1891, was of no effect, because a knowledge thereof was not, on demand, furnished to the plaintiff. For that purpose they were ultimate facts, and the declaration that the plaintiff might consider the claim as rejected on the 7th of February was mere surplusage, which, while, in the view we have taken of the case, immaterial, certainly did no harm to the appellants. The conclusion of law drawn from the facts, that the claim had never been actually rejected, was correct, for reasons hereinbefore given, and the statement that it "is deemed to have been rejected on the tenth day after presentation," instead of at the election of the plaintiff, is of no impor-

tance as to the validity of the judgment. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

4 Cal. Unrep. 19

MALIC v. FOX et al. (No. 14,883.)

(Supreme Court of California. June 9, 1893.)

ESTOPPEL OF PRINCIPAL TO DENY POWER OF AGENT—GUARANTY.

A bond given to the owner of a boat, conditioned to pay for all goods delivered to F., as steward of the boat, was executed by the sureties' bookkeeper without authority. In an action thereon by one who had furnished goods to F., it appeared that the bond was executed June 15th; that plaintiff had commenced furnishing goods June 1st, on F. agreeing to pay on the 15th of each month, and had furnished goods to the value of \$100 before the bond was executed; that on June 30th, when \$237 was due, and F. refused to pay, plaintiff declined to furnish more goods, but afterwards, when F. showed him the bond, he continued to let F. have goods, but made no inquiry of the sureties as to the genuineness of the bond until after the goods sought to be recovered for were furnished. *Held*, that plaintiff did not deliver the goods to F., relying on the bond, "in good faith, and without ordinary negligence," within the meaning of Civil Code, § 2334, providing that only in such case is "a principal bound by the acts of his agent under a merely ostensible authority."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Charles M. Malic against C. G. Fox, W. F. Witzemann, and John J. Staiger. Plaintiff had judgment, from which, and an order denying a new trial, defendants Witzemann and Staiger appeal. Reversed.

Henry N. Clement, for appellants. W. H. Barrows, for respondent.

VANCLIEF, C. Action to recover from the defendant, Fox, and his guarantors, Witzemann & Staiger, copartners, the sum of \$431.29, for goods sold and delivered to Fox by plaintiff's assignor, one H. A. Smith, who did business under the name of "Smith's Cash Store." The action is founded upon a written guaranty of Witzemann & Staiger to the San Francisco & North Pacific Railroad Company, a corporation, which owned and navigated the steamer James M. Donahue, in connection with its road, to transport passengers across the bay of San Francisco, given under the following circumstances: In the latter part of May, 1889, Fox applied to the railroad company for the position of steward of the steamer James M. Donahue, with the privilege of keeping a restaurant thereon for passengers and employes, and was informed by the agent of the company (H. C. Whiting) that he could be appointed to the position only

on the condition that he would give a bond with satisfactory sureties that he would pay all bills contracted by him for goods and supplies for said restaurant. Upon his promise to give the required bond or guaranty, Fox was appointed to and took the position June 1, 1889, but did not give the bond or guaranty until June 15, 1889, when he gave the following instrument: "We, the undersigned, do hereby severally and jointly guaranty the full and complete payment of all bills, dues, and claims arising from the purchase of goods, wares, and merchandise by C. G. Fox, by himself or order, to be used on or for the steamer James M. Donahue, for boarding passengers or employes of the San Francisco and North Pacific Railroad Company; and we severally agree to pay all bills contracted by said Fox or his agent for goods, wares, and merchandise delivered on the steamer James M. Donahue, to be used by him or others as aforesaid, upon presentation to us, or either of us; and we further agree and guaranty that the said steamer James M. Donahue, and the said San Francisco and North Pacific Railroad Company, owners thereof, shall be forever held harmless by reason of any purchase or contracts made by said Fox or his agents for the purposes before named. In case said Fox shall neglect or refuse to pay any or all the bills so contracted, we hereby agree severally to pay the said bills promptly upon presentation, according to the terms of said purchase. Witness our hands, this 15th day of June, A. D. 1889. Witzemann & Staiger, H., 417 East street. Witness: W. B. Hayward." The defendants, Witzemann & Staiger, denied all the material allegations of the complaint, including the allegation that they executed the guaranty. But the court found for plaintiff, and rendered judgment accordingly for the full sum demanded. Witzemann & Staiger appeal from the judgment, and from an order denying their motion for a new trial.

Counsel for appellants contend that the finding that Witzemann & Staiger executed the guaranty is not justified by the evidence. The undisputed evidence shows that the guaranty was signed and delivered to Fox by W. B. Hayward, the bookkeeper of Witzemann & Staiger, in their absence, without their knowledge, and without authority in writing, or any express authority whatever. It is claimed by respondent, however, that, by their acquiescence, Witzemann & Staiger impliedly ratified the execution of the instrument by Hayward; and whether he did so, as to plaintiff's assignor, Smith, is the principal question. "It is the general rule that the act of ratification must be of the same nature as that which would be required for conferring the authority in the first instance." If written authority is required by the statute of frauds, the ratification must be in writing, (Mechem, Ag.

§ 136;) otherwise, the statute of frauds may be evaded. And the only cases constituting exceptions to this general rule (if even they may be called exceptions) are those in which, although the assumed agent had no original authority, the alleged principal is estopped from denying such authority by reason of his acquiescence, acts, or words indicating ratification, upon which others have relied and acted in good faith and with ordinary care. These are causes of implied or ostensible ratification, to which the principle of estoppel in pais is applicable on the same grounds as to cases of original ostensible authority. In both these classes of cases the effect of the estoppel is equivalent to conclusive proof of original authority, (Mechem, Ag. § 107;) and the authority thus established by an ostensible ratification is an ostensible authority in the sense of section 2334 of the Civil Code, which is as follows: "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without ordinary negligence, incurred a liability, or parted with value, upon the faith thereof." Conceding that the conduct or acquiescence of Witzemann & Staiger was such as to justify a finding of the ostensible authority of Hayward to execute the guaranty, (which is doubtful,) did Smith—plaintiff's assignor—part with his goods, relying in good faith upon such authority, and without ordinary negligence on his part? Smith commenced selling to Fox the goods sued for on June 1st, and before the execution of the guaranty had sold him goods to the value of over \$100. Smith and his clerk, Murray, testified that credit for these goods was given because they had been informed that Fox could not take his position of steward without having given a bond to the railroad company "for the faithful performance of his duties." The agreement with Fox was that he should pay Smith on the 15th of each month. On the last day of June the bill, then amounting to \$237, was presented to Fox, who failed to pay it. Smith then refused him further credit, and presented his bill to the railroad company, whose agent told him that "Fox was under bonds to pay the bill himself, and they didn't wish to have anything to do with it," but if he would get an order from Fox they would pay the June bill. On July 3d, Smith asked Fox for an order on the railroad company, but he indignantly refused to give it, saying he would pay his bills on July 15th, or that his bondsmen would. He then showed Smith a copy of the bond he had given the railroad company. As to this, Smith testified: "That was on the 3d day of July, I believe. I had refused to give him (Fox) any more goods at that time. On the strength of that bond I continued giving him goods until the 15th of July." On July 15th, for the first time, Smith called

on Witzemann & Staiger, at their place of business, to inquire whether they were responsible for Fox's bills. Of this he testified: "I saw Mr. Staiger. * * * Introduced myself to him. Told him who I was. * * * Told him I was supplying goods to a man by the name of Fox, on the steamer Donahue. Asked him if it was all right, —whether he would pay the bill when it became due. * * * I gave him to understand that I would rely upon that bond. I said to him * * * that I considered the matter safe as long as they were on the bond, and that was all I wanted to know, —if Fox was short, that they would make it good. He made no response, but he was passing from the street at the time. He shook his head in an affirmative manner, although he made no response." It appears that Fox absconded on that day, (July 15th,) and that Smith sold him no goods after July 13th. On cross-examination, Smith said: "I never went to see Staiger or Witzemann * * * at any time prior to July 15th. I first went to see the railroad company on the 3d of June. * * * I did not ask to see the bond at the railroad company's. * * * He (Fox) showed me the bond, and I told him all right; go ahead; that it was a good bond, provided it was genuine. * * * The one I saw was a type-written copy, with written signatures, with the letter 'H.' 'Witzemann & Staiger. H.' * * * I had seen the signature of the firm, perhaps. Couldn't say that I recognized it. I should suppose, from the letter 'H,' that it was not signed by the firm. The reason I did not go and see Staiger when I saw that the bond was not signed by the firm was that I was very busy, and hadn't time to go at once. I should have done so, of course, but I delayed from time to time, thinking that, as long as I got there (at the railroad office) before he (Fox) drew any part of his money, that he couldn't get it, and that I was safe. * * * I accepted his assurances that the bond was genuine for the time being, excepting, however, that before the money was paid over, during the next month, I would see for myself. I had never been accustomed to dealing with this class of bonds before. * * * I think it is a little out of the regular course for this company to do this sort of business. It was a new arrangement with them, perhaps." Upon re-examination he said: "I had seen nothing about the bond that aroused my suspicion in regard to it. I simply wished to go and see Witzemann & Staiger to confirm its genuineness. * * * I never talked with Mr. Hayward about the bond previous to July 15th."

Martin Murray, who, to say the least, seems to have been somewhat reckless in his statements, testified that he was employed in Smith's Cash Store during the

months of June and July, and knew when Fox commenced to buy goods from that store for his restaurant on the steamer Donahue; that, about a week after he commenced buying, Fox "brought in a copy [of the bond] into the store, [it was not signed until a week later,] and, knowing the man was devoid of veracity, I didn't take any interest in his statement, and I advised Mr. Smith to go and see Mr. Whiting; and I, in the mean time, consulted with the members of the Ocean Market, [Witzemann & Staiger.] I went down after he had purchased some stores. * * * We took all precautions, both myself and Mr. Smith, as I told Mr. Smith he was dishonest. * * * Mr. Smith saw Mr. Whiting, and I saw Mr. Staiger. 'Well,' I says, 'Mr. Staiger, I understand,' says I, 'that you are on the bonds of Mr. Fox.' He says, 'Yes.' Says I, 'Well, now,' says I, 'what am I to understand by that bond?' 'Well,' he says, 'we have given security for all the goods delivered upon that boat in the steward's department.' * * * I told Mr. Smith exactly the words Mr. Staiger told me, and, as I said before, we took every precaution. * * * We acted throughout with the understanding that Mr. Staiger was on the bond, and had also seen copies of it, * * * and it was with that understanding that we sold the goods to Mr. Fox, as we did not consider him responsible. * * * I know he owes me a hundred dollars from another time. I know he came here from Australia. He left his wife there, and he has a very bad record." Being asked when he had the conversation with Mr. Staiger, above detailed, he again answered that it was seven or eight days after Fox commenced to purchase the goods. It appears that Fox ordered the first lot of goods on June 1st, and that it was delivered on June 3d; so that, if Murray's memory is reliable, his talk with Staiger must have been at least five days before the guaranty was signed. Mr. Staiger, however, denied having any such conversation with Murray, and further testified that he did not know that this firm's name was signed to the guaranty by Mr. Hayward until he was so informed by Mr. Smith on July 15th; that although he had been told by Hayward, about the last of June, that he (Hayward) had signed that bond, he understood him to mean that he had signed his own name, and not that of Witzemann & Staiger. Mr. Hayward testified: "At the time I signed it, I thought it was a mere matter of form. * * * It had been in my desk for two or three days. I knew Mr. Staiger had not signed it, but I didn't know why. I knew Mr. Staiger had told Mr. Fox, in my presence, that he would be willing to sign a bond. * * * I assumed it would be all right for me to sign. I didn't speak of it to Mr. Staiger until some time afterwards,—I guess, ten days or two weeks. * * * When I did tell him I merely said I had signed that bond. That is all

I said. I naturally supposed he knew I signed it in the name of the firm. I didn't go into any explanation particularly in regard to it. I supposed he thought so at the time." Mr. Staiger testified that he had promised Mr. Fox to sign the bond, provided he would get other sureties to go on it; but when Fox failed to get any other surety he refused to sign it, except on the condition that Fox would assign his salary as steward, in advance, as collateral security, which Fox had declined to do.

The court found that Witzemann & Staiger had no notice until July 15th that Smith was selling goods to Fox upon the faith of their guaranty, nor that Smith looked to them for payment in case Fox failed to pay. It is clear that Witzemann & Staiger are not liable for the goods sold to Fox before the guaranty was signed, as it is not retroactive. And from the testimony of Smith it seems quite as clear that he sold no goods on the faith of the bond, as he calls it, until after the 3d day of July, 1889, prior to which \$237.32 of the debt sued for had accrued. On July 3d, after having refused to give Smith an order on the railroad company, and after Smith's refusal to give him further credit, Fox first showed Smith the bond, for the purpose of inducing the latter to extend his credit. It was then, for the first time, that Smith claims to have given Fox credit "on the strength of that bond." It is true he testified that when Fox bought the first lot of goods he said he was to give a bond, but he also said at the same time that the bond had not been drawn up. The circumstances that he did not notify Witzemann & Staiger between the 1st and 3d of July, after Fox had refused to give an order on the railroad company, that he looked to them as sureties, is inconsistent with the claim that he had sold goods to Fox on the faith of their guaranty before July 1, 1889; and there is no explanation of this plainly apparent inconsistency. But further, conceding, for the sake of the argument, that Smith relied upon the guaranty as security for all goods sold to Fox after its date, (June 15th,) the question remains, did he rely upon it "in good faith, and without ordinary negligence?" If not, the plaintiff is not entitled to recover, since, as above shown, the execution and validity of the guaranty depend upon the "merely ostensible authority" of Hayward, the assumed agent, by which the principal is bound "to those persons, only, who have, in good faith, and without ordinary negligence, incurred a liability, or parted with value, upon the faith thereof." Ordinary negligence is the absence of ordinary care; "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done." And. Law Dict. If Smith parted with his goods on the faith of the guaranty of Witzemann & Stai-

ger, I think he did so without ordinary care, and consequently with ordinary negligence. In estimating the degree of care exercised by Smith, it should be noted, in addition to the evidence above detailed, that he was not a party to the guaranty; the principal object of which was to indemnify the railroad company. He was but one of a large, indefinite class of unnamed persons, who might have sold Fox goods on the faith of the guaranty to an amount, for the price of which the guaranty, though properly executed, might have proved to be inadequate security. It should also be observed that Smith's Cash Store was but a short distance from the place of business of Witzemann & Staiger. To whatever extent Smith parted with his goods on the faith of the guaranty of Witzemann & Staiger, I think he did so without ordinary care, and, therefore, that the order and judgment should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order and judgment are reversed, and the cause is remanded for a new trial.

DE HAVEN, J. I concur in the judgment.

98 Cal. 525

KLOPPER v. LEVY et al. (No. 14,677.)

(Supreme Court of California. June 9, 1893.)

PLEADINGS—QUESTIONING SUFFICIENCY AFTER TRIAL—REVIEWING ORDER GRANTING NEW TRIAL.

1. Where a trial on the merits was had without questioning the sufficiency of the pleadings, plaintiff cannot claim on appeal that the answer raised no issue.

2. The grounds of a motion for a new trial were that the damages were excessive; that the evidence was insufficient to justify the verdict; that it was against law; and errors occurring at the trial. The motion was granted, but the ground of the order was not stated. *Held*, that the order would not be disturbed, it being conceded that the evidence was conflicting.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Frederick Kloppe against Schewa Levy and others. There was a verdict for plaintiff, and from an order granting a new trial he appeals. Affirmed.

T. C. Coogan, for appellant. Lloyd & Wood, for respondents.

PER CURIAM. This appeal by plaintiff is from an order granting a new trial to defendants, Levy. The complaint states that, during all the times in the complaint mentioned, plaintiff was the owner and in possession of a leasehold interest, for a term of years, of the first floor of a certain building on O'Farrell street, in San Francisco, which on

the 17th day of November, 1889, was and had been used by him as a store in carrying on his business as a dealer in leather and leather findings, and at said time was thoroughly stocked with valuable goods; that on said day the defendants broke and entered into plaintiff's said store from an adjoining store, and by breaking and removing a portion of the roof, in consequence of which great quantities of rain came through said walls and ceilings of said store, wetting his stock of goods, damaging the same to the extent of \$1,397.81, and preventing him from carrying on business for a period of two weeks, to his damage in the sum of \$400, and necessitating the employment of experts to examine his goods, at the cost of \$50, and the further cost of \$100 in removing his goods. Respondents' answer is an attempted denial, but is plainly defective, and it may be doubted whether any material allegation of the complaint is denied. But a trial was had in all respects as though the answer raised an issue as to the trespass and damage. Evidence was introduced by both parties upon these points, objections made and passed upon without a suggestion that the trespass was admitted by the answer. Under such circumstances, plaintiff cannot now claim that the answer raised no issue.

The case was tried with a jury, which rendered a verdict for the plaintiff against the respondents.

Respondents then moved for a new trial upon a statement of the case based upon the ground of excessive damages; insufficient evidence to justify the verdict; that it was against law; and errors of law occurring at the trial, and excepted to by them. The motion was granted, but upon what ground does not appear, and from that order the plaintiff takes this appeal. If it be conceded that there was any evidence that the respondents participated in the alleged trespass, as appellant claims there was, then there was a substantial conflict upon that point, and this court will not disturb the ruling of the trial court. If convinced that the verdict was clearly against the preponderance of evidence, the judge properly granted a new trial, and such ruling will not be disturbed. The rule prevailing here does not apply to the judge of the trial court. In this case there was no abuse of discretion, but, on the contrary, the order was just and proper.

The order appealed from is affirmed.

98 Cal. 522

TULLER v. ARNOLD et al. (No. 14,193.)
(Supreme Court of California. June 9, 1893.)

ACTION BY ASSIGNEE—ASSIGNMENT TO ATTORNEY
—POWER OF OFFICER OF CORPORATION—PRACTICE—APPEAL.

1. An action may be brought on a claim by an assignee thereof.

2. The assignment of claims to the clerk of the assignor's attorney, and an action there-
Cal.Rep. 32-34 P.—26

on in the clerk's name, are not affected by Pen. Code, § 161, prohibiting an attorney from having claims assigned to him with intent to bring suit thereon, although the clerk is an attorney admitted to practice, where there was no solicitation on the part of any attorney that the claims be put in suit, and the assignment was made as a mere matter of convenience, for the purpose of collection.

3. The secretary and general manager of a corporation may assign accounts under a general authorization, the adoption of a special resolution authorizing it being unnecessary.

4. The court may, in its discretion, after the making of a motion for nonsuit, but before deciding it, permit the introduction of additional evidence by plaintiff.

5. Where the transcript contains a notice of appeal from an order made on a motion to retax costs, and a bill of exceptions setting out the ground of the notice, and the court's action thereon, but no mention is made of such appeal in the briefs of counsel, and no other case has been docketed, it will be presumed that the questions involved have been abandoned.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by W. N. Tuller against Charles S. Arnold and another. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Robert H. Countryman, for appellants.
John H. Dickinson, for respondent.

HAYNES, C. Defendants were indebted to each of two business houses in Chicago for goods sold and delivered. The accounts were assigned to the plaintiff, who had prior to that time been admitted to practice in the superior court, but who was a clerk in the office of John H. Dickinson, Esq., who appeared as plaintiff's attorney. The answer denied the assignment, and that plaintiff was the owner; alleged that plaintiff is an attorney at law, and connected with the law office of John H. Dickinson, and that plaintiff bought these claims with the sole intent of bringing suit thereon. The cause was tried without a jury, and findings and judgment went for plaintiff. Defendants appeal from the judgment, and from an order denying a new trial.

1. At the conclusion of plaintiff's evidence, defendants moved for a nonsuit. The record discloses that the motion was taken under advisement; the court understanding that neither party had any further testimony to offer, and that, if the nonsuit should be granted, judgment should go for defendants; otherwise, for the plaintiff. The motion was afterwards denied, and judgment entered upon the findings for plaintiff, and defendants assign for error that the court did not give them an opportunity to introduce evidence. There is nothing in the record to show that the court misunderstood the parties, or that defendants had any evidence they desired to introduce, nor does the notice of intention to move for a new trial embrace any ground

under which it could be made to appear that defendants had not submitted the case as stated.

2. The assignment of the claims to plaintiff made him the proper party to bring and maintain the action. The assignors could not have sued without a reassignment. "It is sufficient, under the Code, if he [the plaintiff] holds the legal title." *O'Connor v. Irvine*, 74 Cal. 440, 16 Pac. Rep. 236. The assignment of the account by the L. Wolff Manufacturing Company, a corporation, was sufficient. The secretary and general manager testified that no special resolution was adopted, authorizing it, but that he had full power, as secretary and general manager, to do so, and there was no evidence tending to show that he had not such power. A general authorization is sufficient.

3. It sufficiently appears that the assignments were made before suit was brought.

4. The remaining ground of the motion for nonsuit was that plaintiff is an attorney at law, and that it is against the provisions of section 161 of the Penal Code for an attorney to have claims assigned to him, with intent to bring suit thereon. It is not necessary to construe that section further than to say that this case is not affected by it. The evidence shows that these claims came to Mr. Dickinson for collection through a law firm in Chicago, to whom the assignors gave them for collection; that Dickinson was the correspondent of said firm here; and that the assignment was made to plaintiff as a matter of convenience, for the purpose of collection. There does not appear to have been any solicitation by any attorney to the assignors that these claims be put in suit, or that they were brought by the assignee for that purpose, but on the contrary the assignors put them in the hands of their attorneys for collection. Nor were defendants in any manner injured thereby. They were not cut off from any defense they might have had to either of these claims if the action had been by the assignors, if such defense were alleged in the answer, and by uniting the claims in one action they were saved the costs of an additional action.

5. The findings support the judgment, and the evidence justifies the findings.

6. It was in the discretion of the court to permit the plaintiff to introduce further evidence after the motion for nonsuit was made, but before it was decided, and this discretion, we think, was not abused. The motion was renewed afterwards.

7. The transcript contains a notice of appeal from an order denying, in part, defendants' motion to relax costs, and a bill of exceptions setting out the grounds of the motion, and the action of the court thereon. Both notices of appeal were served the same day. No mention is made of this appeal in the briefs of counsel upon either side, and no other case has been docketed. We

assume that the questions involved in it have been abandoned. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; VAN-CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

4 Cal. Unrep. 27

ASHTON v. DASHAWAY ASS'N et al.
(No. 14,304.)

(Supreme Court of California. June 9, 1893.)
DISMISSAL OF CASE — MOTION TO VACATE — ABUSE OF DISCRETION.

Where an attorney appears in court five minutes after the dismissal of the cause and rendition of judgment against his client because of the absence of both attorney and client when the case was called for trial, it is not an abuse of discretion for the court, on motion supported by a sufficient affidavit, to vacate the order of dismissal and judgment, and restore the cause to the calendar.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Charles Ashton against the Dashaway Association and others. The case was dismissed, and judgment rendered against plaintiff, because of the absence of both himself and his attorney when the case was called for trial. From an order setting aside the order of dismissal and vacating the judgment, defendants appeal. Affirmed.

Tilden & Tilden, for appellants. S. Heydenfeldt, Jr., and Jos. P. Kelly, for respondents.

SEARLS, C. This is an appeal from an order of the superior court, setting aside an order of dismissal and vacating a judgment. The cause had been set down for trial on the 15th day of October, 1890, but a hearing had been delayed from day to day by reason of other causes on the calendar having precedence, until the morning of October 23d, when it was called for trial at five minutes after 10 A. M., and, neither plaintiff nor his attorney being present, the cause was dismissed, and a judgment was entered on the same day in favor of defendant. Within five minutes after the order of dismissal was entered, the attorney for plaintiff appeared in court, and at once applied to the court on an affidavit and notice for an order shortening the time of notice, which was granted, and a motion to vacate the order and restore the cause to the calendar was noticed for the following day. The court vacated the order of dismissal, and restored the cause to the calendar. The notice of motion and affidavit on the part of plaintiff was accompanied by a transcript on appeal to the supreme

court in the same cause after a former trial, stipulated to be correct, and which contained a sufficient showing of merits. The affidavit accompanying the notice of motion bears evidence of the haste with which it was probably prepared, and is not to be commended as a model in like cases. It is, however, taken with the other papers in the case, and viewed in the light of the surrounding circumstances, sufficient to authorize us to say that the court below was not guilty of an abuse of discretion in setting aside and vacating the order of dismissal and the judgment thereon. A delay of five minutes in reaching court does not raise a very strong presumption of negligence, and in many places and in numerous courts, owing to the habits and practices of the court as to punctuality, as well as of attorneys and litigants, could hardly be regarded as negligence. Of all these things the court below is the more competent to determine, and the wide discretion confided to the nisi prius courts in such cases is wisely bestowed. There may be said to be parallel lines, limiting the discretion of courts acting between which their decisions will be sustained whether one way or the other; and when a court acts in a matter in which such discretion is vouchsafed to it, its order may well be affirmed. In other words, the appellate court, in such cases, does no determine whether it would decide the matter in the same way on the same showing, but only whether the court below has overstepped the legal bounds of its discretionary power. The order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

98 Cal. 285

TUNIS et al. v. LAKEPORT AGRICULTURAL PARK ASS'N et al. (No. 14,963.)
(Supreme Court of California. June 15, 1893.)

On rehearing.

For prior report, see 33 Pac. Rep. 63.

PER CURIAM. It appearing that in this cause a new trial is not necessary of any issue except as to the quantity of land to be subjected to the lien, the judgment hereinbefore rendered is modified so as to read as follows: "The judgment and order appealed from are reversed, and the cause remanded, with directions to the court below to hear such evidence as may be offered by the parties upon the sole point of the quantity of the land required for the convenient use and occupation of the building mentioned in the complaint, in accordance with the opinion of this court herein delivered, and to change its finding upon that point so as to comply with

its conclusion upon such evidence, and thereupon to modify its judgment in accordance with such modified findings."

5 Cal. Unrep. 753

DIGGS v. PORTEUS. (No. 18,017.)

(Supreme Court of California. June 7, 1893.)

APPEAL — OBJECTIONS NOT RAISED BELOW — UNLAWFUL DETAINER — VERDICT — DEFINITENESS.

1. An objection that the legal and equitable issues on a summary proceeding for unlawful detainer were tried together cannot be raised for the first time on appeal.

2. In an action for unlawful detainer, a verdict that "we, the jury," find for plaintiff "that he is entitled to the possession of the premises in controversy, and assess his damages at \$——, and entitled to the sum of \$30 as rent per month," is not sufficiently definite to support a judgment for rent at the rate of \$30 per month from April 1st, the date of the termination of the lease under the notice which was conceded to have been given, to July 16th, the date the verdict was rendered.

Commissioners' decision. Department 1. Appeal from superior court, Yolo county; A. J. Buckles, Judge.

Action by M. Diggs against S. Porteus to recover a house and lot and damages for their detention, etc. Judgment for plaintiff, and defendant appeals. Reversed, unless plaintiff agrees to strike off the money part of the judgment.

R. Clark, for appellant. E. R. Bush, F. E. Baker, and Byron Ball, for respondent.

SEARLS, C. Action to recover possession of a house and lot situate in Woodland, Yolo county, and damages for the detention, rents, etc. Plaintiff had judgment, from which defendant appeals. The cause comes up on the judgment roll.

The complaint avers, in substance, among other things, that on or about May 1, 1880, one Jacob Hays, being the owner of the locus in quo, did lease and let the same to the defendant from month to month, during the will of the lessor, at a monthly rent of \$30, to be paid by defendant to the lessor, upon an agreement that defendant should vacate and surrender the premises to his lessor at any time when required so to do; that defendant entered under the lease, and is still in possession; that in January, 1891, plaintiff purchased the premises; that he is still the owner thereof; that his conveyance was duly recorded, etc.; that defendant had notice of plaintiff's purchase, and paid rent to him up to April 1, 1891, since which time no rent has been paid; that on February 20, 1891, plaintiff served defendant with written notice to vacate said premises and surrender possession to plaintiff on or before April 1, 1891, and that defendant's tenancy would terminate at said last mentioned date, and that, if defendant failed to surrender at said time, plaintiff would claim and demand of defendant \$200 per month thereafter, and damages for detention, etc.; that, after the tenancy ceased, plaintiff demanded of defend-

ant, in writing, a surrender of the premises, which was not complied with in three days, and has never been complied with, although more than three days elapsed before suit brought. Then follows certain allegations as a basis for special damages, not necessary to be mentioned here. Defendant filed an answer and cross complaint, in which he denies his tenancy under the plaintiff, except under and by virtue of a lease, etc., and by his cross complaint (in which it is asserted that Jacob Hays and Thomas Kelly have been made parties by order of the court) he avers that on June 1, 1888, Jacob Hays leased the disputed premises to Thomas Kelly, under a written lease, for a term of five years, at a monthly rental of \$35 per month, payable monthly on the 11th day of each month, in advance, with a privilege of renewal for a further term of five years on like terms. That Hays and Kelly subsequently agreed that said lease should be delivered to Porteus by Kelly, and that Porteus should become responsible to Hays for the rent to the extent of \$30 per month, and that he, Porteus, should be the owner and holder of the lease. That plaintiff, at the date of his purchase, had notice, and thereafter received the rent at \$30 per month. That defendant made improvement, etc. That Kelly never delivered the lease to him as per agreement, and that thereafter Hays agreed to lease to him, and a lease was prepared, but never signed; and asks that Diggs and Kelly be decreed to assign the lease to him, and that Hays and plaintiff be decreed to execute the second lease, etc. The cause was tried by a jury, and, in obedience to instructions of the court, certain questions touching the issues were answered in favor of the plaintiff, and against defendant's theory that he entered under a lease, etc. The jury further found that plaintiff was entitled to possession of the premises, and to \$30 per month as rent. The court adopted the findings of the jury; made additional findings, all in favor of plaintiff; that all the allegations of the complaint were true, except as to damages, which are fixed at \$30 per month, being the same amount agreed to be paid as rent; and judgment of restitution was entered, with \$315, being three times the rent found due.

There is not a formal assignment of errors in the transcript or brief, and it is difficult to glean from some of the objections made by counsel for appellant the precise nature of his intended contention. The first objection is that the notices given by plaintiff to defendant are based upon the theory that defendant was guilty of unlawful detainer, while the judgment is one for the nonpayment of rent. The notice of January 20, 1891, given to defendant, as specified in the complaint, was to the effect that the tenancy would expire April 1st, and required defendant to surrender the premises at that date. It contained all that is necessary under sec-

tion 789 of the Civil Code, and section 1162 of the Code of Civil Procedure, to terminate the tenancy. Upon the expiration of the time specified in the notice plaintiff could have maintained an action of ejectment. *Martin v. Splivalo*, 56 Cal. 128. The residue of the notice as to instituting a suit, the recovery of damages, and \$200 per month, may, in view of the pleadings, be treated as surplusage. The second notice was in compliance with sections 1161 and 1162 of the Code of Civil Procedure, and upon the expiration of three days entitled plaintiff to maintain an action for unlawful detainer under the summary proceedings provided for in chapter 4, tit. 3, pt. 3, Code Civil Proc. The summons in the cause is not set out in the transcript, and there is nothing to indicate with certainty whether the action was intended as one in ejectment or as a summary proceeding for an unlawful detainer. The complaint, with its prayer for relief and the relief granted, are all such as warrant the inference that the latter was the object aimed at, and we shall so regard it.

It is a sufficient answer to the objections urged against the instructions to the jury that no objections or exceptions to the giving of them, or any of them, appear in the record. Nor is there the faintest suggestion that any exceptions were in fact taken.

Appellant further objects that the issues of law, and the equitable defense contained in the amended answer, and amended cross complaint, were tried together. No doubt the better and more orderly method would be to first try the equitable issues where it can be done. In the present case, however, they were so involved by the pleadings with the legal issues that it would be difficult to segregate them. Conceding, however, that it could have been done, no request of that kind was made, and, having consented by a failure to object to the trial of all the issues, legal and equitable together, the objection made here for the first time comes too late. A general verdict was rendered in favor of plaintiff and certain questions were also propounded to the jury, all of which were answered in favor of the plaintiff. The court adopted the verdict and findings of the jury, and found, further, that the affirmative allegations of defendant's answer and of his cross complaint were each and all untrue. These were the allegations going to establish an equitable claim. The general verdict was as follows: "We, the jury in this case, find for the plaintiff Diggs that he is entitled to the possession of the premises in controversy, and assess his damages at \$—, and entitled to the sum of \$30 as rent per month." The court, as before stated, adopted the findings, and as a conclusion of law found, among other things, that plaintiff was entitled to "judgment against said Porteus for rent of the same at the rate of \$30 per month from and after April 1, 1891, until July 16, 1891, and that the same be trebled," etc.

April 1, 1891, was the date of the termination of the lease under the notice, which was admitted by the pleadings to have been given, and the date of the verdict, which was rendered July 16, 1891. Section 1174 of the Code of Civil Procedure provides that in cases of forcible entry and forcible and unlawful detainer the court or jury shall assess the damages occasioned to the plaintiff, and find the amount of any rent due if the alleged unlawful detainer be after default in the payment of rent, and the judgment shall be for three times the amount of the damages assessed and the rent found due. From this section it will be observed there can be no objection based upon the ground that the verdict was for rent, *eo nomine*, instead of for damages.

The only other question is, was the verdict sufficiently certain and comprehensive to authorize the entry of judgment for the rent from April 1, 1891, to July 16, 1891, at \$30 per month? The verdict shows plainly that it was not simply for \$30, but for \$30 per month,—“to the sum of \$30 as rent per month.” The allegations of the complaint are that plaintiff has suffered damages in the sum of \$500 by reason of the hindrance, delay, and detriment to his business, his accruing damages per month will be \$200, and prays for the sum of \$200 per month from April 1, 1891, as rent, until restitution is had, and that the amount thereof be trebled, and with a like prayer as to the other damages. The court found all the allegations of the complaint true except as to the damages, which it finds untrue, “except so far as the same includes the rent found by the jury due the plaintiff, Diggs, and adopted by the court. This was, in effect, a finding that rent at \$30 per month from April 1st was due the plaintiff. Section 626 of the Code of Civil Procedure provides that, “when a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff’s claim as established, the jury must also find the amount of the recovery.” A general verdict must be certain. An uncertain verdict will not support the judgment upon an appeal. In *Watson v. Damon*, 54 Cal. 278, which was an action for the recovery of money on a contract, the verdict was as follows: “We, the jury, find for the plaintiff for the amount of contract, two thousand two hundred and fifty dollars, with interest at ten per cent. per annum from April 1, 1876, to November 15, 1877, less the amount of notes of the value of nine hundred and fifty dollars, with interest on said notes.” This was held to be insufficient to support the judgment, upon the ground that the interest was uncertain, and that there was nothing in the pleadings from which it could be ascertained. In *Macleota v. Packard*, 14 Cal. 179, the verdict was as follows: “Verdict for the

plaintiff for the full sum claimed, with interest and costs of suit;” and it was held that the verdict did not support a judgment entered thereon for the principal sum claimed, and interest thereon at 10 per cent. per annum from April 12, 1849, to the time of judgment. This court said, “The jury should have found the interest.” In *Dougherty v. Haggis*, 56 Cal. 522, the complaint alleged plaintiff to be entitled to 500 inches of water measured with a 4-inch pressure, and the verdict was: “We, the jury, find that the plaintiff is entitled to 40 inches, miners’ measurement,” etc. It was held the verdict was too uncertain. I am of opinion the verdict in this case is too indefinite to uphold the money judgment entered thereon.

The conclusion of law by the court, and its findings upon the complaint, do not help plaintiff’s case. The action was one at law, pure and simple. The defense was an equitable one. As to the defense it was the right and duty of the court to make findings of its own, or adopt the findings of the jury, or to do both at its option. It did the last, and that very properly; but, the cause having been tried by a jury, the court had no duty to perform in preparing findings. So far as plaintiff’s action at law was concerned, the findings and conclusion of law as to plaintiff’s cause of action must be regarded as surplusage. The judgment should be reversed, and a new trial had, unless plaintiff shall elect, within 30 days after filing the remittitur in the court below, to amend the judgment in his favor by striking out therefrom the sum of \$315, awarded to plaintiff therein, and, if he shall so elect, and consent to such amendment, then, and in that event, the judgment so amended shall stand as approved, and as a final judgment in the case.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment will be reversed, and a new trial had, unless plaintiff shall elect within 30 days after filing the remittitur in the court below to amend the judgment in his favor by striking out therefrom the sum of \$315, and if he shall so elect and consent to such amendment, then, and in that event, the judgment as so amended shall be affirmed.

4 Cal. Unrep. 53

BELL et al. v. SAUSALITO LAND & FERRY CO. (No. 14,367.)

(Supreme Court of California. June 13, 1893.)

EASEMENTS—WATER RIGHTS—APPEAL—ASSIGNMENTS OF ERROR.

1. Plaintiff, with defendant’s consent, conducted water to a tank on his lot from a spring on defendant’s lot. Thereupon he took possession of another lot, owned by defendant, and conducted water to the latter lot from the tank. Having used the water about eight years, he surrendered possession of the lot to

which he had no title, and about a year thereafter purchased the same with its appurtenances, and sold the lot on which was the tank. In the conveyance to plaintiff no mention was made of the right to use the spring, but there was evidence that it was understood that he might use it so long as defendant did not need it. *Held*, that plaintiff had no water rights in the spring appurtenant to the lot.

2. The court having found for plaintiff in an action to enjoin the cutting off of the water, an assignment of error that there was no evidence to show any grant of the use of the waters of the spring to plaintiff was sufficient.

3. And so of an assignment that there was no evidence that an easement had been created in favor of the premises deeded to plaintiff, or that a servitude had attached to the land where the spring was located.

4. An assignment that there was no evidence to show the existence of an easement at any time in favor of plaintiff's land to the spring was likewise sufficient.

Commissioners' decision. Department 2. Appeal from superior court, Marin county; E. B. Mahon, Judge.

Action by Julia Emma Bell and another against the Sausalito Land & Ferry Company. From a judgment for plaintiffs, defendant appeals. Reversed.

F. Wm. Reade and John Currey, for appellant. Taylor & Craig, for respondents.

HAYNES, C. This action is for an injunction to restrain defendant from removing certain water pipes, and depriving plaintiffs of water supplied thereby, from a certain spring, and for damages for alleged interruptions thereof. The executors of Alexander Forbes were made parties defendant, but they did not answer, and do not appeal. Plaintiffs had judgment granting a perpetual injunction, from which, and an order denying the corporation a new trial, it now appeals.

There is no material conflict in the evidence. Mr. Bell was the only witness on the part of the plaintiffs, and the testimony of defendant's witness was mainly to additional facts, which were not rebutted. In 1874 the plaintiffs were the owners and in possession of lot 2, block 29, of the village of Sausalito. Appellant had formerly owned that lot, and was then the owner of lots 3, 4, and 5 in the same block, and also of another lot, upon which was a blind spring, about 600 feet distant from lot 2, and which, with the knowledge and consent of appellant, plaintiffs improved, and conducted the water therefrom through pipes to a tank on lot 2, and from which water was supplied to their dwelling on said lot. In 1875 plaintiffs bid off said lots 3, 4, and 5 at an auction sale, but made no payment thereon, and obtained no title, but afterwards took possession of them, and conveyed water by pipes from the tank on lot 2 to said lot 3, and used water thereon for cultivating vegetables. One or two years prior to June 21, 1884, plaintiffs surrendered possession of lots 3, 4, and 5 to appellant, and on the date last named Mrs. Bell entered into a contract in

writing with appellant for the purchase of lot 3 for the sum of \$500, and completed her payments and received a deed therefor February 25, 1886. About the time said contract of purchase was made plaintiffs conveyed lot 2 to the Forbes estate, built a house on lot 3, and removed thereto. In the fall of 1884 appellant cut off the connection between the spring and the Forbes tank on lot 2 by taking up the pipe near the spring, and at the same time connected the tank with appellant's water mains, from which the tank was thereafter supplied, and for the water so furnished the usual rates were charged and paid. The contract of sale of lot 3 to Mrs. Bell was silent in regard to water rights or any appurtenances to the lot. The deed granted the lot with its appurtenances, but made no mention of the water by reservation or otherwise. The complaint alleged that the water from said spring had continuously and openly, and with the full knowledge of, and without objection from, and with the acquiescence of, defendant, been used on lots 2 and 3, and that for more than five years the use of the flow of water from the spring had attached as an appurtenance to lot 3. The complaint also alleged that on March 30, April 16, and May 5, 1885, and on two different occasions in 1886, appellant removed a portion of the pipe which conveyed water to lot 3.

It is contended by respondents that the assignments of error are insufficient, and for that reason the judgment and order should be affirmed. Appellant specifies that "there was no evidence to show any grant of the use of the waters of the spring to the plaintiffs. There was no evidence to show an easement had been created in favor of the premises deeded to plaintiffs, (lot 3,) or that a servitude had attached to the land where the spring was located. There was no evidence to show the existence of an easement at any time in favor of the plaintiffs' land to the spring referred to." It is also specified that the above facts are not found by the court. We think these specifications sufficient. They call attention directly to the controlling questions in the case, and are to be viewed in the light of the findings as made by the court. The findings are merely of probative facts, unless the conclusions drawn from them, and styled and intended as conclusions of law, may be regarded as ultimate facts. These conclusions are as follows: "(1) The hydrants and pipes and the water flowing from said spring to and in the same are necessary for the benefit and enjoyment of said lot 3, and are appurtenant to said lot. (2) The appurtenances, including said hydrants and pipes and said water, and the use and flow thereof, passed to the plaintiff Julia E. Bell, by said deed. (3) The plaintiffs are therefore entitled to a decree as prayed for in their complaint." If the first and second of the above-quoted conclusions are to be regarded as

findings of fact, they are not justified by the evidence; and if they are conclusions of law, and not findings of fact, the ultimate facts are not found, nor are probative facts found, which necessarily or conclusively show the existence of the ultimate fact of an easement appurtenant to lot 3, and charged upon the lot upon which the spring is situated as the servient estate. An easement can only be created by grant or by prescription from adverse enjoyment for a period sufficient to bar an action; in this state, five years. At the time the spring was improved, and the water conveyed to lot 2, appellant had no interest in that lot, nor had plaintiffs any interest in lot 3. Plaintiffs not only allege that the water was conveyed to lot 2 with the knowledge and consent of appellant, the owner of the spring, but Bell testified that he talked it over with one of the directors; and Mr. Harrison, a director and chairman of the executive committee of the corporation, testified that it was understood plaintiff might use the spring so long as they did not need it. Under these circumstances, plaintiffs could acquire no right or easement in the spring, nor create any servitude upon the land on which the spring was situated, by possession and use under the license for any length of time, nor is there any evidence that they ever asserted any right otherwise than under this license. No easement was therefore created in favor of lot 2, nor could there be in favor of any other lot. Plaintiffs were not restricted by the terms of the license to a part of the waters of the spring, so there was no opportunity for acquiring a right to another portion of the water by adverse user. Of course, I do not mean to say that, notwithstanding the license, a right by adverse possession and use might not have been created; but that could only have been accomplished by a repudiation of the license, and the use of the water under an unequivocal assertion of right. But no claim or assertion of any such right was ever made until after the purchase of lot 3, and no adverse right in favor of lot 3 could have been created after that, as the water was cut off near the spring a few months after the purchase, and has never since flowed either to lot 2 or 3, through these pipes, or otherwise than through appellant's water mains.

Plaintiffs' claim in this action is based, however, upon an easement appurtenant to lot 3, existing at the date of the purchase; and it is obvious that, unless it then existed, it could not have passed by the deed made nearly two years later, the water from the spring having soon after the purchase been cut off, and the right, by repeated disconnections with the tank, having been emphatically denied. The question remaining to be considered, therefore, is whether a right appurtenant to lot 3 was created by plaintiffs' use of the water thereon during the time they

were in possession of that lot without right or title thereto, and which possession and use ceased one or two years before the purchase. The complaint alleged that this use was open, and with the knowledge of appellant. The court found that the water was used upon lot 3 "after 1875, up to the time of the sale," but did not find that the use was known to appellant. No evidence was given on the part of the plaintiff that such use was known, unless it could be inferred from the cultivation of vegetables and the existence of hydrants thereon, while the testimony on the part of defendant was positive that such use was not known until after the pipe had been taken up at the spring, and the tank on the Forbes lot had been supplied from appellant's mains; that it was afterwards found that the supply was short at the Forbes tank, and, upon investigating the cause, the pipe leading from the tank to lot 3 was discovered and disconnected, presumably at the date of the first interruption alleged in the complaint, viz. March 30, 1885. This evidence was not disputed, nor was there any evidence of any claim of right to such use of the water in hostility to or otherwise than under the license. The mere finding of the use, without finding that it was with the knowledge of appellant, who was the owner both of the lot and the water, is insufficient to support the judgment; and, if the existence of an easement is found by the court, the evidence does not justify it. It would, indeed, be a strange conclusion that plaintiffs, having a mere license to use the waters of the spring upon their own lot, could, without the knowledge of appellant, use it upon one of appellant's lots, in which they had no interest, and thus create an easement in favor of one of appellant's lots, and a servitude upon another, and then sell lot 2 to a third party, who acquired no right to the spring, and buy lot 3, with a valuable easement created by themselves, and of which the seller had no knowledge. The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

98 Cal. 603

In re PEARSONS' ESTATE.

Appeal of HARSHALL. (No. 15,138.)

(Supreme Court of California. June 13, 1893.)

SALE BY EXECUTOR—POWER IN WILL—CONSTRUCTION—CHARITABLE DEVISES.

1. Under Code Civil Proc. § 963, authorizing an appeal from a judgment or order of the superior court against or in favor of directing the sale of real property, the purchaser of property at an executor's sale may appeal from an order confirming the sale over his objections.

2. Testator, in the first clause of his will, devised to his two aunts certain lands. By the second clause he devised to them also all land held by him jointly with them, directing that on the death of either before he died "all property of whatever nature herein bequeathed to them shall revert and vest in the survivor, her heirs and assigns, forever," and that, in case both of them died before he did, "the aforesaid property otherwise bequeathed to them shall be sold at public auction to the highest cash bidder." *Held*, that the power to sell given in the second clause of the will applied to the property devised by the first clause as well as that devised by the second.

3. The action of the superior court in refusing to construe a will and to instruct petitioner as to his duties as executor in making sales under a power given by the will, when there was no contention by interested persons that the executor's discretion was not being properly exercised, is not subject to review.

4. A power of sale in a will is not invalidated by the presence of a provision for the distribution of the proceeds among charitable institutions which is invalid under Civil Code, § 1313.

5. A sale by an executor under a power in a will, though required to be confirmed by the court, is not a judicial sale, and the purchaser can repudiate his contract only on grounds which would be sufficient for the rescission of any other contract of sale.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal by Gustave Harshall from an order confirming a sale made by Elliott J. Moore, executor of Hiram A. Pearsons, deceased. Affirmed.

Rosenbaum & Scheeline and Jarboe & Jarboe, for appellant. J. H. Moore, for respondent.

HARRISON, J. Hiram A. Pearsons died July 7, 1889, leaving a last will and testament, bearing date August 9, 1882, which was admitted to probate by the superior court of San Francisco August 12, 1889, and letters testamentary issued thereon to Elliott J. Moore, who was named therein as its executor. On the 28th of January, 1892, the executor sold at public auction several parcels of land belonging to the estate of his testator, one of which was purchased by the appellant. The executor did not obtain any order of sale from the superior court, but made the sales upon the contention that he had authority therefor by the terms of the will. After he had made his return, and asked for a confirmation of the sales, the appellant filed certain objections thereto, but upon the hearing the objections were overruled, and the court confirmed the sales, and directed conveyances to be made. From this order the purchaser has appealed.

1. The order confirming the sale and directing a conveyance to be made is appealable. Section 963, (3,) Code Civil Proc., authorizes an appeal to be taken from the superior court to the supreme court "from a judgment or order * * * against or in favor of directing the partition, sale, or conveyance of real property." There is no limitation upon the

character of the proceeding in which the order directing the conveyance is made, and we are not authorized to limit the right of appeal more than it has been limited by the legislature. The provisions of section 1553, Id., are not a limitation of the right of filing objections to the confirmation of the sale, but an extension of such right to those who are "interested" in the estate. The right of the purchaser to be heard at the hearing upon the return is implied in the provision of the previous section, which requires public notice of the day fixed for the hearing to be given; and his right to be heard carries with it the right to make objection to the confirmation; and section 938, Id., gives the right of appeal to any party "aggrieved" by the action of the court, whether he be "interested" in the estate or not.

2. The chief objection made by the appellant to the confirmation of the sale is that the executor was not authorized by the will to sell the property, and, as there had been no order of sale made by the court, the sale was incapable of confirmation by reason of the want of jurisdiction over the subject-matter. Section 1561, Code Civil Proc., provides: "When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases, and, if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no title passes unless the sale be confirmed by the court."

The will in question contains the following provisions: "First. I give, devise, and bequeath unto Betsey Frances Matthewson and Polly Barton, my aunts, the following described lots and pieces of land situate in the city and county of San Francisco, state of California: [Describing the same.] Second. I do give, devise, and bequeath unto Betsey Frances Matthewson and Polly Barton, my aunts, all real property which I hold jointly with them, and I direct that, in the event of the death of either Betsey Frances Matthewson or Polly Barton prior to that of my own, all property of whatever nature herein bequeathed to them shall revert and vest in the survivor, her heirs and assigns, forever. And, furthermore, in the event of the death of both Betsey Frances Matthewson and Polly Barton prior to my decease, the aforesaid property otherwise bequeathed to them shall be sold at public auction to the highest cash bidder, the proceeds of said sale to be equally distributed among the different orphan asylums of the city and county of San Francisco, and said asylums I request to be designated by the judge of the probate court." "Seventh. I do give, devise, and bequeath the remainder of my property, of whatever kind, to Betsey

Frances Matthewson and Polly Barton, subject to the reversion before stated. All the above real property being situated in the city and county of San Francisco, state of California." Betsey Frances Matthewson and Polly Barton died prior to the death of the testator, without leaving any descendants. By their death in the lifetime of the testator the testamentary disposition in their favor failed, but by virtue of the provisions of section 1343, Civil Code, the testamentary disposition of the property which had been devised to them did not fail, for the reason that it is apparent from the terms of the will that the testator intended to substitute the orphan asylums of San Francisco in their place. The provisions of section 1313, Id., which preclude these beneficiaries from receiving more than one-third of his estate, do not destroy this intention, but merely prevent it from being carried into effect.

The property sold by the executor is a portion of that described in the first of the above clauses in the will, and his power to sell it without any previous order of the court depends upon the construction to be given to the latter portion of the second of the above clauses. The executor's authority to sell property is, by the terms of the will, brought into existence only in the event of the death of both of the testator's aunts prior to his own death. Upon the happening of that event he directed the aforesaid property to be sold at public auction to the highest bidder, and it is therefore necessary to ascertain what was the "aforesaid" property to which the authority was extended. On the one hand it is contended that the authority to sell which is given in the will is limited to the property disposed of in the second clause; while on the other hand it is contended that it extends to all the estate which would have been taken by his aunts in case they or either of them had survived him. By his will the testator made his aunts his devisees of three different classes of property, viz.: (1) The specific lots of land described in the first clause thereof; (2) all property which he held jointly with them; (3) the residuum of his estate after satisfying his other dispositions thereof. The second clause of his will is devoted to three distinct subjects: (1) The devise to the aunts of the property therein specifically described; (2) the provision for the nature of the estate which they shall take in the property which he leaves to them; (3) the disposition to be made of this property in case both of them should die before him. This latter subject also contains two testamentary provisions, viz. that the property shall be sold at public auction, and that its proceeds shall be distributed among the orphan asylums of San Francisco. After giving to his aunts all real property which he held jointly with them, he directs that, in the event of the death of either of them prior to his own,

"all property of whatever nature herein bequeathed to them shall revert to and vest in the survivor, her heirs and assigns forever." The evident purpose of the testator in this clause was to make his aunts joint tenants with the right of survivorship in all the estate which they would receive under the will, although the use of the term "revert" in this connection is inappropriate, and must be construed in connection with the term "vest," as expressive of his intention to confer the right of survivorship. The property thus directed by him to vest in the survivor is not limited to that which in the first part of the same clause was devised to them both. In that part of the clause he only disposes of "all real property which I hold jointly with them," while in the latter part of the clause he directs that "all property of whatever nature herein bequeathed to them" shall vest in the survivor; thus clearly indicating that he intended the right of survivorship to extend to other property than that which in the previous portion of the same clause he had devised to his aunts. Nor does his use in this clause of the word "herein" limit the right of survivorship to the property which he had in that clause devised to them. "Herein," as used in legal phraseology, is a locative adverb, and its meaning is to be determined by the context. "It may refer to the section, the chapter, or the entire enactment in which it is used," (And. Law Dict.;) and this rule is applicable to the construction of a document as well as of a statute. In the present case its reference to "all property of whatever nature" indicates its application to other property than "real property held jointly" with his aunts. We are not seeking to determine herein the extent to which the testator directed the right of survivorship to attach, since both of his aunts died in his lifetime; but the object of this discussion is merely for the purpose of ascertaining the intention of the testator, and the meaning which he gave to the words in his direction for the sale, that "the aforesaid property" be sold. Having provided for the contingency of the death of one of his aunts, the contingency of the death of both of them would naturally present itself to his mind; and it is reasonable to suppose that the provision which he would make for that contingency would be as extensive as that which he had made for the contingency of the death of only one of them. Accordingly, he "furthermore" directs that in that event "the aforesaid property" be sold at public auction. There is no rule of construction which limits the application of the term "aforesaid" to that which immediately precedes it, and in the present case there is nothing in the connection, or in the subject to which it refers, which would justify us in passing over the intervening clause in which the testator mentions "all property

of whatever nature herein bequeathed to them," and limits its application to certain real property held jointly with his aunts that had been designated in a previous portion of the clause. See *Doe v. Gell*, 2 Barn. & C. 680. In the absence of any qualifying terms, its natural reference would at least include that which next preceded it, and would be as comprehensive as the term to which it referred. We have already seen that the "property" for which he made provision in the event of the death of one of his aunts included "all property of whatever nature" that by his will he had given to both of them, and it follows that the provision for the contingency of the death of both of them is equally extensive. We hold, therefore, that the "aforesaid property" which the testator directed to be sold at public auction includes "all property of whatever nature," which, in the sentence immediately preceding, he refers to as having been bequeathed by him to his aunts.

3. After the will had been admitted to probate, and prior to the sale of the land involved in this appeal, the executor filed a petition in the superior court, praying for the construction of certain clauses of the will, and for a determination of his duties in reference thereto. In his petition he set forth the foregoing clauses of the will, and showed to the court that the aunts had died before the decedent; that the decedent left certain heirs at law, and that the bequest to the orphan asylums exceeded one-third of his estate; that in the third clause of his will the testator had devised to a Mrs. Kinsey all his interest in a certain block excepting that which he held jointly with his aunts, and he asked the court to determine what portion of that block was held jointly by the testator with his aunts, who were the legatees and who the next of kin, how the estate should be distributed, and what real estate should be sold to pay the bequests to the different orphan asylums. At the hearing upon this petition the court declined to pass upon many of the questions presented therein, for the reason that the proper time for acting thereon would be upon an application for distribution, and limited its judgment to determining the property which Mrs. Kinsey was entitled to receive under the third clause of the will. From this judgment an appeal was taken, and is now pending in this court.

It is now urged by the appellant that by this proceeding the executor cast doubts upon his power to sell any portion of the estate of the testator, and rendered the title to the lands sold by him uncertain, and, therefore, that the purchaser ought not to be compelled to take the same, and that the court should not have made a confirmation of the sale. The judgment of the court upon that petition was, however, limited to the land described in the third clause of the will, and does not affect the land sold to the

appellant herein. The question of the power of the executor to sell any property of the decedent was not involved in the proceedings before the court; nor does this power appear to have been questioned, either by himself or by any of the respondents to the petition, and it is not alluded to in the judgment. The executor did, it is true, ask the court to determine what property should be sold to pay the bequests to the several orphan asylums; but the court did not in its judgment give to him any direction, acting doubtless upon the theory that, as the discretion upon this subject had been already conferred upon him by the testator, it was not proper for the court to interfere, in the absence of any objection by interested parties that such discretion was not being properly exercised. It may have been prudent for the executor to seek in advance instruction upon his duties in these respects, but the court was at liberty to give it or not, and the exercise of its discretion in declining to give it is not subject to review or comment.

4. It is objected that, inasmuch as the testator's bequest to charitable purposes is in excess of one-third of his estate, he died intestate as to such excess, and therefore the power of sale in the will cannot be executed. The power of sale conferred by the will does not depend for the validity of its execution upon a valid disposition of the proceeds of the sale. The power of converting the estate into money depends upon the will of the testator, and may be conferred without any limitation, while the power of disposing of his estate is limited by a statutory provision. In the present case there is no specific property given to the orphan asylums, nor is there any specific property directed to be sold with which to pay the legacies to them, but the testator directs the sale of the entire estate "otherwise" (i. e. if they had survived him) bequeathed to his aunts, and the proceeds of said sale distributed among the different orphan asylums of San Francisco. Neither the statute nor the testator places any limitation upon the exercise of the power of sale over the property; but after that power has been exercised, and the estate reduced to money, the statute steps in, and prevents the executor from carrying into effect the further direction in the will that these proceeds shall be distributed to the orphan asylums. The provisions of section 1313, Civil Code, only make void "dispositions" of property made contrary thereto, but do not affect any other disposition of the property contained in the will, or impair a power of sale given by the will for converting the entire estate into money. The "disposition" of the property which the testator made in directing it to be sold at public auction does not contravene this section, but only the distribution of the proceeds of the sale is contrary thereto. A testator may confer upon his executor the power to sell

all his estate, and divide the proceeds among his heirs at law, or he may confer such power, and distribute the proceeds according to his will, except as prevented by the statute. The heirs at law are not entitled to receive the estate in specie, since the act of the executor in selling the same is within the express authority conferred upon him by the will. Their rights arise only when an attempt is made to carry out the further provisions of the will in distributing the proceeds of those sales to the orphan asylums. The one-third of the estate which may be given to charitable uses is one-third of the distributable assets, (*Estate of Hinckley*, 58 Cal. 457,) and a sale and conversion of the property into money when the devise is not specific is a convenient, if not a necessary, mode of ascertaining the amount of the estate for the purpose of determining the quantity thereof to which the charitable beneficiaries are entitled. Until a sale, it cannot be determined what is the amount of the estate. "The valuation of the inventory is not conclusive for any purpose." *Estate of Hinckley*, supra. Its value at the date of distribution must be ascertained for the purpose of ascertaining the amount to which the charitable beneficiaries and the heirs at law are respectively entitled.

5. It is further contended by the appellant that it is incumbent upon the executor to satisfy the purchaser that the title which his conveyance will transfer will pass all the estate in the property of which the testator was seised at the moment of his death, and, inasmuch as there may have been a wife or a pretermitted child whose interest in the estate would be paramount to the will, and would not pass by the executor's conveyance, the court ought not to have confirmed the sale without requiring the executor to furnish evidence in disproof of their existence. A sale by an executor under a power in the will is not a judicial sale, nor does the statutory requirement that no title shall pass until the sale be confirmed give to it the incidents of a judicial sale. A judicial sale is one made under the order of a court having jurisdiction of the subject-matter of the sale, and which it directs to be sold for the purpose of carrying its judgment into effect, or of directing a disposition of its proceeds. *Freem. Jud. Sales*, § 1. At such a sale the court is regarded as the vendor, and a purchaser who buys the property at the sale has a right to a conveyance which will vest in him the title to the property sold, and may present in objection to its confirmation any facts which will impair or defeat the title thereby transferred. We refer here to those sales which purport to sell the property itself, and not those in which only the right, title, and interest of the parties to the proceeding are sold, as in such cases the purchaser buys at his own risk. The purchaser from an executor at a sale under a power in the will deals with him in making

the purchase as he would with any other vendor. He makes the purchase subject to a confirmation by the court, but in all other respects he may incorporate in his contract of purchase the same terms and conditions as he would in dealing with any other agent for the sale of property, and he can repudiate his contract for purchase only for the same reasons as he could in case he had bought from another. The executor is regarded as the donee of a power, (*Conklin v. Egerton*, 21 Wend. 436; *Newton v. Bronson*, 13 N. Y. 592,) and the sale is treated as if made under a power; and the purchaser is required to examine the sufficiency of this power as he is that of any other power under which a sale may be made, (*Larco v. Casaneuava*, 30 Cal. 561.) In this state it is essential that the will shall have been admitted to probate before the power can have any validity, (*Castro v. Richardson*, 18 Cal. 478,) but in all other respects the contract of purchase and sale between the executor and his vendee is attended with the same incidents, and is to receive the same construction, as a similar contract between any other vendor and vendee. Prior to 1861 a sale by an executor under a power in the will was valid without any confirmation by the court. In that year the legislature amended the procedure so as to require that such sale should be confirmed by the probate court, the same as those made under its own order. The confirmation thus required is, however, for the protection of the estate, and for the purpose of determining whether it will confirm the sale. The scope of investigation by the court is limited to ascertaining whether the sale was legally made and fairly conducted, and the sum bid not disproportionate to the value of the property sold, and that a sum exceeding such bid at least 10 per cent., exclusive of the expenses of a new sale, cannot be obtained. *Code Civil Proc.* § 1554. If any of these facts exist, the court is authorized to vacate the former sale, (*Estate of Durham*, 49 Cal. 490;) but unless such facts are shown to the court, the court must make an order confirming the sale. Section 1554.

In the ordinary contract of purchase and sale there is an implication that the conveyance to be made thereunder will transfer the title to the property; but, in the absence of any special agreement upon the subject, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor. *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. Rep. 280. The title to a piece of real estate frequently depends as much upon the existence of facts outside of the record as it does upon the records and written muniments of title, and the investigation of these facts is as essential to an examination of the title as is the examination of the records. In the examination of a title to be derived from an executor under a power of sale in the will it is es-

essential to know whether the testator was married at the time of his death, and, if so, whether the property offered for sale was community property; and also whether the decedent left children surviving him whom he did not mention in his will. These, however, are questions of fact to be determined by the vendee, and, if found to exist, and deemed by him to impair the sufficiency of the title tendered by the vendor under his contract, should be pointed out. In the present case no proof of the existence of these facts was presented, and it is very clear that, unless they are shown to exist, the vendee cannot make the possibility of their existence a ground for refusing confirmation of the sale, any more than he could make such possibility a ground for resisting an action for specific performance.

The order is affirmed.

We concur: PATERSON, J.; FITZGERALD, J.

In re PEARSONS' ESTATE.

Appeal of GREEN et al., (five cases, Nos. 15, 139-15,143.)

(Supreme Court of California. June 13, 1893.)

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeals by D. W. Tietjen, A. T. Green, Louis Spiegel, John F. English, and A. Delbanco, from an order confirming a sale made by Elliott J. Moore, executor of Hiram A. Pearsons, deceased. Affirmed.

Rosenbaum & Scheeline and Jarboe & Jarboe, for appellants. J. H. Moore, for respondent.

PER CURIAM. For the reasons assigned in the opinion this day filed in Re Pearsons' Estate, (No. 15,138,) 33 Pac. Rep. 451, the order appealed from is affirmed.

4 Cal. Unrep. 29

CROWLEY v. STROUSE. (No. 14,987.)

(Supreme Court of California. June 9, 1893.)

APPEAL—ASSIGNMENT OF ERRORS—INSTRUCTIONS—NEGLIGENCE.

1. An objection that the verdict is against the law is not sufficient to raise the point that plaintiff was guilty of contributory negligence.

2. That a person, in crossing a street, fails to use the best course to avoid the danger of being run over, does not show contributory negligence.

3. Whether a driver of a wagon at a street crossing could resume his course after checking his horse to allow a foot passenger to get out of the way, without negligence, is for the jury.

4. An objection to an instruction as not sufficiently explicit will not be considered, where no request was made to make it more explicit.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Julia Crowley sued Mark Strouse to recover for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

Taylor & Craig, for appellant. Edward P. Cole, for respondent.

TEMPLE, C. This action was brought to recover damages for personal injuries alleged to have been sustained while plaintiff was crossing Ninth street, in San Francisco, at its intersection with Howard, through being run into by a wagon negligently driven by the defendant. The case was submitted to a jury, which returned a verdict for plaintiff, and defendant appeals from the judgment, and from an order refusing him a new trial.

Plaintiff's testimony tended to prove that plaintiff was crossing Ninth street, going towards Tenth, on the street crossing, when a meat wagon driven by defendant's servant rapidly down Howard turned upon Ninth, over the crossing where plaintiff was; that plaintiff started to run down Ninth, leaving the crossing, and defendant's wagon, without slackening speed, ran upon her, knocking her down, and inflicting upon her the injury complained of. Naturally, the defense contended that by leaving the crossing, and running down the street, instead of hastening across, plaintiff increased the danger; was, in fact, guilty of such contributory negligence as should prevent her recovering. The plaintiff, who was about 70 years old, at the trial stated that she did not see the wagon, but, hearing the noise, she thought it was the street car, (on Howard street, I presume,) and so started to run as fast as she could, but had proceeded but a few steps when she was struck. This raised a question, undoubtedly, as to whether plaintiff was not guilty of negligence which contributed proximately to the injury. But the matter was left to the jury, and it cannot be said that there was not sufficient evidence to justify their conclusion. Defendant's evidence conflicts with that of the plaintiff, but, as the jury evidently did not believe defendant's witnesses, and the court refused a new trial, that is not a matter of much interest here.

There is nothing in the claim that the verdict is against law. The point there made is that there was no proof of negligence on the part of defendant. The argument to sustain the point is that plaintiff was guilty of contributory negligence. This point cannot be made under the objection that the verdict is against law. Still, it is the same as that made under the exception as to insufficiency of the evidence, and need not be further considered.

The defendant complains of the refusal of the court to give certain instructions. The first is as follows: "If you believe from the evidence that the plaintiff brought about the collision by pursuing her intended route,

when she could easily and safely have avoided the contact by turning to the left, and from the wagon, then she is guilty of contributory negligence, and your verdict should be for defendant." This instruction was properly refused. It involves the proposition that if the jury can now see that there was some other course open to plaintiff than the one she did take, which would have prevented the injury, she cannot recover. This is not law. That she used bad judgment in the excitement of imminent danger does not necessarily prove negligence. Whether the fact that she took an unwise course was negligence, under the circumstances, was for the jury.

2. An instruction was also asked to the effect that streets may be used by vehicles and pedestrians; that wagons must go over the crossings; and that all persons using the crossings must use a high degree of care and caution for their own safety, and that of others. It is difficult to see any benefit in the instruction for the defendant, but there was no occasion to tell the jury that the streets were for use and included the crossings, and I do not understand that a pedestrian is called upon, when upon a street crossing, to use more than ordinary care for the safety of others. It certainly was no injury to the defendant that the court failed to instruct the jury that the defendant was bound to use a high degree of care and caution at that point. Besides, the jury were fully instructed upon this subject.

3. The next complaint is the refusal to give the following instruction: "If you believe from the evidence that the driver of the defendant's wagon checked his horses seasonably when about to turn the corner, and the plaintiff, seeing the wagon, also checked her speed, the driver of the wagon, seeing his road clear, had a right to suppose that the plaintiff was alert to care for her safety, and would not run against the wagon or the horses, and the driver might lawfully resume his progress at a moderate speed, using proper care to avoid accident." There are several objections to this proposed instruction. If the driver checked the speed of his wagon, and plaintiff also "checked her speed," it would not therefore necessarily follow that the driver, seeing his road clear, could drive on, relying on the alertness of the plaintiff to get out of the way. There may have been indications that she was not alert, or was confused; and if, for any reason, she did not get out of the way, defendant had no right to drive over her. The instruction also assumes that she run against the wagon or horses. This was not conceded to be the fact, but was opposed to testimony of plaintiff's witnesses, and to plaintiff's theory of the case. The instruction, at the best, is as to the effect of testimony. Whether the driver could properly resume his course, supposing that he did check his team, was for the jury.

The right to do so did not follow as matter of law from the assumed facts.

4. The next point is that the instruction given by the court on the subject of contributory negligence is erroneous. The only objection made to this instruction was that it was not sufficiently explicit, and was not applicable to the facts and circumstances of the case. This objection admits the correctness of the instruction as a proposition of law. If the defendant desired an instruction which would be in some respects more explicit, he should have drafted the desired instruction, and requested the court to give it. The objection does not state in what respect it failed to be sufficiently explicit. It is not so much an objection to the instruction as a statement that the party is entitled to further instruction, upon what special point, however, was not stated. Under such circumstances the appellant cannot complain. That it was not applicable to the facts was probably intended as a repetition of the same objection. In the briefs no such claim is made. The defect in the instruction, argued here, was not only not called to the attention of the court, but the objection actually made conceded the correctness of the instruction in that respect. See *Robinson v. Railroad Co.*, 48 Cal. 425. I think the judgment and order should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(4 Cal. Unrep. 6)

DESMOND v. FAUS et al. (No. 14,116.)

(Supreme Court of California. June 6, 1893.)

NEW TRIAL—EXTENDING TIME FOR SERVING
STATEMENT—PRACTICE.

1. The fact that counsel consented to the first extension of time in which to serve the statement on a motion for a new trial did not authorize the court to further extend the time 30 days, under the Code, exclusive of the first extension.

2. An order denying a motion for a new trial is properly made on the hearing of a motion to dismiss the same for failure to prosecute with due diligence.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action for personal injuries by James Desmond against Otto Faus and others. There was a verdict for defendants, and from an order denying a new trial plaintiff appeals. Affirmed.

James F. Smith, for appellant. J. F. Castelhun, for respondents.

TEMPLE, C. This action was brought to recover damages for personal injuries, and the verdict was for the defendants. Plain-

tiff appeals from an order refusing a new trial.

Respondents contend that the order must be affirmed, without considering the alleged errors, because plaintiff lost his right to move for a new trial by his failure to prepare and serve his proposed statement in time. Notice of intention to move for a new trial was given April 7, 1888. The proposed statement was served May 28th,—49 days after the notice of intention was given. The adverse party did not consent to any extension of the time. Sundry orders extending the time were made by the court, amounting to 45 days in all. But the court could only grant extensions amounting to 30 days, which, added to the 10 days given by the Code, make 40 days. The statement was therefore served 9 days too late. No excuse is attempted for this delay, but it seems to be contended that the court granted the first extension of 15 days with the consent of the attorney for defendants. His record does not sustain this contention, but if it did it would not satisfy the exigencies of plaintiff's case. Such consent is itself a refusal to stipulate, and amounts to referring counsel to the court for his relief. It falls far short of a consent that the court may extend the time more than 30 days.

December 14, 1888, a motion was noticed to dismiss the motion for a new trial on the ground that plaintiff had not prosecuted it with due diligence. Amendments to the proposed statement were served July 3, 1888. It does not appear whether anything was done to effect a settlement prior to October, when plaintiff was ordered to engross the statement. December 8, 1888, defendants gave notice of a motion to dismiss for want of due diligence in prosecuting the motion. Yet the statement was not engrossed until March 14, 1889, and was certified and settled March 15, 1889, and not filed until March 30th. I find no evidence in the record that the motion for a new trial was ever brought on, or submitted for decision, except by the motion to dismiss. The order appealed from is as follows: "In this action the defendants' motion to dismiss plaintiff's motion for a new trial having been heretofore submitted to this court for consideration and decision, now, the court having fully considered the same, it is ordered that the motion for a new trial herein be, and the same is hereby, denied." By this order it would seem that the motion was granted, or rather that the motion for a new trial was denied, because of the failure to prosecute with due diligence. This practice has been approved by this court in several cases. *Quivey v. Gambert*, 32 Cal. 309; *Calderwood v. Peyser*, 42 Cal. 110; *McDonald v. McConkey*, 57 Cal. 325; *Bunuel v. Stockton*, 83 Cal. 319, 23 Pac. Rep. 301. Whether the first objection, that the proposed statement was not served in time, is properly included in the motion to dismiss for failure to pro-

secute with due diligence, may be questioned. No point is made on this, however, and no injury is done. By such failure, plaintiff's motion was lost. The objection to the failure to serve in time was never waived by respondents, but was expressly reserved in all subsequent steps in the proceeding. The order, I think, should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

98 Cal. 527

GARBER v. GIANELLA. (No. 14,736.)

(Supreme Court of California. June 9, 1893.)

DEED OF LEASED LAND—NOTICE TO PURCHASER—POSSESSION BY SUBTENANT—UNRECORDED LEASE TO TENANT—ESTOPPEL.

1. The owner of land leased it for five years to defendant, for cash rental, but the lease was not recorded. The latter sublet it, by recorded lease, to B., for a share of the crops. Thereafter the owner conveyed the land, with the rents and profits, by full warranty deed, to plaintiff, "subject, however, to a lease to B., which said lease expires" nearly two years from date of the deed. *Held* that, in the absence of actual notice to plaintiff of defendant's interest under his lease from the owner, plaintiff was entitled to the rents and profits after his purchase of the land, as the record of the lease from defendant to B. was not constructive notice to plaintiff of defendant's interest.

2. Defendant, as representative of the owner, placed the land in the hands of brokers for sale, through whom plaintiff purchased, and also delivered to the latter the deed, and received the purchase money, without at any time disclosing to plaintiff any interest in the land under his unrecorded lease. *Held*, that defendant was estopped from claiming any interest in the land.

In bank. Appeal from superior court, Yuba county; John C. Gray, Judge.

Action by Samuel Garber against Vincenzo Gianella for the conversion of certain wheat. From a judgment for plaintiff, defendant appeals. Affirmed.

W. G. Murphy and Barney & Donohoe, for appellant. M. E. Sanborn, for respondent.

HARRISON, J. The plaintiff recovered a judgment in this action against the defendant for the conversion of certain wheat. The plaintiff claimed title to the wheat by virtue of his ownership of the land; and the defendant, by virtue of a lease executed between him and one Boulware prior to the acquisition of the land by the plaintiff. The land is situated in Yuba county, and was originally owned by Lorenzo Gianella, the father of the defendant, and was conveyed to the plaintiff by a deed of conveyance bearing date April 12, 1888, and recorded two days thereafter. The deed was an ordinary grant, bargain, and sale deed of the land in question, "together with the rents, issues, and profits thereof," and contained the following covenant: "And the said party of the

first part, and his heirs, the said premises in quiet and peaceable possession of the said party of the second part, and his heirs and assigns, against the said party of the first part, and his heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend, subject, however, to a lease to Daniel Boulware, which said lease expires November 1, 1889." The defendant testified that his father had given him a lease of a tract of land, including that conveyed to the plaintiff, upon a money rent, for the term of five years, expiring November 1, 1889, and by virtue thereof, on the 6th day of September, 1886, he had leased the same to Boulware for the term of three years from November 1, 1886, by the terms of which Boulware was to pay him a yearly rent or sum of one-third of the crops in the stack at the machine. The lease from Lorenzo Gianella to the defendant was not acknowledged or recorded, and the lease from the defendant to Boulware was recorded, at the request of the defendant, April 3, 1888. The wheat which the defendant is charged with having converted is that which was delivered by Boulware to him in accordance with the terms of the lease between them. While the plaintiff was negotiating for the purchase of the land he was informed that there was a lease to Boulware, which did not expire till a year from the ensuing fall, but he was not informed who was the lessor to Boulware, and testified that he supposed that it was his grantor. Other testimony was given to the effect that at the time of the negotiation it was the understanding between the plaintiff and the brokers who had charge of the sale that the plaintiff was not to disturb Boulware in his possession, and was to receive all the rents and issues of the land.

The conveyance from Lorenzo Gianella to the plaintiff had the effect to transfer to him the entire ownership of the land, including its rents, issues, and profits, subject to only such limitations as were contained in the instrument of transfer, or of which the plaintiff had either actual or constructive notice. As the lease to the defendant from his father was not recorded, there was no constructive notice thereby to the plaintiff of its existence. The lease was a "conveyance" of the land, within the definition of section 1215 of the Civil Code; and the interest in the land that was thereby created in the defendant, though limited to a right to receive the products of the land, was as void, as against the plaintiff, by reason of the failure to have it recorded, as if it had been an unrecorded conveyance in fee. The record of the lease from the defendant to Boulware was not constructive notice of the lease to the defendant, or that he had any interest in the land. The provisions of recording acts are for the protection of subsequent purchasers and incumbrancers from the common grantor,

and do not affect the rights of strangers to the claim of title. *Chicago v. Witt*, 75 Ill. 211; *Losey v. Simpson*, 11 N. J. Eq. 249; *Traphagen v. Irwin*, 18 Neb. 198, 24 N. W. Rep. 684; *Ely v. Wilcox*, 20 Wis. 523; *Long v. Dollarhide*, 24 Cal. 227; 2 Pom. Eq. Jur. §§ 658, 701. Records are only constructive notice of a title, of which they enable a party to obtain actual notice or knowledge by means of a search. As the record did not impart any constructive notice to the plaintiff of the rights of the defendant in the land, it was necessary for him to show that the plaintiff had actual notice of such rights before he made his purchase, and of this the burden was upon the defendant. The record, however, fails to show that the plaintiff was ever informed, either by the defendant himself, or by any other person, that the defendant claimed any interest in the land, or that he was the owner of the leasehold estate under which he seeks to defend this action. The clause in the conveyance to the plaintiff, "subject, however, to a lease to Daniel Boulware, which said lease expires November 1, 1889," does not contain or imply any notice of this character, and is entirely consistent with the title which the deed purported to transfer. Not naming any one as the lessor to Boulware, and being found as a limitation upon a covenant on the part of the grantor, the natural construction to be given to the language of the instrument is that which was testified to by the plaintiff, and those through whose agency he effected the purchase, viz. that the possession of Boulware was not to be disturbed until the time named in the deed as the termination of his lease. The deed does not contain any reservation of the rents that were to be paid by Boulware under this lease, and the grant of the rents, issues, and profits of the land in a previous portion of the deed justified the belief that whatever rents were to be paid by Boulware were to belong to the plaintiff herein. If it had been intended that such rents should be reserved for the defendant, there should have been an express mention thereof in the deed.

It clearly appears from the record that the plaintiff was wholly ignorant of any claim by the defendant to an interest in the land, or in the lease to Boulware, until many months after he had made the purchase, and the position which the defendant held in the matter of the purchase by the plaintiff gave him every opportunity for giving to the plaintiff actual notice of his unrecorded lease. As the representative of his father, he had placed the property in the hands of the brokers for sale, and after the sale to the plaintiff had been effected by them, and the deed sent for execution to his father, who lived at Santa Rosa, the defendant wrote for the deed, and it was returned to him, executed by his father, and containing the foregoing clause in reference to Boulware's lease; and upon its receipt the defend-

ant notified the plaintiff thereof, and they went together to a banking house in Marysville, where the money was paid to him, and the deed delivered by him to the plaintiff. It was then incumbent upon the defendant, if he had intended to claim an interest in the land by virtue of the lease to Boulware, to notify the plaintiff thereof; and his failure to do so estops him from now claiming that the deed did not transfer the land according to its terms. Whatever ambiguity there is in the deed, in its reference to the Boulware lease, is to be construed as strongly against the defendant as against the grantor in the deed; and inasmuch as that clause is consistent with the transfer of the entire ownership of the land, except as to the right of Boulware to remain there, we must hold that the plaintiff took the land discharged of any claim of the defendant.

Certain errors of law are specified in the statement, but none of them deserve any particular notice. It was within the discretion of the court to allow the plaintiff, after the motion for a nonsuit had been denied, to supplement his case by additional proof. The objection to allowing any testimony by the witnesses thereafter called, upon the ground that after the motion for the nonsuit had been denied it was incompetent to call them, cannot be used as against any particular testimony, thereafter introduced, that was not specially objected to.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; McFARLAND, J.

98 Cal. 531

In re JOHNSON'S ESTATE. (No. 18,028.)
(Supreme Court of California. June 9, 1893.)

ADOPTION—EXAMINATION OF CHILD.

1. Civil Code, §§ 222-226, provide, as necessary to the adoption of a child, that the person adopting must be at least 10 years older than the child; that certain persons must consent, including the child if over 12 years of age; and that the child, the person adopting, and other persons whose consent is necessary, must appear before the county judge, and the necessary consent must thereupon be signed, and an agreement executed by the person adopting to educate and treat the child in all respects as his own. Section 227 provides that the judge must examine "all persons appearing before him," each separately, and, if satisfied that the interests of the child will be promoted, shall make an order of adoption. *Held*, that the examination of a child under the age of consent is not necessary. Harrison and Pater-son, JJ., dissenting.

2. The fact that the agreement and consent are not actually signed in presence of the judge, but are signed and filed with the clerk before the parties appear, can make no difference as to the validity of the adoption, since the material thing under the statute is merely that the parties shall consent in presence of the judge, and that such consent shall be manifest by writings then delivered.

In bank. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Petition of Mary Eliza Johnson Howell for revocation of letters of administration issued to Eugene W. Kay upon the estate of William B. Johnson, deceased, and for her own appointment as administratrix. From an order denying the petition, petitioner appeals. Reversed.

Baldwin & Campbell, F. T. Baldwin, J. C. Campbell, and Pillsbury, Blanding & Hayne, for appellant. Jas. H. and J. E. Budd, Nutter & Devries, and Wesley Minta, for respondent.

DE HAVEN, J. Appeal from an order of the superior court denying the petition of Mary Eliza Johnson Howell for the revocation of letters of administration issued to one Eugene W. Kay upon the estate of William B. Johnson, deceased, and for her appointment as administratrix of said estate. The proceeding was commenced under section 1383 of the Code of Civil Procedure. The petitioner claims to be the legally adopted child of the deceased, and whether she is or not is the only question presented by this appeal.

It appears from the evidence that on July 8, 1874, the petitioner was a motherless child, five years of age, and the daughter of David G. Strahan; and on that day the deceased, William B. Johnson, then an unmarried man, the petitioner, and her father, all residents of the county of San Joaquin, appeared before the Honorable W. S. Buckley, county judge of that county, and an order was made by said judge declaring the petitioner adopted by the said deceased, and that she should be regarded and treated in all respects as his child, and should take his family name. The order, as shown by its recitals, was based upon a petition therefor, signed by the deceased, accompanied by the written consent of the father of the petitioner herein to such adoption, and an agreement executed by the deceased to the father to the effect that the petitioner here should be adopted as the child of the deceased, and treated in all respects as if she were his own lawful child. The order further sets forth that all parties to the proceeding were "present before the county judge of said county of San Joaquin in open court," and "were then and there (save and except said child) duly sworn and examined separately in relation thereto;" and that it appeared "that the interest of said minor would be promoted by such adoption." The petitioner lived with the deceased as his child from the date of the proceeding for her adoption until her marriage in April, 1889. The adoptive father had no other children, and died in January, 1891, intestate. The natural father of petitioner is also dead. Upon the foregoing evidence, which is undisputed, the superior court found that the adoption papers were not signed or acknowledged before the county judge of San Joaquin county, and that the child, Mary Eliza Strahan, the petitioner here,

was never examined before the county judge, and, as a conclusion of law, held that the adoption proceedings were and are invalid.

1. The respondent claims that the appellant was never legally adopted by the deceased, because she was not examined by the county judge at the time the order of adoption was made, as required by section 227 of the Civil Code, then and now in force; and this is the main question to be decided by us. The right of one person to legally adopt the offspring of another, and thus to create between the person adopting and the child adopted the relation of parent and child, giving the child all the rights and subjecting it to all the duties of that relation, was unknown to the common law, and exists in this state as a pure creation of statute law; and, in order to effect such adoption, it is necessary that there should be a substantial compliance with all of the essential requirements of the law under which the right is claimed; but, in determining what provisions of the law are essential, and therefore mandatory, the statute is to receive a sensible construction, and its intention is to be ascertained, not from the literal meaning of any particular word or single section, but from a consideration of the entire statute, its spirit and purpose. In the case of *Rutledge v. Crawford*, 91 Cal. 533, 27 Pac. Rep. 779, this court said that "it is one of the great maxims of interpretation to keep always in view the general scope, object, and purpose of the law, rather than the mere letter. He who considers merely the letter of an instrument goes but skin-deep into its meaning." *Broom*, Leg. Max. 611.

Following this rule of construction, it is necessary to read section 227 of the Civil Code with other sections of the same Code relating to the subject of adoption, in order to determine the force of the objection made by respondent to the validity of the adoption proceedings under consideration now. Those sections are: Section 222: "The person adopting a child must be at least ten years older than the person adopted." Section 223: "A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife; nor can a married woman, not thus separated from her husband, without his consent: provided, the husband or wife not consenting is capable of giving such consent." Section 224: "A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights * * * or who has been judicially deprived of the custody of the child on account of cruelty or neglect." Section 225: "The consent of a child, if over the age of twelve years, is necessary to its adoption." Section 226, (as it read in 1874):

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"The person adopting a child, and the child adopted, and the other persons whose consent is necessary, must appear before the county judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be educated and treated in all respects as his own lawful child should be treated." Then follows section 227, upon which the respondent places special reliance, and which provides: "The judge must examine all persons appearing before him pursuant to the last section, each separately, and, if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting."

The language of this section, if literally construed, is broad enough to require the examination of an infant incapable of consenting to the proceeding, or of giving to the judge any information which could aid him in determining whether to give or withhold his consent to the adoption; and the contention of respondent on this point is that the section is mandatory, and must receive this literal construction; and that without the examination of such an infant the proceeding for its adoption, although regular in every other respect, and acquiesced in by all of the parties to it, is void, and may be collaterally assailed by a stranger to the proceeding. We are unable to accept this as a correct interpretation of the statute. The adoption of a child under the section of the Civil Code above cited is not a judicial proceeding, (In re *Stevens*, 83 Cal. 322, 23 Pac. Rep. 379,) although the sanction of a judicial officer is required for its consummation. The proceeding is essentially one of contract between the parties whose consent is required. It is a contract of a very solemn nature, and for this reason the law has wisely thrown around its creation certain safeguards, by requiring, not only that it shall be entered into in the presence of a judge, but also that it shall receive his sanction, which is not to be given until he has satisfied himself of these three things: First, that the person adopting is 10 years older than the child; second, that all the parties whose consent is required do consent, fully and freely, to the making of such contract; third, that the adoption contemplated by the contract will be for the best interest of the child adopted.

It is apparent that the only object of section 227 of the Civil Code in directing the judge to examine the parties who are required to appear before him is that he may satisfy himself in relation to the facts just mentioned, and the subject of the examination is to be confined to these three matters; and, in order that he may thus satisfy himself that a child over the age of 12 years, or a wife whose consent is necessary, does freely

consent to the adoption, the judge is required to examine the parties separately. But the examination of a child whose consent to the contract is unnecessary, and who is of such tender years that it is incapable of exercising any judgment as to the effect of such contract upon its interests, would certainly be an idle thing to do, and the section should not receive such an extremely narrow and literal construction as to make the examination of such a child mandatory, and its omission fatal to the creation of a valid contract, binding upon adults who have done everything required of them in order to manifest their full and free consent to such adoption. The provision in relation to the separate examination of the parties to such contract, most certainly in so far as it is applicable to a child under the age of consent, is simply directory, and is to be complied with or not, in the discretion of the judge. "Unless a fair consideration of a statute directing the mode of proceeding of public officers shows that the legislature intended compliance with the provision in relation thereto to be essential to the validity of the proceeding, it is to be regarded as directory merely. Thus, directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and, if the act is performed, but not in the time or in the precise mode intended, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute." *Suth. St. Const.* p. 575; *Jones v. State*, 1 Kan. 273; *People v. Supervisors*, 34 N. Y. 272. In this latter case the court said: "A strict and literal adherence to the letter and form of a statute in minor or nonessential particulars will often defeat a remedy or destroy a right which it was the principal intention of the legislature to create or provide. Where the statute directs an act to be done in a certain way, or at a certain time, and a strict compliance as to the time or form does not appear to the judicial mind to be essential, the proceedings are held valid, though the command of the statute has been disregarded." Keeping in view the foregoing rule for determining whether the provisions of a statute relating to the mode of proceeding by a public officer are mandatory or simply directory, and looking at the substantial object which the statute has in view in requiring the judge to examine the parties appearing before him for the purpose of entering into the contract of adoption, it is clear to us that the examination of a child under the age of consent should not be deemed indispensable to the validity of the adoption proceeding.

The cases of *Long v. Hewitt*, 44 Iowa, 363; *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. Rep. 902; *Shearer v. Weaver*, 56 Iowa, 578,

9 N. W. Rep. 907; *Furgeson v. Jones*, 17 Or. 204, 20 Pac. Rep. 842; *Ex parte Chambers*, 80 Cal. 219, 22 Pac. Rep. 138; and *Ex parte Clark*, 87 Cal. 640, 25 Pac. Rep. 967,—cited by respondent, are neither of them in conflict with the views here expressed, as an examination of those cases will show. In Iowa the statute requires that the act of adoption shall be evidenced by an instrument in writing, signed by the parents or others named, and provides that "upon the execution, the acknowledgment, and filing for record of such instrument, the rights, duties, and relations between the parent and child by adoption shall thereafter * * * be the same as exist by law between the parent and child by lawful birth;" and it was held in each of the above-cited cases from the supreme court of that state that until the instrument was filed for record its execution was not complete; that the filing for record was in the nature of a delivery, and was necessary in order to give validity to the instrument. Thus in *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. Rep. 902, the court said: "The statutory conditions and terms are that the written instrument must be executed, signed, acknowledged, and filed for record. When this is done, the act is complete. If the named requisites are not done, then the act is not complete, and the child cannot inherit from the parent by adoption." This is the ground upon which all the above-cited cases from the supreme court of Iowa were decided, and it will thus be seen that they are all based upon the sound legal principle that, until the parties whose consent is necessary to the formation of a contract have performed every act which the statute requires of them in order to manifest such consent, the contract is not complete. In Oregon adoption is a judicial proceeding, and under the statute of that state, in order to give the court jurisdiction to proceed, the natural parents must be served with notice, or must consent to the decree; and in *Furgeson v. Jones*, 17 Or. 204, 20 Pac. Rep. 842, the only matter decided was that a decree of adoption without notice to the natural parent, and without his consent, was void for want of jurisdiction in the court rendering the decree. The distinction between that case and this is most obvious. In this state, as we have seen, adoption is simply a matter of contract, and in the case before us all of the parties whose consent was necessary to the formation of such contract entered into the same freely and voluntarily, and with the sanction of the proper officer. In *Ex parte Chambers*, 80 Cal. 216, 22 Pac. Rep. 138, involving the right to the custody of a child, it appeared that the order for its adoption was made without the consent of the managers of the orphan asylum having the care of the child, and such consent was required by the statute under which the adoption proceeding was had. The court held the adoption invalid, because of the failure to

comply with this essential requirement of the law, and it was with reference to this omission that the court used the general language relied upon by the respondent here, saying: "The power to adopt minor children is a creation of the statute unknown to the common law, and the mode must be held to be the measure of the power." The court simply meant by this language that the statute having made the consent of certain parties necessary, there could be no valid adoption without such consent. In *Ex parte Clark*, 87 Cal. 638, 25 Pac. Rep. 967, the natural mother was seeking to obtain the custody of her child from John D. Reulin and his wife, who claimed to be the adopted parents of the child, and the case was submitted to the court upon the record of the adoption proceedings alone, and the court, in its opinion, speaking of this record, said: "It will be observed that the parents consented to the adoption of their child by Jacob Reulin, that the agreement to adopt is signed by David Reulin, and that the order of the court gives the child to Jacob Reulin. There is nothing in the record of the proceeding to show that the names Jacob Reulin, David and John D. Reulin indicate one and the same person." And upon this record, which did not show that the parents of the child had ever consented to its adoption by John D. Reulin, or that John D. Reulin had ever agreed to adopt the child, or that the judge had ever made an order declaring the child adopted by him, the court held that the natural mother was entitled to the custody of the child, saying: "In our opinion, the order is void, and affords respondents no warrant for the detention of the child. It confers no rights upon them, and is manifestly too uncertain, when read in connection with the agreements and consents upon which it was based, to render any one liable as the parent by adoption,—especially one whose name does not appear in the record at all." And this was all that was decided in that case, and was the only question before the court. It is true that it was also said in the opinion in that case by way of argument: "The child by adoption cannot inherit from the adopting parent unless the act of adoption has been done in strict accordance with the statute. No matter how persuasive may be the equities of the child's case, or how clear the intention of all parties, it must appear that the statutory conditions have been strictly performed, otherwise the relation never existed, and the right to inherit never was acquired. * * * It cannot be said that one condition is more important than another." But it is evident that the court, in saying that one condition or provision of the statute concerning adoption was no more important than another, was speaking of essential conditions, such as, under a proper construction of the statute, are mandatory, as the case then under consideration was one where there had been a failure to observe essential requirements of

the law, the order of adoption not being based upon an agreement signed by the person named in such order as the adopting parent; nor did the record there show any consent upon the part of the natural parents of the child to its adoption by the respondents in that case.

In *Cohens v. Virginia*, 6 Wheat. 264, Chief Justice Marshall repeated the rule which it is always necessary to keep in mind when construing the opinion of a court. He said: "It is a maxim never to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." And Lord Manners, in *Revell v. Hussey*, 2 Ball & B. 286, said upon this same point: "It is always unsatisfactory to abstract altogether the reasoning of the court in any reported case from the facts to which this reasoning is meant to apply. It has a tendency only to misrepresent one judge and to mislead another." The opinion in *Ex parte Clark*, supra, when construed and limited as it must be by the facts of that case, is not in conflict with the conclusions here announced, that the statute in relation to adoption must receive a reasonable construction, and that a substantial compliance with its essential provisions is all that is required in order to effect a valid adoption. The essential foundation of the proceeding is the consent of the persons named in the statute; and when this has been given in the presence of the proper judge, and manifested in writing, and by the order of such judge, the contract cannot be declared invalid because of some merely technical objection to the manner in which the judge who signed the order of adoption may have discharged his duty in the premises.

2. The finding of the court that the agreement of the deceased to adopt the petitioner, and the consent of her father thereto, were not signed or acknowledged before the county judge of San Joaquin county, is not sustained by the evidence. The only basis for this finding seems to be that there was no evidence that the papers were actually signed in the presence of the judge, and that the recitals in the order show that they were signed and filed with the clerk of the court before the parties appeared before the judge. But the evidence does show that the papers were actually signed by the parties, and the court so finds, and they were presented to the judge at the time he made his order thereon. This was sufficient. It can make no difference whether the papers already properly signed were presented to the judge by the parties, or whether such papers were signed by them at the time. The substantial thing required by the statute is that the parties whose consent is required do consent in the presence of the judge, and that such

consent is manifested by writings then delivered by them for that purpose.

Judgment and order reversed.

We concur: GAROUTTE, J.; McFARLAND, J.; FITZGERALD, J.

BEATTY, C. J. I concur in the judgment and generally in the opinion of Justice DE HAVEN, but I am not willing to say that the provisions of the statute requiring the judge before whom an adoption proceeding is had to examine the child, even when of tender years, is in no sense mandatory. The provision is designed to safeguard the interests of the child, and it may be that she or one proceeding in her behalf could attack the validity of the order upon the ground that the statute had not been strictly pursued. As to children under 12 years of age the proceeding is strictly in invitum, and to change or abridge their natural rights the prescribed procedure must be strictly followed. But it does not lie in the mouth of a stranger, or one claiming through an adult, and a consenting party to the adoption proceeding, to say that because the interests of the passive and helpless subject of it were not so carefully looked after as they should have been she must therefore be deprived of the advantages of the order of adoption to which she has always conformed, and the protection of which she invokes.

HARRISON, J., (dissenting.) William B. Johnson died intestate in San Joaquin county, January 16, 1891, and on the 13th of February, 1891, letters of administration upon his estate were granted by the superior court of that county to Eugene W. Kay. April 10, 1891, Mary Eliza Johnson Howell, wife of M. D. Howell, filed a petition in said court, alleging that she was the child and sole heir of the decedent, and therefore entitled to letters of administration upon his estate, and praying that the letters theretofore granted to Kay be revoked, and that she be appointed administratrix of said estate. To this petition answers were made by Kay, both as administrator and as one of the next of kin of the deceased, and also by Mollie Settle, a grandniece of the decedent, contesting the application of Mrs. Howell, and denying that she was the child of the deceased, or entitled to any portion of his estate. At the hearing before the superior court the evidence presented was limited to that involving the determination of the issue whether Mrs. Howell was the child of the decedent. The evidence offered by her in support of this averment consisted of certain proceedings taken before the county judge of San Joaquin county, July 8, 1874, for the purpose of her adoption by the decedent, under the provisions of the Civil Code. The court held that these proceedings were not in conformity with the provisions of the Code, and that the petitioner had not been adopted as a child of the de-

cedent, and therefore was not his heir, and dismissed her petition. From the order denying her application, and the judgment entered thereon, she has appealed to this court.

The question presented for consideration upon the appeal is whether the proceedings for adoption taken before the county judge sufficiently complied with the requirements of the Civil Code to constitute the petitioner the child of the decedent. The point chiefly urged in support of the judgment of the superior court is that it appears upon the face of the order made by the county judge that he did not make any examination of the child whose adoption was sought, as required by the Code before he could make an order sanctioning the adoption, while on the part of the appellant it is contended that under the circumstances of this case no examination of the child was required.

The evidence offered in support of the claim of adoption consisted of: (1) A petition by Johnson to the county judge setting forth that the child was about five years of age; that the petitioner was desirous of adopting the child, and had made a written agreement to that effect; that the mother of the child was dead; that its father had given his consent in writing to its adoption by the petitioner, and praying the judge to make an order declaring that the child be adopted and treated by him as his lawful child. To this petition was annexed a request of the father of the child that the county judge would make an order of adoption. (2) An agreement executed by the petitioner to the father that he would adopt and treat the child in all respects as his own lawful child should be treated. (3) An order signed by the county judge reciting the filing of the petition and the facts therein recited, and the filing of the consent and the agreement; and also that "the said David G. Strahan, the father of said minor, and the said minor, Mary Eliza Strahan, and the said petitioner, being present before the county judge of said county of San Joaquin, in open court, were then and there (save and except said child) duly sworn and examined separately in relation thereto;" and ordering "that said Mary Eliza Strahan, minor child of said David G. Strahan and Nancy Ann Strahan, be adopted, and that the said minor is hereby adopted, by said William B. Johnson, under and in pursuance of chapter 2, tit. 2, of the Civil Code of California, and the acts amendatory thereof, and that said Mary Eliza Strahan be regarded and treated in all respects as the child of said William B. Johnson, and that she take his family name." These documents were severally entitled "In the County Court of San Joaquin County," and were each indorsed by the clerk, "Filed July 8, 1874."

Adoption has the effect to change the status of an individual from that which was impressed upon him at his birth, and can never take place unless authorized by some positive law, and then only to the extent so

authorized, and in the manner prescribed by the statute conferring such authority. The common law made no provision for adoption, but within the past 50 years statutes upon that subject, and providing for its exercise, have been enacted in a majority of the states of this country. The principles upon which these statutes are based are taken from the civil law. They are also to be found in the Twelve Tables, and were the subject of many social regulations in Roman history, and were finally embodied by Justinian in his Institutes. Liber 1, tit. 11, *De Adoptionibus*. Under this system an adoption was always attended with restrictions, and made a matter of public ceremony and sanction. Code Just. lib. 8, tit. 48. The provisions necessary to effect an adoption vary in different states, and hence, in considering opinions of other courts, it is necessary to read them in the light of the statutes under which they were given. In many of the states the proceedings partake of the nature of a judicial proceeding, either in the form of an action in court upon notice to the interested parties, wherein a judgment is rendered from which an appeal may be taken, or, if not in the form of an action, are conducted in the presence of the court, so far as to be made a matter of record therein under its sanction; while in others the act of adoption is invalid until it has been authenticated before some designated officer, and made a matter of public record. The provisions of the Civil Code of this state differ materially from those of any other state to which our attention has been called, and are characterized by much greater simplicity. The various steps requisite to an adoption under this Code are in the nature of a deed of adoption, which is required by the statute to be authenticated before the county judge. Upon such authentication and sanction the act of adoption is complete, and when thus executed and authenticated becomes the only evidence by which the adoption can be established. These provisions of the Civil Code are in no respect judicial in their requirements, and are entirely dissociated from any judicial supervision or sanction. The provision for their sanction by the county judge does not make it a judicial proceeding, or subject the acts done to the rules governing judicial acts. The county judge has been selected by the legislature as the officer to be charged with the function of solemnizing the ceremony of adoption, but his duties in the exercise of that function are no more of a judicial character than would be the same duties if performed before a notary public. In *re Stevens*, 83 Cal. 331, 23 Pac. Rep. 379. See, also, *People v. Bush*, 40 Cal. 346. Jurisdiction, in the sense in which that term is ordinarily employed, is not predicable of the function of the judge in making the order which he is authorized to make under section 227 of the Civil Code, but his action

thereunder resembles more the execution of a power conferred upon him by the statute. The statute has conferred upon him an authority to make the order provided in that section whenever certain conditions have been complied with, but, as the power to make the order is conditional, it is always requisite to show that the condition under which the authority could be exercised existed, before the exercise of the power can be invoked in support of any right claimed thereunder. There is no provision in the Code authorizing or sanctioning the filing of the instruments with the clerk, or making a record of the act of adoption, or of the order of the county judge, either in the minutes of the court or in any of the public records of the county.

The law upon this subject as it existed in 1874 is contained in sections 226 and 227 of the Civil Code, which are as follows: "Sec. 226. The person adopting a child, and the child adopted, and the other persons whose consent is necessary must appear before the county judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated. Sec. 227. The judge must examine all persons appearing before him pursuant to the last section, each separately, and, if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child shall henceforth be regarded and treated in all respects as the child of the person adopting." From these sections it is seen that the acts to be performed before the adoption is complete are: First. The person adopting the child, and the child adopted, together with its parent or parents, must all appear before the county judge, and he must make a separate examination of each of the persons appearing before him. Second. The parents of the child must execute a written consent to its adoption by the person proposing to adopt it, and he must execute an agreement to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated. Third. After such adoption and the execution of said instruments, the judge, "if satisfied that the interests of the child will be promoted by the adoption," must make an order sanctioning the adoption of the child. The Code is silent as to the character and extent of the examination to be made by the judge of either of the persons who are to appear before him, but, inasmuch as the evident object of this examination is that the judge may be satisfied that the interests of the child will be promoted by the adoption, it is apparent that the extent, as well as the character, of the examination must be determined by the judge according to the circumstances of each case. The provision of the section is, how-

ever, imperative and mandatory that the judge "must examine all persons (including the child) appearing before him." The fact that the consent of the child, if under 12 years of age, is not required, does not obviate the necessity of its examination. The examination is not for the purpose of obtaining any consent, as that, both of the parent, as well as the adopter, must have been previously given, and is required to be evidenced by writing, but is for the purpose of satisfying the judge whether the interests of the child will be promoted by the adoption. There would seem to be a greater necessity for an examination by the judge of a child under 12 years of age than of one above that age, for, as the child above 12 years of age must give its individual consent, the ascertainment whether such consent was voluntary would greatly dispense with any further examination, whereas, in the case of an infant under 12 years of age, a greater responsibility is placed upon the judge in determining whether the interests of the child will be subserved by the adoption. For this purpose the judge would naturally inquire into the character and circumstances of the person adopting, the motives influencing the parent to give its consent, the history and life of the child; and whenever the child was capable of giving expression to its feelings or wishes, these feelings and wishes would be not only proper, but essential, subjects of examination. The character of the child, its sex, its age, its feelings towards its parent, as well as towards the adopter, would all be elements for the purpose of giving to the judge information on which to base his determination.

The precise age at which an examination would be followed with results tending to the satisfaction of the judge cannot be fixed by general rules, but must be left to the individual case. Even in matters which affect the interests of other persons, and where the child is without any interest, he can be a witness if over 10 years of age, and also, though under that age, if he is capable of receiving just impressions of the facts respecting which he is examined, and of relating them truly. Code Civil Proc. § 1880. There is no precise age at which a child can be regarded as absolutely disqualified from testifying, and therefore it has been wisely left to the judge to determine, after an examination in each particular case, the extent to which he will prosecute his inquiries for the purpose of determining its competency. The rule which formerly obtained in England, that, as the child could not be examined except under oath, its evidence was excluded unless it understood the nature of an oath, not only does not obtain in this state, but would be inapplicable to the case under consideration, as the examination of neither of the parties is required to be under oath. While an infant of only a few months of age

would not be competent to respond to any examination by the judge, it is equally clear that a child of 11 years of age would be presumed to have decided preferences which should be consulted for the purpose of satisfying the judge whether its interests would be promoted by the adoption proposed. A child of five years of age has ordinarily reached such maturity as to be able to have preferences as well as memory, and to give intelligent responses to the questions that might be put to it by the judge. It was doubtless for this reason that the legislature required that such examination should be made in all instances, and that the judge should determine in each case to what extent the examination should proceed, rather than limit the age at which it might be made. As in the case when a child is a witness upon matters between other parties, its competency can be determined only after a preliminary examination. Such examination must be had in every case under the statute in question for the purpose of determining in the first instance whether the child is competent to give answers to the inquiries, and, if so, then the examination should be continued as to the matters which may enlighten the judge in reaching his conclusion. But it is not necessary to find a reason for the form in which the law has been enacted, or to say that, because the reason which would exist in some cases does not exist in the individual case, therefore the requirements of the statute need not be observed. Laws are enacted for the purpose of prescribing a rule of action applicable to all the cases which fall within the class for which they are enacted. But to substitute the will of one man in each individual case for a general rule made for an entire class would be to subject society to a rule of men, and not of law. It would be difficult to give a satisfactory reason for requiring that a summons in a civil action should be personally served upon a newborn infant in its nurse's arms, as well as upon the person who has the custody of the infant, except that it is the requirement of the statute that in all cases there shall be a personal service upon the defendant. There would be no certainty or safety in judicial proceedings if it were left to the arbitrament of a judge to determine in each case whether the defendant was of such tender years that it would be useless to make a personal service upon it, and therefore the legislature has wisely determined that there shall be personal service upon the defendant in all cases, as it has also said that in all cases the judge shall make a separate examination of a child proposed for adoption.

As it appears upon the face of the order made by the county judge that he disregarded this requirement of the Code for an examination by him of the child, I am of the opinion that there was an essential de-

fect in the proceedings taken for its adoption, and that the order of the judge sanctioning the adoption was made without a compliance with one of the essential provisions of the Code, and consequently conferred no rights either upon the person adopting or upon the child. In thus holding that it is necessary to show a compliance with all the requirements of the Code, I do not disregard the provisions of section 4 of the Civil Code, that "its provisions are to be liberally construed, with a view to effect its objects and to promote justice." This rule for a liberal construction is applicable only to the provisions of the Code, and is limited to the objects sought to be effected. The most extended application of this rule has never justified the disregard of plain requirements of a statute, or the omission of any act which is specifically declared essential to effecting the object of the provision. "Liberal construction does not mean enlargement or restriction of a plain provision of a written law. If a provision of the Code is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is to be indulged in as, within the fair interpretation of its language, will effect its apparent object, and promote justice." In re Jessup, 81 Cal. 419, 21 Pac. Rep. 976, and 22 Pac. Rep. 742, 1028. "The power to adopt minor children is a creation of the statute which was unknown to the common law, and the mode must be held to be the measure of the power." Ex parte Chambers, 80 Cal. 219, 22 Pac. Rep. 138. "The right of adoption is purely statutory. It was unknown to the common law, and, as the right when acquired under our statute operates as a permanent transfer of the natural rights of the parent, it is repugnant to the principles of the common law, and one who claims that such a change has occurred must show that every requirement of the statute has been strictly complied with. It cannot be said that one condition is more important than another." Ex parte Clark, 87 Cal. 641, 25 Pac. Rep. 967.

The construction of a statute is the interpretation of the meaning of the legislature; and when its meaning is clear, or the language of the statute is unambiguous, there is no opportunity for construction. It is only when the language of an act is susceptible of different meanings, or when the object sought or the means provided for effecting the object are imperfectly expressed, that rules of construction are invoked. The rule directing that a statute shall be liberally construed means that the terms therein used are not to be construed so strictly as to defeat the evident purpose of the statute by a strict adherence to the letter, but that, if the acts required by the statute are

performed, it will be a sufficient compliance with the legislative intent, though they may not be performed in the exact mode or order prescribed by the statute. In the present case, for example, the provision in section 226, that when the parties appear before the county judge "the necessary consent must thereupon be signed, and an agreement executed by the person adopting," does not require the literal construction that such consent and agreement are ineffective if signed prior to the appearance of the parties before the judge. The object of the statute is that the consent and agreement shall be executed and approved by the judge, and it is immaterial whether they are signed before the parties appear before him or are signed in his presence, if their execution is conceded and sanctioned by the judge. It is never permitted, however, under any rule of liberal construction, to dispense with an explicit requirement of the statute, upon the theory that it could not have been intended by the legislature, or that the court or judge shall exercise its discretion in determining whether such requirement is essential. It is not within any definition of liberal construction for a court to substitute its own judgment for that of the legislature.

It cannot be presumed that the judge did any other act or made any other examination than he has recited in his order; and in the face of his recital that he examined the parties who appeared before him "save and except the child," it cannot be presumed that he made any examination whatever of the child. As the order was made in the execution of a statutory authority, it was necessary to show by the order itself the existence of all the conditions under which the statute permitted him to exercise such authority; and, although he was a county judge, yet the execution of this authority was not in the exercise of any judicial power, and the rules of presumption that are invoked in support of judicial action have no application. I think that the judgment and order should be affirmed.

PATERSON, J. I concur in the views expressed by Mr. Justice HARRISON.

98 Cal. 465

RICO et al. v. BRANDENSTEIN et al. (No. 14,315.)

(Supreme Court of California. June 7, 1893.)

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—CONVEYANCE BY WIFE DIRECT TO HUSBAND—VALIDITY.

Const. 1849, art. 11, § 14, provided that all property of the wife, owned before and acquired after marriage, shall be her separate property, and laws should be passed, defining her rights in relation thereto. Act April 17, 1850, (St. 1850, p. 254,) gave the husband the control of the wife's separate property during coverture, but provided that no alienation thereof could be made, or lien thereon created, unless by instrument in writing, signed by both husband and wife, and acknowledged by her on privy examination. Section 7 provided that when any sale is made by the wife, of her property, for her husband's benefit, it shall be deemed a gift, and neither she, nor those claiming under her, shall have any right to recover the same. Act April 16, 1850, § 19, provided that "a married woman may convey any of her real estate by any conveyances thereof executed and acknowledged by herself and her husband," etc. *Held*, that the common-law disability of the husband to take a conveyance direct from the wife was not removed, and that a deed of trust of the wife's separate property, executed in 1857 by a married woman and her husband to the latter, was void.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; John K. Alexander, Judge.

Action by Tomas Rico and another against Meyer Brandenstein and another, for the partition of certain lands. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Pillsbury, Blanding & Hayne, for appellants. Reinstein & Eisner, for respondents.

SEARLE, C. Appeal from a judgment in favor of defendants, and from an order denying a motion for a new trial. The action was brought for a partition of the southeast two-thirds of the Rancho San Bernardino, situate in the county of Monterey. The two plaintiffs claim to be the owners of an undivided one-eighth each, as tenants in common, with defendants Brandenstein and Godchaux, who are averred to be each the owner of an undivided three-eighths in said rancho. The answer denies the ownership of plaintiffs, or that they were ever tenants in common with defendants, and avers ownership in defendants to the entire tract of land, except as to certain lots conveyed by them to third parties. The area of the land in question is 8,901 and 25-100 acres. Francisco Rico, the father of the plaintiffs, on the 10th day of January, 1855, became the owner of the premises in controversy, and on August 27, 1855, conveyed the same

by deed to Tomasa Sepulveda Rico, his wife. The title asserted by plaintiffs in the action rests upon a deed of trust of the premises, dated November 9, 1857, executed by Francisco Rico and Tomasa Sepulveda Rico, his wife, as parties of the first part, to the said Francisco Rico, as party of the second part. The deed purports to be in consideration of \$15,000, paid to the parties of the first part by Theodora Gonzales and Jose Sepulveda, the receipt of which is acknowledged, and which, the proofs show, was actually paid. The remaining portions of the deed, important to the inquiry, are as follows: "And by these presents doth bargain, sell, remise, release, and quitclaim and convey unto Francisco Rico, in trust for and the use, interest, behoof, benefit of Guadalupe Rico, Francisco Rico, Junior, Vicente Rico, and Alexander Rico, all being legitimate children of the parties of the first part hereof, * * * all now living, and all other offspring that may be born hereafter of the said parties of the first part hereof, all the right, title, and interest of the parties of the first part hereof in and to. * * * This conveyance is intended as a deed of trust, to be held by the said Francisco Rico under the express conditions hereinafter set forth, that is to say, to hold the same aforementioned premises to and for the uses, interests, and purposes of the said minors, Guadalupe, Francisco, Vicente, and Alexander Rico, now living, and also all other children that may be born hereafter of the said parties of the first part hereof, to receive the rents, issues, and profits of the said lands and improvements thereon, and apply the same to the use and benefit of the said aforementioned children now living, and all others that may be born hereafter of the said parties of the first part hereof, during their natural lives." Then follows a clause authorizing the said Francisco Rico to appoint his successor as trustee of said property for said children during his lifetime, and by will after his death. The trustee and beneficiaries are forbidden to sell, pledge, or hypothecate the land and premises described in the deed. The deed was duly acknowledged and recorded in the office of the county recorder of the county of Monterey, November 9, 1857. Francisco Rico, the grantee of the deed of trust, was one and the same person with Francisco Rico, one of the grantors, and the grantors were husband and wife. The plaintiffs herein were their children, born subsequent to the execution of the deed of trust. Defendants Brandenstein and Godchaux hold the premises under a conveyance in trust executed by the same grantors, in 1862, to third parties, as trustees. It was admitted at the trial, for the purposes of the case, that, if plaintiffs are not the owners of two-eighths of the rancho, defendants are the owners thereof.

The first question presented by the record

relates to the validity of the deed from Rico and wife to the husband. It must be assumed that at common law the wife could not convey her separate property to her husband. The contention of appellant is that, conceding the property to have been the separate property of the wife, still at the time of the deed there was, under the statute of this state, no restriction upon such a conveyance. Section 14, art. 11, of the constitution of this state, adopted October 10, 1849, provided that "all property, both real and personal, of the wife, owned and claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well as to her separate property, as to that held in common with her husband." By an act approved April 17, 1850, the legislature, in obedience to the requirements of the constitution, passed a law by which the husband was given "the management and control of the separate property of the wife during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband, before," etc. The seventh section of the same act provided "that when any sale shall be made by the wife of any of her separate property for the benefit of her husband, or when he shall have used the proceeds of such sale, with her consent, in writing, it shall be deemed a gift, and neither she, nor those claiming under her, shall have any right to recover the same." St. 1850, p. 254. An act concerning conveyances, passed April 16, 1850, provided as follows: "Sec. 19. A married woman may convey any of her real estate by any conveyances thereof, executed and acknowledged by herself and her husband, and certified in the manner hereinafter provided, by the proper officer taking the acknowledgment." A number of other statutes might be referred to, tending to indicate the evident policy of our lawmakers, to loosen the chains which bound married women at the common law, and, so far as their separate property is concerned, to confer upon them like power of alienation with that possessed by their husbands. Step by step the work has gone on, until now "a conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner." Civil Code, § 1187. We are dealing, however, with a question which depends, not upon the present condition of the law, but upon the status and rights of married women as they existed in 1857, the date of the deed under consideration. No question is made here as to the due execution of the deed by the hus-

band and wife, or that it was properly acknowledged as required by statute. The contention of respondents in this behalf is that the deed is void because at the date of its execution, to wit, November 9, 1857, a married woman could not convey real property directly to her husband. The husband was required to join in the conveyance. The objects of the statute in requiring the husband to join with his wife in the conveyance of her separate property, as it has been said, was to afford her his protection against imposition and fraud, and to aid her by his counsel and advice. *Meagher v. Thompson*, 49 Cal. 190. The requirement of the statute is analogous to the rule of the civil law, under which the wife must have the authorization of her husband, or a decree of a judge, before she could convey any of her rights, or enter into a civil contract. The wider experience of men in business affairs, their better opportunities for becoming conversant with property values, and the mode of its transfers, as well as the important object of promoting unity of purpose and harmony of action in the close relation existing between husband and wife, may well have conduced to the enactment of the law requiring them to join in a conveyance of property which, while belonging to the wife, was yet subject to the management and control of the husband. The law required them to join in the conveyance, and there is no disposition to question either its wisdom, or its binding force; and these remarks are only indulged as tending to a better understanding of the cognate question, can the husband and wife convey her separate real property to the former?

This court has repeatedly decided that a husband, when free from debt, may make a gift to his wife of either his separate property, or of the community property of the husband and wife. *Barker v. Koneman*, 13 Cal. 9; *Peck v. Brummagim*, 31 Cal. 441; *Dow v. Mining Co.*, Id. 653; *Woods v. Whitney*, 42 Cal. 361; *Higgins v. Higgins*, 46 Cal. 263. It does not necessarily follow that the converse of the proposition is true, and that the wife can convey by way of gift to her husband. If, however, she cannot do so, or, rather, if she could not do so under the law we are considering, viz. the statute in force in 1857, it must be because of the inherent condition of the parties as husband and wife. The owner of property competent to convey may convert himself into a trustee by making a proper declaration of the trust, in writing. *Suarez v. Pumpelly*, 2 Sandf. Ch. 336; *Pinkett v. Wright*, 2 Hare, 120. A trust is valid only to the extent of the legal capacity of the one creating it. *Tiff. & B. Trusts*, p. 2. Any person may create a trust who is capable of making a valid distribution of property. The power to dispose of property involves the right to attach such limitations to the act of disposition as will vest the legal estate in one, and the beneficial interest in another.

At common law, neither husband nor wife could convey property directly to the other. The power to alienate and to take property on the part of the husband was unaffected by marriage, except in the single instance of conveyances to and from his wife. To the wife the common-law system was a source of constant repression. Her husband became the absolute owner of her personal property, and was entitled to the rents, issues, and profits of her real estate. To relax the severity of the rules of her environment, as a wife, many of the states have adopted laws similar to the one under consideration, empowering her to convey her real property by joining with her husband in the deed of conveyance; and in a few of the states—New York and California (since 1891) included—a conveyance by a married woman may be made in the same manner, and has the same effect, as if she were unmarried. Under these laws, however, the courts, in numerous instances, still adhere to the doctrine that the wife cannot convey her property directly to her husband.

The general result of the reasoning of the cases may be summarized as follows: (1) These statutes are for the benefit of married women, and not for that of their husbands; and any construction which would result in making it more easy for the husband to secure control of the estate of the wife would tend to defeat the very object of the law. (2) The inhibition of the common law, as applied to the husband, was that he could neither convey to his wife, directly, nor be a grantee from her; and, while the right of the wife to take by gift removes the impediment to a voluntary conveyance from the husband to her, yet the right to receive such voluntary conveyance from the wife has not been conferred upon the husband, and he stands, as at common law, incapacitated from taking by deed of gift directly from his wife. (3) The "power to convey and devise real and personal property as if she was unmarried" does not enlarge the powers of the grantees under conveyances by her, and she could not devise to a corporation or person incapable of taking by will, or convey to one incompetent to be a grantee. (4) To render a conveyance from the wife to her husband valid, the husband's common-law disability, as well as that of the wife, must be removed. *White v. Wager*, 25 N. Y. 328; *Brooks v. Kearns*, 86 Ill. 547; *Scarborough v. Watkins*, 9 B. Mon. 545; *Cards, Leg. & Eq. Rights Mar. Wom.* § 428; *Amer. & Eng. Enc. Law*, tit. "Husband and Wife," p. 794; *Bish. Mar. Wom.* §§ 711, 712; *Kinnaman v. Pyle*, 44 Ind. 275; *Winans v. Peebles*, 32 N. Y. 423; *Sims v. Rickets*, 35 Ind. 181.

I find no case extant in which, under a statute requiring the husband and wife to join in the conveyance of her separate property, a sale and conveyance from the latter to the former has been sustained. The law having provided for the joinder of the husband in

this class of conveyances, with a view, as has often been declared by this court, of giving the wife the benefit of the husband's counsel, advice, and judgment, it would seem strange and illogical to permit him at the same time to act as her opponent, as one working against her interests, and seeking to obtain her land for himself, either with or without limitations upon the effect of the conveyance. In Colorado, Iowa, and some other states, statutes have been passed, giving to married women the same rights of alienation of their separate property as those enjoyed by unmarried women. Where such laws prevail, we may reasonably expect to see their right to convey directly to their husbands, as well as to others, finally upheld, as has already been done in a number of cases. *Wells v. Caywood*, 3 Colo. 487; *Simms v. Hervey*, 19 Iowa, 287; *Robertson v. Robertson*, 25 Iowa, 350; *Allen v. Hooper*, 50 Me. 371; *Burdens v. Amperse*, 14 Mich. 97.

The views herein enunciated are expressly confined to an interpretation of the statute as it existed prior to the amendment of 1891, and are not intended as an exposition of the rights of married women under the broader aegis of that amendment. I am of opinion that, under the law as it existed in 1857, the husband and wife could not legally convey her separate real estate to the husband, and that the deed of trust to the latter, set out in the record, was void. This view renders a consideration of the other points made in the case unimportant. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

98 Cal. 602

SAN JOAQUIN COUNTY v. SUPERIOR COURT. (No. 15,227.)

(Supreme Court of California. June 12, 1893.)

MANDAMUS—WHEN LIES—CHANGING PLACE OF TRIAL.

On the overruling of a motion to change the place of trial of an action of ejectment the remedy of the moving party is by appeal, and not by mandamus to compel the change.

In bank.

Mandamus by the county of San Joaquin to compel the superior court of that county to change the place of trial of an action of ejectment. Proceedings dismissed.

P. W. Bennett, T. C. Van Ness, and L. A. Redman, for petitioner.

PER CURIAM. This is an original proceeding by mandamus to compel the superior court of San Joaquin county to change the place of trial of an action of ejectment to which the judges of said court are parties defendant. A motion to change the place of

trial was made, and promptly overruled. The proper remedy of the petitioner was an appeal from that order. In such cases mandamus is only proper when the court refuses or unreasonably delays to decide the motion, as in *Krumdick v. Crump*, (Cal.) 32 Pac. Rep. 800; and *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. Rep. 848. But when the motion is overruled without delay, an appeal from the order affords a complete remedy, and if the case is for any reason one of urgency the hearing of the appeal can be expedited so as to reach a decision as soon as it can be reached in an original proceeding. Proceeding dismissed.

98 Cal. 625

PAINTER et al. v. PAINTER et al. (No. 15,310.)

(Supreme Court of California. June 13, 1893.)
APPEAL—STAY OF PROCEEDINGS — UNDERTAKING.

1. In an accounting between partners the decree was that plaintiffs should receive a certain sum from defendant personally. Defendant's interest in the partnership property was to be sold to realize the amount, and, if not sufficient, personal judgment was to be entered against defendant for the deficiency. *Held* that, until a judgment for the deficiency was entered, there was no judgment "directing the payment of money," within Code Civil Proc. § 942, and that hence defendant was entitled, pending an appeal, to have the proceedings stayed without the undertaking required by said section, and on the giving merely of the ordinary undertaking required by section 941.

2. In so far as the decree directed the sale of real property for satisfaction of the lien therein declared, no undertaking to pay the deficiency was required, under Code Civil Proc. § 945, as such lien was not created by mortgage.

In bank.

Original application by the executors of Jerome B. Painter against Thomas P. Painter and others for a stay of proceedings during the pendency of an appeal. Granted.

Pringle, Hayne & Boyd, for appellants.
Fox & Kellogg, for respondents.

PER CURIAM. This is an original application for a writ staying proceedings in the court below upon a judgment during the pendency of an appeal therefrom to this court. The appellant has given the ordinary undertaking on appeal from the judgment, required by section 941, Code Civil Proc. The application must be granted. It would have been entirely proper, under the pleadings in the action, to have entered a judgment in favor of plaintiffs for the amount found to be due them upon the accounting, and upon such a judgment the plaintiffs would have been entitled to an execution against all property of the defendant, as upon an ordinary judgment for the recovery of money; but the judgment actually given seems to be of a different character. After reciting the amount due from the defendant Thomas P. Painter to the partnership of which he and Jerome B. Pain-

ter, now deceased, and represented in this action by plaintiffs as his executors, were members, the court, in the decree appealed from, proceeded to adjudge that plaintiffs "are entitled to and shall have and receive from said Theodore P. Painter, defendant, (in accordance with the terms and provisions of this judgment and decree,) personally, * * * the sum of \$14,337.82." The decree then makes this sum a lien upon that defendant's interest in the partnership property, and further directs that such interest be sold "to realize and pay the said amount of \$14,337.82 to said plaintiffs," and, if such interest be not sufficient for that purpose, "then, upon the ascertainment of the deficiency, that a judgment for such deficiency shall be docketed for such balance, and entered against said Thomas P. Painter personally, in favor of plaintiffs," and that said plaintiffs shall have the right to apply for and have such judgment against said defendant. A portion of the partnership property thus directed to be sold consists of real estate.

The effect of this decree is clearly to postpone the right of plaintiffs to a personal judgment against the defendant Theodore P. Painter for the recovery of the money found to be due from him to the plaintiffs, as representatives of the deceased partner, until such time as the interest of the defendant in the partnership property has been sold or appropriated, as in the decree provided, and then such personal judgment shall only be for the deficiency appearing after the application of such property or its proceeds to the satisfaction of said indebtedness. Until a judgment for such deficiency has been entered there will be no personal judgment against the defendant, directing the payment of the money, within the meaning of section 942, Code Civil Proc.¹ In so far as the decree directs the sale of real property for the satisfaction of the lien therein declared, no undertaking to pay the deficiency is required in order to stay its execution, because such lien was not created by mortgage, and it is only in such case that an undertaking to pay the deficiency is required by section 945, Code Civil Proc. This was so held in *Englund v. Lewis*, 25 Cal. 354, in construing section 352 of the old practice act, which contained similar provisions to those found in section 945, Code Civil Proc. It was there said: "Where the sale is directed for the purpose of satisfying any lien other than a mortgage lien the undertaking need not provide for the payment of any deficiency which the judgment may direct. To this extent the statute discriminates in favor of mortgage, and against all other liens." It follows from these views that the defendant is entitled to a writ staying the execution of the

¹This provides that an appeal from a judgment or order directing the payment of money does not stay execution unless a written undertaking be executed on the part of appellants, etc.

judgment appealed from until the determination of such appeal. Application for writ staying execution granted.

98 Cal. 472

GAYLORD v. PLACE et ux. (No. 18,106.)
(Supreme Court of California. June 7, 1893.)
HOMESTEAD—MINERAL LANDS—EX PARTE ORDER
—VALIDITY.

1. Mineral lands of the United States, which have been located and used chiefly as a placer mining claim, though also used by the owner as a residence for himself and family, and to some extent for pasturing stock and raising vegetables, may be selected, under the state laws, as a homestead; and the fact that such lands are reserved by acts of congress from entry and sale, except as mining claims, and that title to them cannot be acquired by pre-emption or homestead entry, is immaterial in a contest between a homestead claimant and his creditors, since, as between them, the title to the land claimed as a homestead is immaterial.

2. The fact that Code Civil Proc. § 690, subd. 5, exempts from execution the dwelling of a miner, not exceeding in value \$500, and also his mining claim, actually worked by him, not exceeding \$1,000, does not preclude the right to select the dwelling and claim as a homestead.

3. An order setting apart a homestead for an insolvent under Code Civil Proc. § 1465, though made ex parte, and without notice to the assignee and creditors, is valid.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by George C. Gaylord, as assignee of the estate of Henry M. Place, an insolvent debtor, against Henry M. Place and Mary Ann Place, to recover certain lands set apart as a homestead. Judgment for plaintiff, and defendants appeal. Reversed.

A. Burrows, for appellants. P. F. Simonds, for respondent.

BELCHER, C. On September 24, 1891, the defendants were husband and wife, and were residing on a tract of land in Nevada county. On that day the husband, Henry M. Place, executed, in proper form, and caused to be recorded, a declaration of homestead on the said land, in which he stated that he estimated the actual cash value of the property to be \$1,500. On October 10, 1891, Place filed, in the superior court of Nevada county, his petition in insolvency, properly verified, and stating the necessary facts, and having annexed thereto the schedule and inventory required in such cases; and thereupon an order was made by the court, adjudging the petitioner to be an insolvent debtor, and fixing November 16, 1891, as the time for the creditors of the debtor to meet and prove their debts, and choose an assignee of his estate. A copy of this order was duly published, and served by mail on all the creditors named in the schedule. On October 26, 1891, the insolvent presented to the court, and filed, his petition, asking that the premises

described in his declaration of homestead be set apart for his use and benefit as a homestead; and thereupon the court, on the same day, and without any notice being given to creditors, made and entered an order as prayed for. On the day appointed for that purpose the creditors met, and elected the plaintiff assignee of the insolvent's estate, and within five days thereafter he duly qualified, and entered upon the discharge of his duties as such; and the clerk of the court then, by an instrument under his hand and seal of the court, assigned and conveyed to him all the estate, real and personal, of the debtor, not exempt by law from execution. On January 5, 1892, the plaintiff commenced this action, alleging, among other things, in substance, that the premises set apart as a homestead to the defendant Henry M. Place were, at the time his declaration of homestead was filed thereon, public mineral lands of the United States, which had been located by him as a placer mining claim, and had been used solely for mining purposes; that the said premises were of a value of not less than \$3,000, and that no portion thereof was, or ever had been, exempt by law from execution, or from the operation of proceedings in insolvency, or subject to be selected or set apart as a homestead; that by virtue of the election and appointment of plaintiff as assignee, and the assignment and conveyance made to him as such assignee, he became, and then was, the sole and exclusive owner, and entitled to the possession, of all of said premises. And the prayer was that it be adjudged and decreed that the said premises were not impressed with a homestead character; that plaintiff, as assignee of the estate of the insolvent, was the sole and exclusive owner thereof; and that neither of the defendants had any interest in, or right of possession to, any portion thereof. The answer of defendants denied that the premises described in the complaint were valuable solely for placer mining purposes, or had been solely used by them as a mining claim; denied that no portion of the said premises was, or had ever been, exempt by law from execution or not subject to be selected or set aside as a homestead; denied that the plaintiff, as assignee, ever became or was the sole or exclusive owner, or entitled to the possession, of that part of said premises described in the declaration of homestead set forth; and also denied that the claim of defendants, or either of them, was without right. It then alleged that defendants were husband and wife, and that for many years prior to September 24, 1891, they actually resided upon and used the land described in the declaration of homestead, with the dwelling house thereon, as their permanent home; that up to the said date the said premises were largely used by the husband for the purpose of earning a living by the process of hydraulic mining,

but that the said operations were so impeded by injunctions and other legal process as to prevent him from properly working the ground; and that at the time the declaration of homestead was recorded the premises were of little value for any purpose, but remained the permanent residence and home of the defendants. It then sets forth the declaration of homestead, and the filing thereof, the proceedings in insolvency, and the order of the court setting apart the homestead, as before stated, and alleges that the said order was duly given and made, and is still in full force and effect, and that the court had jurisdiction to make it; that the plaintiff, and those whom he represents, were parties defendant to the insolvency proceedings; and that plaintiff is estopped from questioning the validity of the order so setting apart the homestead, and that defendants plead the same as a bar to the suit.

The case was tried, and the court found, among other things, that the premises in controversy were public mineral land of the United States, held by the defendant Henry M. Place by virtue of locations thereof as placer mining claims, and that they were chiefly valuable as a mining claim, and had been used by defendants as their sole means of support, chiefly by carrying on the business of gold mining thereon; "that on the 24th day of September, 1891, and for many years prior thereto, the defendants, Henry M. Place and his wife, actually resided upon and occupied the dwelling house and premises described in the declaration of homestead, occupying and using the same as their home and residence, * * * but said occupation was for the purpose of carrying on mining on said premises and the land adjoining, the use of the homestead premises for grazing or agriculture being secondary, and merely incidental to the said occupation of mining; that said defendants had no other home or residence save the one described in their homestead declaration; that, on and up to the time when the declaration of homestead was filed, all the premises described therein were used by the defendants for the additional purpose of grazing their horses and cattle, and a small portion thereof for a vegetable garden;" that the order setting apart the premises as a homestead "was still in full force and effect at the date of the commencement of, and at the date of the trial of, this action, and that in making said order this court had jurisdiction so to do, and that the plaintiff and those whom he now represents were parties defendant to said insolvency proceedings, but that said order was made ex parte, and without notice of any kind, and inadvertently and improvidently made by said court, and that said plaintiff is not estopped by the said order from questioning its validity;" that the premises embraced in the said declaration of homestead are of a value of not

less than three thousand dollars, and that no portion thereof is, or ever at any time has been, exempt from execution, or subject to be selected or set apart as a homestead, and that the plaintiff, by virtue of his election, appointment, and qualification as assignee, and the conveyance made to him by the clerk of the court, "became and is the sole owner of all the premises" described in his complaint; that the defendants each claim some interest in the premises and property described, and refuse to deliver possession thereof to the plaintiff, but that their "said claim and refusal are wholly without right, and a cloud upon plaintiff's title thereto, and right of possession thereof, as such assignee." Judgment was accordingly entered that the plaintiff, as assignee, was the true and lawful owner of all the premises and property described in his complaint, and that all adverse claims of the defendants thereto were invalid and groundless, and that they, and each of them, be perpetually estopped from setting up any claim to the said premises. From this judgment the defendants have appealed on the judgment roll.

The conclusion reached by the court below was evidently based upon the theory that mineral land of the United States, which had been located and chiefly used as a placer mining claim, could not be selected as a homestead, though it was also used by the owner as a place of residence for himself and family, and to some extent for pasturing stock and raising vegetables, and, therefore, that the proceedings taken by the defendant to select the premises in controversy were wholly ineffectual to impress upon them the character of homestead. If this theory is correct the judgment should be affirmed, and, if not, it should be reversed.

The statute provides that the homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as in the Civil Code provided, and that from and after the time the declaration is filed for record the premises therein described constitute a homestead. Civil Code, §§ 1237, 1265. The homestead right does not depend upon the character of the title held by the party claiming it. It is impressed on the land to the extent of the interest of the claimant in it, not on the title merely. "The actual homestead, as against everybody who has not a better title, becomes impressed with the legal homestead right by taking the proceedings prescribed by the statute." *Spencer v. Geissman*, 37 Cal. 99. "In the solution of all questions arising between homestead claimants and those claiming under or against them, as creditors, the absence of title is a false quantity, which must be excluded from consideration." *Brooks v. Hyde*, 37 Cal. 373. A homestead in the country may include a farm, whether it contains a hundred or a thousand acres, and whether it is used for the ordinary purposes of farming, or for

grazing and raising stock. The only tests are use and value. Its value must not exceed \$5,000, and its use must be primarily as a home for the family. "Whatever is used—being either necessary or convenient—as a place of residence for the family, as contradistinguished from a place of business, constitutes the homestead, subject to the statutory limit as to value. If, however, it is also used as a place of business by the family, which frequently happens, it may not therefore cease to be a homestead, if it would be necessary or convenient for family use independent of the business." *Gregg v. Bostwick*, 33 Cal. 220; *Ornbaum v. His Creditors*, 61 Cal. 455.

It is claimed, however, for respondent, that mineral lands of the United States are expressly reserved by statute from entry and sale, except as mining claims, and therefore, as the title to such lands cannot be acquired by pre-emption or homestead entry, they should be held not subject to selection under our homestead laws. But, if title to the land selected, as between the homestead claimant and his creditors, is a false quantity, which must be excluded from consideration, how can it be material in what way, or under what statute, title in fee to the premises might be acquired? It is enough that the claimant has actual and rightful possession of the premises at the time of his selection, and the courts will go no further in investigating his title.

It is also claimed that a homestead is intended to make a permanent home for the claimants, and that a placer mining claim is taken up for the purpose of washing it away, and thus, within some limited time, destroying the home, if located upon it, and that this must necessarily preclude the right to select the claim as a homestead. But it is not necessary that a homestead should be and remain a permanent home. It may be sold or abandoned by the claimants at any time. It only remains their home so long as they choose to make it so. We fail to see, therefore, how the right to select a particular parcel of land for a homestead can in any way be affected by the fact that the claimants intend to, and do, make a living by washing out gold from the ground, rather than by raising grain, hay, or fruit thereon.

It is further claimed that the statute exempts from execution "the cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars, * * * and also his mining claim, actually worked by him, not exceeding in value the sum of one thousand dollars," (Code Civil Proc. § 690, subd. 5,) and that this exemption is inconsistent with, and must preclude, the right to select the cabin or dwelling and claim as a homestead, and thus have them exempt under another statute. We see no inconsistency in the two supposed rights, and nothing in the statutes or policy of the law precluding the miner from claiming exemp-

tion under either of the statutory provisions referred to. The homestead is for the benefit and protection of the family, and the law providing for its selection should be liberally construed, so as to effectuate the beneficent ends contemplated by it. *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. Rep. 404. The exemption of the claim under section 690 of the Code, *supra*, does not depend upon residence thereon, but its selection as a homestead does. The dwelling may be of a value greater than \$500, and the claim of a value greater than \$1,000, and when they are properly selected and filed upon as a homestead we think they should be protected as such.

The court found that the order setting apart the homestead in the insolvency proceedings "was made *ex parte*, and without notice of any kind, and inadvertently and improvidently." Section 60 of the insolvent act provides that "it shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution, and also a homestead, in the manner as provided in section one thousand four hundred and sixty-five of the Code of Civil Procedure." In *Kearney v. Kearney*, 72 Cal. 591, 15 Pac. Rep. 769, it was held that under section 1465, Code Civil Proc., an order or decree setting apart a homestead was valid, although no notice of the application was given to the heirs. The order setting apart the homestead involved in this case was therefore not invalid because made *ex parte*, and without notice. Nor is there anything tending to show that the order was made inadvertently or improvidently, except the facts on which the court based its conclusion that the property set apart did not and could not constitute a homestead. But, as we have seen, that conclusion was not justified by the facts and law of the case, and cannot, therefore, be sustained.

Under the findings—and they cover all the issues in the case—we think the defendants were entitled to judgment. We advise, therefore, that the judgment be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the defendants.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court to enter judgment in favor of the defendants.

98 Cal. 514
STEWART v. POWERS et al. (No. 14,956.)
(Supreme Court of California. June 9, 1893.)
"CONVEYANCE"—WHAT CONSTITUTES—MORTGAGE—VALIDITY.

1. Civil Code, § 1215, provides that "the term 'conveyance,' as used in sections 1213

and 1214, embraces every instrument by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills." Section 2920 defines a mortgage as "a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession." *Held* that, since section 1215 defines the term "conveyance," as used in the recording act only, a mortgage, according to the definition given in section 2920, was not a conveyance.

2. Rev. St. U. S. § 2262, provides that, before a person claiming the benefit of the pre-emption laws can enter upon the lands, he must swear that he has entered and improved the land in good faith, for his own exclusive use, and has made no contract by which the title may inure to the benefit of any one but himself; that, if he swears falsely, he shall forfeit the money paid, and all right and title to the land, and any "grant or conveyance" made by him, except in the hands of a bona fide purchaser, shall be void. *Held*, that a mortgage executed by a pre-emption claimant before final proof and payment to secure the repayment of money borrowed to perfect the title was not a "grant or conveyance," within the statute, and was therefore valid.

3. Rev. St. U. S. § 2263, which provides that "all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void," refers to transfers and assignments of the right of pre-emption, and therefore the mortgage is not void under this section.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by James Stewart against Harriet H. Powers and another to foreclose a mortgage. Decree for plaintiff. Defendants appeal. Affirmed.

Latimer & Brown and Eli R. Chase, for appellants. W. S. Tinning, for respondent.

HAYNES, C. Prior to November 12, 1887, Harriet H. Harding (afterwards the wife of Nathan Powers) and her sister Sarah Harding (afterwards the wife of Aurelius Sharp) each filed pre-emption claims upon certain lands of the United States situate in Contra Costa county, and had applied to the local United States land office to prove up and enter their respective parcels under the pre-emption laws of the United States, and November 15, 1887, was fixed for that purpose. Contests against their several claims had been initiated, whereby it became necessary to employ counsel; and in order to meet this expense, and to provide money to pay for their land, the two sisters, then unmarried, borrowed from respondent \$400, and executed to him their joint and several note therefor, and a mortgage upon all said lands, to secure the same, and also to secure such further sums as they might require, not exceeding \$1,500, in addition to the sum then borrowed. Final proofs were made on November 15, 1887, but, owing to the contests, payment was not made until November 9, 1888, at which date receivers' receipts were given for the portion of their claims to which they

were found to be entitled. On January 16, 1891, respondent commenced an action to foreclose said mortgage for the amount of said promissory note and other advances. A decree of foreclosure was granted, from which Harriet H. and Nathan Powers appeal upon the judgment roll. The land involved in this appeal is the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 26, township 2 N., range 3 W., M. D. M.

The question, as presented by appellants, is: "Can a court decree that a title derived from the government of the United States under its pre-emption laws be sold to satisfy a mortgage given by a pre-emptor on the land pre-empted prior to making his final proofs and entry?" Appellants contend that, under the provisions of sections 2262 and 2263 of the Revised Statutes of the United States, the mortgage in question is void. Section 2262 is as follows: "Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the receiver or register of the land district in which the land is situated * * * that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; and, if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, for a valuable consideration, shall be null and void, except as provided in section 2288." Section 2263 provides that proof of settlement, etc., shall be made before final entry; and the last clause of the section is as follows: "And all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void." These statutes were considered by the supreme court of the United States in *Myers v. Croft*, 13 Wall. 291. The court said: "It had been the well-defined policy of congress, in passing these laws, not to allow their benefit to inure to the profit of land speculators, but this wise policy was often defeated. Experience had proved that designing persons, being unable to purchase valuable lands, on account of their withdrawal from sale, would procure middlemen to occupy them temporarily, under an agreement to convey them so soon as they were entered by virtue of their pre-emption rights. * * * This was felt to be a serious evil, and congress, in the law under consideration, undertook to remedy it by requiring the applicant for a pre-emption, be-

fore he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it upon speculation, but in good faith to appropriate it to his own use." And, after quoting the last clause of section 2263, the court further said: "Looking at the language employed, as well as the policy of congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter section of land. * * * This right was valuable, and, independently of the legislation of congress, was assignable. The object of congress was attained when the pre-emptor went with clean hands to the land office, and proved up his right, and paid the government for his land." The direct question before the court in that case was the right to convey after the entry, but before the patent had issued, (which right was affirmed;) but the purpose of the restrictions in the act, and the policy of congress in its enactment, have an important bearing on the question here, and conclusively settle that the assignments and transfers declared null and void by section 2263, Rev. St. U. S., are transfers and assignments of the right of pre-emption. It remains to be considered whether the mortgage in question is embraced in the expression "grant or conveyance," used in section 2262.

The granting part of the mortgage is in the usual form, and, following the tenendum clause, contains this covenant: "And the parties of the first part hereby covenant that they are lawfully seised in fee of the above-described premises; that they are free from all incumbrances; that they have good right to sell, grant, and mortgage the same; and that they will forever warrant and defend the same to the party of the second part, his heirs and assigns, against the lawful claims and demands of all persons." That under this covenant any after-acquired title would inure to the benefit of the mortgagee is beyond question, (*Clark v. Baker*, 14 Cal. 629; Civil Code, § 2930,) unless the mortgage itself is void. It is contended, however, that a mortgage is a conveyance, and is so declared by section 1215 of the Civil Code. That section is as follows: "The term 'conveyance,' as used in sections 1213 and 1214, embraces every instrument by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills." This section defines the term "conveyance" only "as used" in the recording act, and does not imply that a mortgage is in fact a conveyance of real property, but rather the contrary; for if it were a conveyance, and so regarded and understood, it need not have been included in the definition. Section 2920, Civil Code, defines it as follows: "Mortgage is a contract by which

specific property is hypothecated for the performance of an act, without the necessity of a change of possession." The Code commissioners, in a note to this section, say: "The definition of the text is new. It is designed to make a clear distinction between a pledge and a mortgage, and at the same time to avoid the idea of a mortgage being in any sense a transfer." It is so well understood in this state that a mortgage does not transfer the title that a citation of authorities is unnecessary. A mortgage is therefore not necessarily embraced in the term "grant or conveyance," as used in the act of congress, even though, as appellants suggest, there was at the date of that act but one state in which it was held that a mortgage did not pass the title. But for the restriction imposed by the act of congress, the right of the pre-emptor before proof and payment was transferable. The restriction, therefore, cannot be extended beyond the express terms of the act, interpreted in the light of the mischief to be remedied, and this transaction was not of the character requiring prohibitory legislation. On the contrary, it was in aid of the beneficent purpose of the pre-emption act. Without the aid of respondent, the mortgagors were unable to perfect their entries. Making the mortgage was not inconsistent with a purpose in good faith to appropriate the land to their exclusive use, but was in aid of the purpose; nor was it a contract or agreement by which the title they might acquire from the government "should inure," in whole or in part, to the benefit of respondent. There is nothing in the record tending to show that it was the intention of the mortgagors not to pay the mortgage debt, or that the mortgage should be used as a vehicle to transfer the title they might acquire to respondent. For appellants now to make such admission would be to admit that the oath taken before the register, after the execution of the mortgage, was false.

That the point under consideration has been decided in accordance with appellants' contention in other states is true. *McCue v. Smith*, 9 Minn. 259, (Gil. 237,) and *Woodbury v. Dorman*, 15 Minn. 338, (Gil. 272,) cited by appellants, were expressly overruled in *Jones v. Tainter*, 15 Minn. 512, (Gil. 423.) In line with the earlier Minnesota cases are *Bass v. Buker*, 6 Mont. 442, 12 Pac. Rep. 922, and *Brewster v. Madden*, 15 Kan. 249. While the precise question here presented, under well-defined facts, bringing it clearly within the facts of the case at bar, seems not to have been discussed in the cases in this state, we think they nevertheless conclusively settle the law against the contention of appellants. In *Tartar v. Hall*, 3 Cal. 263, the mortgage was upon "a pre-emption claim," but executed before the pre-emption laws had been extended to this state. Its validity was attacked. Held, the mortgagor was estopped from asserting its

invalidity. *Whitney v. Buckman*, 13 Cal. 536, was a mortgage upon a pre-emption claim. The court said: "The mortgage does not pretend to transfer to the mortgagee the right to a pre-emption. This is not assignable, but the possession of public lands, whether taken for the purpose of getting a pre-emption right, or any other purpose, may be mortgaged, or the land itself; and, if the mortgagee gets no title through the mortgage, this is not an objection to be raised by the man who makes it." This doctrine of estoppel was also applied in *Kirkaldie v. Larrabee*, 31 Cal. 456, where the mortgage was upon a homestead claim before title acquired. In *Christy v. Dana*, 42 Cal. 174, the mortgage was upon land upon which the mortgagor resided, and which "he proposed to claim as a pre-emption." He afterwards pre-empted the land, obtained title, and sold to a third party. Held, that the title inured to the benefit of the mortgagee. *Bull v. Shaw*, 48 Cal. 455, differs from *Christy v. Dana*, in this: that, after the mortgage was executed, the mortgagor sold part of the land mortgaged to a third party, who afterwards secured the government title. As to this part it was held, the title not having been acquired by the mortgagor, it did not inure to the benefit of the mortgagee, as he did not derain title from the United States through Shaw, the mortgagor; but that if Shaw had acquired the title, and had then conveyed to Delaney, the latter would have been estopped from asserting title against the mortgage. In *Camp v. Grider*, 62 Cal. 25, it does not appear under what statute Grider acquired the title from the United States, but a mortgage executed while he was in possession, and before he obtained title, was enforced, and was held to inure to the benefit of the mortgagees. The latest, and a case not distinguishable in principle from the one at bar, is *Orr v. Stewart*, 67 Cal. 275, 7 Pac. Rep. 693. There the mortgage was upon land taken up by Stewart under the homestead act of 1862. After the foreclosure of the mortgage, and the sale thereunder to Orr, and the purchaser had gone into possession under the sheriff's deed, Stewart went to the United States land office, and was permitted to commute his homestead entry into a cash entry, paid for the land, and received a certificate of purchase. The action was commenced by Orr to quiet title against Stewart. Judgment for defendant was reversed. It was held that the after-acquired title inured to the benefit of Orr, the purchaser at the foreclosure sale. The only apparent distinction between that case and this is that in *Orr v. Stewart* the land, at the time the mortgage was made, was held under the homestead laws, though afterwards commuted and entered under the pre-emption laws. The opinion proceeded upon two grounds: (1) That the mortgagor was estopped from defeating, by his own act, the

enforcement of the lien he attempted to create; and (2) that the mortgage was not made void or voidable under the provisions of the homestead act. In no case which we have been able to find in the reports of this state has a mortgage been held invalid against the mortgagor because of the fact that the title was in the United States at the date of the mortgage, whether the land was occupied by the mortgagor under the homestead or under the pre-emption laws. In none of these cases has either section 2262 or 2263 of the Revised Statutes of the United States been mentioned by the court, though it is hardly possible that they have been overlooked; and that fact would seem to show that a mortgage, under our system at least, was not regarded as a "conveyance," within the meaning of those sections. We conclude, therefore, that a mortgage executed by a pre-emption claimant before final proof and payment, at least if given to secure the repayment of money loaned to pay for the land, or in any manner to aid the mortgagor in perfecting his title, is not in contravention of the pre-emption laws, and that, if it purports to be a mortgage of the fee, it carries the after-acquired title, unless it is intended as a mode of transferring the title in evasion of the statute; and, further, that, under the uniform current of authorities in this state, the mortgagor is estopped from defeating by his own act the operation and enforcement of the lien appellants have attempted to create. These views render it unnecessary to distinguish between that part of the mortgage debt created before entry and any portion of it which may have been created afterwards. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

4 Cal. Unrep. 33
STEWART v. POWERS et al. (No. 15,217.)
(Supreme Court of California. June 9, 1893.)

CONVEYANCE SUBJECT TO MORTGAGE.

A pre-emption claimant, before final proof and payment, mortgaged the claim to secure the repayment of money borrowed to perfect her title. After she had entered upon and paid for the land, and had received her certificate of purchase, she conveyed a part of the claim to one H. Held that, as the title acquired by the pre-emptor from the United States inured to the benefit of the mortgagee when acquired, the conveyance to H. was subject to the mortgage.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by James Stewart against Harriet H. Powers and others to foreclose a mortgage. Decree for plaintiff. Defendants appeal. Affirmed.

Latimer & Brown and Eli R. Chase, for appellants. W. S. Tinning, for respondent.

HAYNES, C. In *Stewart v. Powers*, (No. 14,956, this day filed,) 33 Pac. Rep. 486, the appeal was from the same judgment, and upon the same judgment roll, from which the above-named appellants have taken this appeal.

As to appellants Sarah E. Sharp and Aurelius Sharp, the facts and the questions of law presented are precisely the same as in No. 14,956, and, upon the authority of that case, the judgment should be affirmed as against them.

As to appellant John Harding, a fact not appearing in No. 14,956 is necessary to be stated, viz. that on December 31, 1888, Sarah E. Sharp, the above-named appellant, after she had entered and paid for the land, and had received her certificate of purchase therefor, conveyed to said John Harding a part of the premises so mortgaged, to wit, the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 26, township 2 N., range 3 W., M. D. B. & M. All other facts are sufficiently stated in the opinion in No. 14,956. It must be apparent that if the title acquired from the United States after the mortgage was executed inured to the benefit of the mortgagee, as was there decided, it must follow that it inured at the moment the title was acquired by the pre-emptioner, and that the conveyance afterwards received by appellant Harding vested the title in him subject to the mortgage. See *Christy v. Dana*, 42 Cal. 174; *Bull v. Shaw*, 48 Cal. 455, and *Orr v. Stewart*, 67 Cal. 275, 7 Pac. Rep. 693, cited in the former opinion. It follows that the judgment appealed from should be affirmed as against all the appellants.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed as against all the appellants.

98 Cal. 587

In re **STOW et al., Park Commissioners.**
(No. 15,063.)

(Supreme Court of California. June 12, 1893.)

GOLDEN GATE PARK COMMISSIONERS—NEGLECT OF DUTY—SUFFICIENCY OF ACCUSATION.

Pen. Code, § 772, provides that where an accusation verified by the oath of any person is presented to a superior court, alleging that any officer within the jurisdiction of the court has refused or neglected to perform the official duties pertaining to his office, the court must cite the accused to appear, and on his appearance must hear the accusation, and, if the charge is sustained, must enter a decree removing the accused from office, and must render judgment for \$500 in favor of the informer, with costs. Pol. Code, § 3245, provides that "eight hours' labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this state, or under the direction, control, or by the authority of any officer of this state, acting in his official capacity, or under the direction, control, or by the authority of any municipal corporation within this state, or of any officer

thereof, acting as such; and a stipulation to that effect must be made a part of all contracts to which the state or any municipal corporation therein is a party." *Held*, that an accusation under Pen. Code, § 772, that the commissioners of Golden Gate Park, "while acting in their official capacity," entered into a contract for labor, from which the stipulation directed by Pol. Code, § 3245, was willfully omitted, and that such commissioners compelled their laborers to work nine hours a day, is insufficient, where it fails to show the location of Golden Gate Park; that the commissioners, when they made the contract, or compelled the laborers to work nine hours a day, were officers of the state, or of any county or municipality within the state, or that the commissioners were acting as such, or held any office, when the accusation was filed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Accusation under Pen. Code, § 772, by William M. Willey, against W. W. Stow, R. P. Hammond, and Joseph Austin, as commissioners of Golden Gate Park. The accusation was dismissed, and complainant appeals. Affirmed.

Wm. M. Willey, per se. Harold Wheeler, for respondents.

BELCHER, C. On January 6, 1892, William M. Willey filed in the superior court of the city and county of San Francisco an accusation in writing, verified by his own oath, alleging that the respondents, Stow, Hammond and Austin, "while acting in the official capacity of commissioners of the Golden Gate Park," entered into and signed an agreement with one Charles Warren, on or about August 12, 1891, whereby said Warren contracted to perform certain work upon and within said public park; that the said contract was not drawn in the form prescribed by law, in that the stipulation, directed by section 3245 of the Political Code, that eight hours should constitute a legal day's work, was omitted therefrom; and that this omission was made willfully and knowingly by respondents, because prior to the execution of the said contract they had been petitioned, for and on behalf of the citizens for whose protection the said statute was enacted, to have the said stipulation inserted in all contracts let by them. The accusation also alleged that the respondents, "while commissioners of said Golden Gate Park," have compelled the laborers employed by them to work nine hours daily, and it concludes with a prayer that the respondents be cited to appear in court, and show cause why they should not be removed from office, and that judgment be given against them, in the sum of \$500 each, in favor of the deponent, as informer, and for costs, "as provided by section 772, Pen. Code Cal., under which section this information is herewith filed." The respondents severally appeared and demurred to the accusation upon nearly all the statutory grounds. After argument the demurrers were sustained, and, the complainant declining to amend, judgment was

entered that the proceeding be dismissed without costs. From this judgment the complainant appeals.

Section 772 of the Penal Code is as follows: "When an accusation, in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented; and on that day, or some other subsequent day not more than twenty days from that on which the accusation was presented, must proceed to hear, in a summary manner, the accusation, and evidence offered in support of the same, and the answer and evidence offered by the party accused; and if, on such hearing, it appears that the charge is sustained, the court must enter a decree that the party accused be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases." And section 3245 of the Political Code is in these words: "Eight hours' labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this state, or under the direction, control, or by the authority of any officer of this state, acting in his official capacity, or under the direction, control, or by the authority of any municipal corporation within this state, or of any officer thereof, acting as such; and a stipulation to that effect must be made a part of all contracts to which the state, or any municipal corporation therein, is a party." The evident purpose of section 772, above quoted, was to authorize a superior court to remove from office any unfaithful officer of the state or of a county or municipality within the state, who is within its jurisdiction, and who has refused or neglected to perform the official duties pertaining to his office. The section is penal in its character, and, in order to give the court authority to enforce it, all the facts showing that the accused is a state, county, or municipal officer within the jurisdiction of the court, and when, how, and where he refused or neglected to perform his official duty, should be plainly and fully alleged; and the proceeding must be instituted while the accused is still in office, and not after his term has expired. *Smith v. Ling*, 68 Cal. 324, 9 Pac. Rep. 171; *Woods v. Varnum*, 85 Cal. 639, 24 Pac. Rep. 843. The only question, then, is, does the accusation in this case meet these requirements? In our opinion, it does not, but is fatally defective in several respects. In the first place, there is no averment as to where Golden Gate Park is located. So far as appears from the aver-

ments, it may be in San Diego or Siskiyou county, or in the states of Nevada or Oregon. In the second place, it does not appear from any averment that the respondents, when they entered into the contract with Warren, or when they compelled laborers employed by them to work nine hours daily, were officers of this state, or of any county or municipality within the state. The averment is only that they did the acts complained of "while acting in the official capacity of commissioners of Golden Gate Park." And, in the third place, it does not appear that the respondents were park commissioners, or held any office, when the accusation was filed against them. This being so, the demurrers were properly sustained, and it is immaterial upon what particular ground the court below based its ruling.

The judgment should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

DE HAVEN, J. I concur in the judgment. The failure of the defendants to have inserted in the agreement alleged to have been made by them with Warren a clause to the effect that eight hours should constitute a legal day's work thereunder did not constitute a refusal or neglect upon the part of defendants "to perform the official duties pertaining" to the office of park commissioner, within the meaning of section 772 of the Penal Code. The official duties referred to in that section, and the nonperformance of which is made cause for removal from office, relate to such official duties, the failure to perform which may injuriously affect the rights of some one of the general public, and the performance of which duties is made mandatory upon the part of the officer in the interest of the public. The omission here charged is not of this nature, because, if it should be assumed that section 3245 of the Political Code has any reference whatever to such a contract as is mentioned in the accusation, the omission to insert in such agreement a provision that eight hours should constitute a legal day's work thereunder can in no wise affect the rights of laborers employed by the contractor, and who did not expressly stipulate as to the number of hours they would work each day, for the section itself, independent of any such express provision, forms part of the contract, and the contract, in such a case, is to be read and interpreted as if it contained the express stipulation mentioned in the statute. Plainly, therefore, the rights of no one can be, or were, affected by the omission complained of. If, upon the other hand, section 3245 of the Political Code does not include such a contract as the petition alleges was made by defendants with Warren, then,

clearly, the omission to make the express stipulation referred to was not, in any sense, a failure to discharge an official duty. Looked at from any point of view, the petition fails to state a cause of action against the defendants.

98 Cal. 578

BOYSON v. THORN. (No. 14,534.)

(Supreme Court of California. June 12, 1893.)

TORTS—MALICIOUS INTERFERENCE WITH CONTRACT.

An action will not lie against one who maliciously, but without threats, violence, fraud, falsehood, or benefit to himself, procures a breach of contract between others.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Thomas Boyson against S. F. Thorn for maliciously procuring a breach of contract. There was a demurrer to the complaint, which was sustained. Plaintiff appeals. Affirmed.

Carroll Cook and J. E. Foulds, for appellant. Wm. F. Herrin, J. M. Allen, and Wm. H. L. Barnes, for respondent.

HAYNES, C. Defendant demurred to plaintiff's complaint, the demurrer was sustained, and judgment was thereupon rendered dismissing the action, from which judgment the plaintiff appeals.

The complaint alleges that Frank G. Newlands is the owner and in possession and control of the Palace Hotel in the city of San Francisco, and of a public restaurant attached thereto, and conducted the same as a hotel and restaurant, and that the defendant, during all the times mentioned in the complaint, was the agent of Newlands, and as such had charge of the business thereof, and direction of the servants therein. That immediately prior to November 1, 1889, Newlands entered into an agreement whereby plaintiff hired certain rooms in said hotel, as lodgings for himself and wife from November 1, 1889, at the monthly rent of \$100; that they were to have their meals at said restaurant, or furnished from said restaurant to their said rooms, he paying therefor the usual rates; that they entered and occupied the rooms, and in all things complied with said agreement, but that on December 5, 1889, the "defendant maliciously, and with intent to oppress, annoy, and disturb plaintiff in the occupancy of his lodgings, and to force him to abandon the same, and to deprive him of the comforts and conveniences which he was then and there enjoying, and to injure him in his profession, and to degrade and belittle him in the eyes of the guests of said hotel and of his friends and of the public in general, and in fraud of said agreement, caused and procured F. G. Newlands then and there to demand that plaintiff and his wife forthwith vacate said lodgings." It is further charged that defendant maliciously caused and

procured Newlands to refuse to furnish meals, etc., and to instruct the servants to refuse their orders; and that on December 12, 1889, defendant maliciously caused and procured Newlands to threaten and attempt to forcibly eject plaintiff and his wife from said rooms, whereby his wife became ill, and he was compelled to and did employ a nurse at an expense of \$60, and also to hire men to protect his wife and retain possession, etc., at a further expense of \$60, and prays for \$25,120 damages. The action is against Thorn alone. The demurrer is that the facts stated do not constitute a cause of action against the defendant.

The broad question presented is whether an action will lie against one who, from malicious motives, but without threats, violence, fraud, falsehood, deception, or benefit to himself, induces another to violate his contract with the plaintiff. We state the question thus because it will be observed that the complaint does not state the means used to cause or procure Newlands to violate his contract with the plaintiff, but only that it was done "maliciously." The general rule is that only those who are parties to, or in some manner bound by, a contract, are liable for a breach of it. To this general rule there are certain exceptions, as, for example, contracts for personal services involving the relation of master and servant; and there are also other cases that are sometimes classed as exceptions, but which are not strictly so. In Cooley on Torts (2d Ed., p. 581) it is said: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff, the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it. But if the third person was induced to break his contract by deception it may be different. If, for example, one were to personate a vendee of goods, and receive and pay for them as on a sale to himself, the vendee would have his action against the vendor; but he might also pursue the party who, by deceiving one, had defrauded both." In the case supposed by the learned author the gist of the action is the fraud of the defendant in personating the vendee. The fact that the only injury or damage sustained by the vendee in consequence of defendant's fraud was the loss of the benefit he would have derived from the performance of the contract does not at all change the character of the action. Suppose that A., knowing that B. is about to bestow upon C., as a gratuity, a large amount of money or property, and A. fraudulently personates C., and receives the money or property, C. could have no action against B., for there was no contract relation between them; but C. could have his action against A. for the loss caused by his fraud. The means used to accomplish the wrong is in each case the same, showing conclusively that the fraud is the basis of the action, while the breach of

the contract thus procured goes only to the question of damages; that is, how and in what manner and to what extent has the plaintiff been injured by the fraud, deceit, or other wrongful act of the defendant? *Rice v. Manley*, 66 N. Y. 82, cited by appellant, is another illustration. There the plaintiffs had contracted verbally with Stebbins for the purchase of a large quantity of cheese. The defendant, Manley, procured a telegram to be sent to Stebbins in the name of E. Rice, falsely saying that plaintiffs did not want the cheese, and thereby induced Stebbins, who supposed E. Rice was one of the plaintiffs, to sell the cheese to Manley. Stebbins was not bound by the verbal contract, but it is found that he would have performed it but for the fraud of defendant. The action was sustained. *Benton v. Pratt*, 2 Wend. 385, also cited by appellant, was another case where a contract with the plaintiff was broken because of defendant's false representation that plaintiff had abandoned all intention of fulfilling it. *Lally v. Cantwell*, 30 Mo. App. 524, also cited by appellant, was an action for loss of employment. The court, after discussing the cases involving the relation of master and servant, said: "But this case falls within another well-settled principle, which is that, where the interference takes the form of false, defamatory statements,—of libel or slander,—an action will lie for interference with a relation beneficial to the plaintiff, although the relation did not rest in contract, and although the breach of it by the party who was procured to break it was not actionable." The cases are too numerous to be cited or reviewed where interference with business or contract relations through acts of violence, nuisance threats, deceit, fraud, libel, and slander have been redressed, both in England and in this country. Most of the cases cited by appellant, which do not involve the relation of master and servant, will be found of the character above mentioned, though in many of both classes will be found expressions which more or less directly support the proposition for which appellant contends.

Cases involving the relation of master and servant, though that relation is now created solely by contract, seem to stand upon different grounds from contracts not involving that relation. Section 49 of the Civil Code, entitled "Protection to Personal Relations," is as follows: "The rights of personal relation forbid (1) the abduction of a husband from his wife, or of a parent from his child; (2) the abduction of a wife from her husband, or of a child from a parent or guardian entitled to its custody, or of a servant from his master; (3) the seduction of a wife, daughter, orphan sister, or servant; (4) any injury to a servant, which affects his ability to serve his master." In this state, at least, no analogy favorable to appellant can be drawn from cases involving what the Code itself declares to be "a personal relation" existing between master and servant. The Code does not distinguish be-

tween different means which may be employed to disturb or destroy any of these relations, for it is the direct interference with the relation which is forbidden, whether the relation be one founded in natural right, as parent and child, or created by the law, as guardian and ward, or by personal contract, as between master and servant; and therefore does not depend upon the mode or means in or by which the relation may be created. It is not the mere procuring of one party to a contract to break his contract, but it is the taking away from or depriving the master of the subject of the contract, or that which the master contracted for, viz. the services of the servant.

The facts alleged in the complaint do not bring the case within the principle governing cases involving the relation of master and servant, nor of those other cases where a contract is procured to be broken by fraud, deceit, slander, or other actionable wrong, as in *Rice v. Manley*, and other cases above noticed. It is conceded by appellant, and it is unquestionably true, that "one may advise a friend in all honesty, and without ill will to the other contracting party, to abide the risks of breaking an onerous or mischievous contract, rather than those of performing it." In *Bowen v. Hall*, 6 Q. B. Div. 343, Brett, L. J., said: "Merely to persuade a person to break his contract may not be wrongful in law or in fact." This being true, will the fact that the advice or persuasion proceeds from malicious motives create a liability where the same advice or persuasion, if given from good motives, would not? In considering this question the distinction between civil and criminal proceedings must not be overlooked. In the dissenting opinion of Lord Coleridge, C. J., in *Bowen v. Hall*, supra, the question above presented is answered thus: "It is, I believe, also admitted, except by Sir William Erle, whom I think no one has ever followed, that if a man endeavors to persuade another to break his contract, and succeeds in his endeavor, yet if he does this without what the law calls 'malice,' the damage which results, however great, is not in itself a cause of action against him. But if the damage which is not in itself actionable be joined to a motive which is not in itself actionable, the two together form a cause of action. This seems a strange conclusion. * * * I do not know, except in the case of *Lumley v. Gye*, 2 El. & Bl. 216, that it has ever been held that the same person, for doing the same thing, under the same circumstances, with the same result, is actionable or not actionable, according to whether his inward motive was selfish or unselfish, for what he did. I think the inquiries to which this view of the law would lead are dangerous and inexpedient inquiries for courts of justice. Judges are not very fit for them, and juries are very unfit."

It is a truism of the law that an act which does not amount to a legal injury cannot be

actionable because it is done with a bad intent; that what one has a right to do another cannot complain of. It is conceded that one may lawfully persuade or procure another to break his contract with a third person, "if it be done from good motives." We think the qualification has no place in the proposition. If it is right, and the means used to procure the breach are right, the motive cannot make it a wrong any more than a good motive would justify fraud, deceit, slander, or violence to effect the same purpose. Suppose A. by fraudulent representations induces B. to sell him a large quantity of goods upon credit, intending to defraud B. of the entire value of the goods. C., knowing that the representations are false, and not caring whether B. shall lose his goods or not, but of unmixed malice and ill will towards A., procures B. to refuse to deliver the goods, by truthfully informing B. of the falsity of the representations made by A. Will it be said that C. is liable in an action brought by A.? In *Cooley on Torts* (2d Ed., p. 832) the learned author says: "Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. When in legal pleadings the defendant is charged with having wrongfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged." Again, the same author (at page 836) says: "Motive generally becomes important only when the damages for a wrong are to be estimated. It then comes in as an element of mitigation or aggravation, and is of the highest importance." That the mere fact that one induces another to break a contract with a third person does not give a right of action, seems to have been directly decided in *McCann v. Wolff*, 28 Mo. App. 447, cited by appellant. The petition alleged that "by some means unknown to plaintiff" the defendant induced a third person to renege from a contract, whereby the plaintiff lost commissions. The court said: "The demurrer was properly sustained. The petition charges neither malice nor fraud on defendant's part, and in the absence of both an action of this kind is not maintainable."

Lumley v. Gye, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333; and *Walker v. Cronin*, 107 Mass. 555,—are cited and largely relied upon by appellant. In *Lumley v. Gye*, plaintiff, the proprietor of a theater, employed Miss Wagner to sing in his theater for a specified time. Defendant, knowing the premises, and maliciously intending to injure the plaintiff, enticed and procured Wagner to refuse to perform, by means of which enticement and procurement she wrongfully refused to perform, etc. Defendant demurred to the declaration. The court held that the relation of master and servant existed, and the decision was placed upon that ground; *Crompton, J.*, saying, however, that

he did not wish to be considered as deciding "or as saying that in no case except that of master and servant is an action maintained for maliciously inducing another to break his contract to the injury of the person with whom such contract has been made." Mr. Justice Coleridge (now lord chief justice of England) dissented in a long and able opinion, holding that the relation of master and servant did not exist within the intent of the statute of laborers of 23 Edw. III., in which he said the law in relation to the seduction of servants had its origin; and as to the broader proposition argued by counsel and referred to by *Crompton, J.*, concluded: "Merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reason I have stated, is not actionable." In *Bowen v. Hall*, supra, a contract for skilled labor, the case was decided in the appellate court upon the authority of *Lumley v. Gye*, Lord Coleridge again dissenting. The opinions of the majority of the court go far to sustain the broad proposition contended for by the appellant here. *Lumley v. Gye* was declared by Lord Coleridge, in the latter case, to stand alone. The reasoning in the dissenting opinions in those cases seems conclusive and satisfactory. *Walker v. Cronin*, supra, was also a case of enticement of laborers. The question arose upon demurrer. The court held, after stating the declaration: "This sets forth sufficiently (1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant, which constitutes malice; and (4) actual damage and loss resulting." This case does not seem to be based upon the relation of master and servant, or that of a contract for personal services; but, unless it can be sustained upon that ground, (a point not necessary to consider,) the decision is clearly wrong. In *Payne v. Railroad Co.*, 13 Lea, 507, plaintiff, a merchant, had a large and profitable trade with defendant's employees. Defendant circulated a notice to the effect that any of its employees who, after that date, traded with plaintiff, would be discharged. This, it is alleged, was done maliciously, whereby plaintiff was damaged. The court held that an act not unlawful, done in a manner not unlawful, though from wicked and malicious motives, and causing injury, is not actionable. That no contract existed between the merchant and the employees does not affect the principle involved. 2 Greenl. Ev. § 453, defines a malicious act: "In a legal sense, any unlawful act, done willfully and purposely to the injury of another, is, as against that person, malicious."

Two cases recently decided by the supreme court of Kentucky fully sustain our conclusion. *Boulter v. Macauley*, 15 S. W. Rep. 60, was a stronger case than *Lumley v. Gye*, as

the dramatic performer was not only induced to violate her agreement with plaintiff, but to perform in defendant's theater instead. It was held that defendant was not liable. The other case—*Chambers v. Baldwin*, 15 S. W. Rep. 57—was for procuring a third party to break his contract for the sale of a crop of tobacco. The complaint was demurred to. The questions presented, as stated by the court, are: "First, whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it; second, whether an act lawful in itself can become actionable solely because it was done maliciously." The judgment of the court below sustaining the demurrer was affirmed. *Jones v. Stanly*, 76 N. C. 355, cited by appellant, directly sustains appellant's contention, but the decision is based upon *Haskins v. Royster*, 70 N. C. 601, (the only case cited,) which case involved the relation of master and servant, and was decided by a divided court. It may be questioned whether the omission to allege that Thorn knew of the contract between appellant and Newlands is not fatal to the complaint, but, as we conclude that the demurrer was properly sustained upon the principal point made, it is not necessary to consider it. We are of the opinion that the judgment appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

4 Cal. Unrep. 58

DOWLING v. ALTSCHUL. (No. 14,978.)
(Supreme Court of California. June 13, 1893.)
STREET ASSESSMENT—APPEAL TO CITY COUNCIL—
CONCLUSIVENESS OF DECISION.

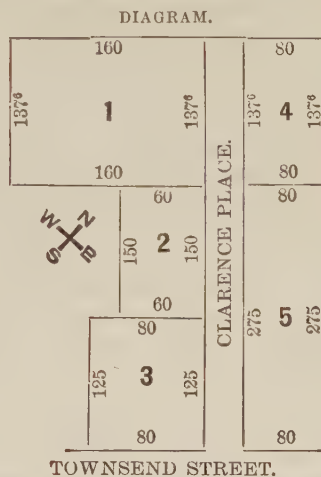
Act March 18, 1885, p. 147, § 11, provides for an appeal to the city council from an act or determination of the superintendent of streets as to the legality of any assessment; that on such appeal the city council may "confirm, amend, set aside, alter, modify, or correct" the assessment, as it may deem just; that all decisions of the council shall be conclusive, on all persons entitled to such an appeal, as to all errors and irregularities which the council might have remedied. *Held*, that an appeal on the ground that an assessment for paying a cul-de-sac failed to assess the land at the end of the same presented a question which the city council had power to determine, and therefore their decision was conclusive.

Commissioners' decision. Department 1.
Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by J. J. Dowling against L. Altschul to enforce a street assessment. Judgment for defendant. Plaintiff appeals. Reversed.

J. C. Bates, for appellant. Sullivan & Sullivan, for respondent.

VANCLIEF, C. Action to enforce a street assessment in the city of San Francisco, in which the judgment was in favor of the defendant. The plaintiff brings this appeal from the judgment on the judgment roll, in which there is no bill of exceptions, and contends that upon the findings of fact the judgment should have been in favor of the plaintiff. There is no question that the plaintiff entered into a valid contract with the superintendent of streets to construct sidewalks and curbing, and to pave the roadway throughout the entire length of Clarence place, which is a cul-de-sac 35 feet in width, extending northwesterly from Townsend street a distance of 412½ feet, as shown by the following diagram:



The black figures on the diagram represent feet, and the red (which are large) designate the numbers of lots assessed. The land adjoining the northwesterly end of Clarence place was not assessed; and for this reason alone the defendant, who owns lot No. 3, contends that the assessment is not equal or uniform, and is therefore void, and so the trial court expressly found, as a conclusion of law. It is found as a fact that the defendant duly appealed from the assessment to the board of supervisors, and that the board affirmed the assessment; and counsel for appellant contends that under section 11 of the act of March 18, 1885, (page 147,) such appeal was respondent's only remedy, and that the affirmance of the assessment by the board of supervisors is conclusive. And, as I think this point should be sustained, it will be unnecessary to consider whether the decision of the supervisors was erroneous or not. Section 11 of the act above cited provides for an appeal to the city council from any act or determination of the superintendent of streets as to the correctness or legality of any assessment, and that "upon such appeal the city council * * * may confirm, amend, set aside, alter, modify, or correct

the assessment in such manner as to them shall seem just, * * * and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram.

* * * All the decisions and determinations of the city council * * * shall be final and conclusive upon all persons entitled to appeal under the provision of this section, as to all errors, informalities, and irregularities which said city council might have remedied or avoided; and no assessment shall be held invalid, except upon appeal to the city council as provided in this section, for any error, informality, or other defect * * * in the assessment, when notice of the intention of the city council to order the work to be done has been actually published in any designated newspaper in said city for the length of time prescribed by law before the passage of the resolution ordering the work to be done." In this case it is found that the notice mentioned in the last clause of the above quotation was duly published, and that all the proceedings up to the time the assessment was levied were regular, and it is also clear that the error in the assessment, if error it was, might have been remedied or avoided by the city council on the appeal. The assessment upon defendant's lot was not so totally void that it could not have been amended by order of the city council. It was founded upon a valid contract for work that had been completed according to the contract, and for which defendant's whole lot was assessable, and was made by an officer (superintendent of streets) having plenary power to make it. In consequence of the alleged error, defendant's lot was assessed for \$490.30, when it should have been assessed at only about \$470. If such an error cannot be corrected on appeal to the city council, I think no substantial error in an assessment can be so corrected, and that it must follow that section 11 of the act of March 18, 1885, so far as it purports to authorize the city council on appeal to amend, alter, modify, or correct an assessment, is wholly ineffectual.

To the point that the error could not have been corrected on appeal, and, therefore, that defendant is not concluded by the decision of the board of supervisors, counsel for respondents cite *People v. Lynch*, 51 Cal. 15; *Dyer v. Harrison*, 63 Cal. 448; and *Diggins v. Brown*, 76 Cal. 318, 18 Pac. Rep. 373. But in none of these cases does it appear that any question as to the effect of the failure to appeal, or of a decision on appeal, was raised or expressly decided. Nor does it appear that any such question possibly could have been involved in the leading case, (*People v. Lynch*.) which arose in Sacramento city, and was governed by the charter of that city, in which I find no provision analogous to section 11 of the

general act of March 18, 1885. While I find no case construing section 11 of the act of 1885, or any other similar statute, which sustains the position of respondent's counsel, I think the following late cases, and many earlier ones, are in point for the appellant: *Frick v. Morford*, 87 Cal. 576, 25 Pac. Rep. 764; *Perine v. Forbush*, (Cal.) 32 Pac. Rep. 226. I think the judgment should be reversed, and the lower court directed to render judgment for the plaintiff on the findings of fact.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reason given in the foregoing opinion the judgment is reversed, and the lower court is directed to render judgment for the plaintiff on the findings of fact.

HARRISON, J. I concur in the judgment for the reason that in my opinion the assessment was correct. The provision in the statute that the assessment shall be made upon the lots and lands fronting upon the work must be construed as referring to the lots which front laterally upon the street, and not as including one which abuts upon the bottom of a court or a cul-de-sac. I am not prepared to say, however, that the act of the board of supervisors, confirming an assessment which is made in manifest violation of the provisions of the statute, concludes the owner from making such defense in an action to enforce the assessment.

4 Cal. Unrep. 24

WALLACE et al. v. Sisson et al. (No. 14,-566.)

(Supreme Court of California. June 9, 1893.)

CONTRACTS—EVIDENCE—PARTNERSHIP—ACCOUNTING.

S. W. & Co. made a business of hiring Chinese laborers to railroad and construction companies. No direct compensation was paid for this service, but the understanding was that S. W. & Co. were to have the right to furnish supplies to whatever men they obtained for the companies, which supplies were to be retained out of the men's wages. There being a scarcity of labor, S. proposed the importation of men direct from China. Not meeting with encouragement from the other partners, he took the matter to the president of the S. P. R. Co., and an agreement was perfected, under which importations were afterwards made. The secretary of the construction company, one of the parties signing the contract, testified that certain advances were to be made under the contract by his own company and by S. W. & Co. to cover the cost of importation; that, according to his recollection, S. W. & Co. signed the contract, and that the last he saw of it it was in the hands of W. The person who was to go to China to secure the importations was to act ostensibly for the S. P. Co., as that company was better known than the construction companies. Directions were sent by the S. P. officials to the steamship agent in China to make the advances and draw on S. W. & Co. for the entire amount. The clerk to whom the draft was presented at S. W. & Co.'s office,

in their absence, claimed that they were not to pay it. The secretary of the construction company testified that he then had some conversation with the clerk concerning payment, in which reference was made to the contract. The contract itself was not produced. A large number of Chinese were imported, and worked for the construction company. *Held*, that there was not merely a privilege to furnish supplies, but a contract to which S., W. & Co. was a party, and which, at least by force of usage, gave them the right to furnish supplies to the men obtained thereunder, and on the death of one of the partners his estate was entitled to a share of the profits arising therefrom.

2. The rescission of a partnership settlement effected through fraud, and return of property received thereunder by the estate of a deceased partner, is not necessary to the maintenance of a suit for further accounting by the representatives of deceased.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action for an accounting, brought by Emeline Wallace and Cora A. Herzstein against Joseph H. Sisson and Milo A. Burke, executors of A. W. Sisson, deceased, and Julia Ann Crocker, executrix of Clark W. Crocker, deceased. Judgment for defendants. Plaintiffs appeal. Reversed.

A. N. Brown, (D. M. Delmas, of counsel,) for appellants. Mastic, Belcher & Mastic, for respondents.

HAYNES, C. Appeal from a judgment for defendants, and from an order denying plaintiffs' motion for a new trial. A. W. Sisson, W. H. Wallace, and Clark W. Crocker were copartners in the name of Sisson, Wallace & Co. Wallace died intestate, October 2, 1881. This action was commenced in May, 1884, against Sisson and Crocker, and, Sisson having died before judgment, his executors were substituted, and, defendant Crocker having died since this appeal, his executrix was substituted in this court. The firm was organized about 1868, having its principal place of business at San Francisco, and subsidiary places of business at different points on the line of the Central and Southern Pacific Railroads during the construction and operation of those roads. The Pacific Improvement Company, the Western Development Company, and the Southern Development Company were corporations severally engaged in the construction of these railroads under contracts with the railroad companies. Sisson, Wallace & Co. were dealers in merchandise, but their principal business was procuring Chinese laborers for the railroad and construction companies, and furnishing them with supplies of food and clothing while laboring for those corporations. As Chinamen were needed for construction or repairs, orders were given Sisson, Wallace & Co. for the men, and these would be procured and forwarded. No compensation was paid by the corporations for this service, but there was an understanding that Sisson, Wallace & Co. should supply the men

so furnished with food and clothing out of the profits of which they would be compensated for their labor and expense in procuring them. The Chinamen labored under the immediate direction of the railroad or construction company, who also kept their time; but the pay rolls, when made out, were delivered to Sisson, Wallace & Co., and the money called for by the rolls was paid to them, and they retained the amounts due them from the Chinamen for supplies, and paid them the remainder. In June or July, 1881, more Chinamen were required than could be obtained here. One Koopmanschap suggested to Mr. Sisson that he could obtain in China all the men required, but it would involve the expense of procuring them, and of their transportation from China. Sisson communicated the suggestion to Mr. Wallace, who thought the risk too great to justify incurring so large an outlay. Sisson, however, took Koopmanschap to Charles Crocker, the president of the Southern Pacific Railroad Company, and introduced the subject of procuring men from China, and an arrangement was afterwards perfected under which a large number of Chinamen were imported. What this arrangement was, who were parties to it, and whether it constituted a contract under which Sisson, Wallace & Co. had a right to supply the Chinamen for any definite time, or while they should labor for the construction company, are the principal questions involved in the appeal.

Mr. Wallace left surviving him, Emeline, his widow, Cora, his daughter, (the plaintiffs,) and a minor son. Mrs. Wallace was appointed administratrix of his estate and the guardian of the minor. Early in January, 1882, negotiations were commenced by the surviving partners for the purchase of the interest of the estate in the partnership, the offer being that they would pay the value of that interest as shown by the annual statement of the assets and liabilities, as of January 1, 1882. Mrs. Wallace insisted that she should be allowed the proportionate part of the value of the good will of the business, which was long established, and large and valuable, and also claimed, while admitting her inability to establish the fact that the Chinamen imported from China were so imported under a contract made before Mr. Wallace died, by which the firm had a vested right to furnish them supplies, that the profits which would accrue to the firm during the time they were to labor would amount to a very large sum, and that the estate should have its interest in these profits, or be compensated for them in the settlement. On the other hand, Sisson and Crocker insisted that there was no contract right; that all they had was a mere privilege of furnishing supplies, which the corporations could revoke at any moment; and refused to allow anything for the good will, or for any profits to be realized from supplies to be furnished the Chinamen; that,

if their offer was not accepted, they would proceed to liquidate the affairs of the partnership. Mrs. Wallace, admitting her inability to establish the fact at that time, and protesting that if she should ever be able to establish it, she would enforce her rights, accepted the offer made, and, in order to consummate the arrangement, gave bonds for the payment of the debts of the estate and procured a distribution, the sale of the interest of the minor being effected through the probate court. Plaintiffs, claiming to have discovered facts establishing a contract right to the said profits, brought this action for an accounting, alleging that 1,800 Chinamen were so imported; that the profits arising therefrom were \$450,000, of which one-third belonged to the estate; that other contracts and rights were secured by said firm shortly before the death of said Wallace of the value of \$50,000, charging fraud and concealment in relation to those contracts, and praying for a disclosure and accounting, and for judgment for the sum of \$180,000, and for general relief.

The court, after finding the uncontroverted facts, and some controverted facts which do not require special notice, upon the principal questions at issue found, in substance, that there was no fraud, misrepresentation, or concealment on the part of defendants; that they informed the plaintiffs, and the plaintiffs well knew, that defendants believed that said business was becoming very lucrative, and that during the years succeeding would yield large and increased profits; that the firm of Sisson, Wallace & Co. did not enter into any contract, nor was there any contract or agreement whatever between said firm and any of said corporations for the importation of Chinamen, or for the securing such men in China, or the forwarding of them to San Francisco, or the collection or payment of their wages, or the reimbursement of any sums advanced to pay passage money or other expenses, of collecting or forwarding men, or giving to Sisson, Wallace & Co. the exclusive right or any right to furnish said or any Chinamen with supplies, or with the privilege of deducting the accounts of said firm therefrom from the wages of such laborers; that the exclusive privilege which the firm had enjoyed for many years of furnishing supplies to the Chinese laborers was by mere sufferance upon a parol understanding with certain stockholders and officers of the railroad companies; that for the purpose of enabling the firm to protect itself against loss, and to collect the money due them, the pay rolls were placed in their hands with funds to pay the laborers; that there was no contract giving to said firm any fixed or vested right to the privilege thus enjoyed, or giving any assurance to said firm that such privilege would be accorded to them for any time in the future. These findings are not justified by the evidence.

Before discussing the circumstances under which these importations of Chinamen were made, it is necessary to understand the previous relation of the parties concerned. It is quite true that Sisson, Wallace & Co. did not have a contract by which they were to furnish all the labor for the construction of these roads, nor any particular number of men. These corporations were at all times at liberty to procure men through others, and, according to the testimony of Mr. Charles Crocker, did obtain men through others; but he further testified (and as to this there is no conflict) that whoever furnished men for the work had the exclusive right to furnish the supplies for them. F. S. Douty, the secretary of the Pacific Improvement and Southern Development Companies, testified: "We looked to them (Sisson, Wallace & Co.) to get Chinamen. They employed Chinamen for us, and sent them down there, and we paid them the proceeds of the Chinese labor. Some one connected with the company would give them an order for whatever men we wanted." Mr. Charles Crocker testified that this mode of transacting the business dated back to 1864. No exception to it is shown to have occurred. Mr. Douty testified that it had been the custom since he knew anything about the business; that it was a great convenience to them, and enabled them to perform their business with one person instead of a large number of Chinamen who would be employed. This arrangement was, in substance and effect, that Sisson, Wallace & Co. hired the Chinamen to work for them under the direction of the construction companies, at wages agreed upon, and Sisson, Wallace & Co. were paid the whole amount of their wages. There was no contract relation between the Chinamen and the construction companies; the contract was with Sisson, Wallace & Co. There was, however, no contract with Sisson, Wallace & Co. that they should furnish all the labor required until the roads should be completed, nor for any definite length of time. Each order constituted a contract for the men furnished under it, and the men so furnished were the employes of Sisson, Wallace & Co. so long as they remained upon the work. This, I think, was clearly the effect of the arrangement. But, if I am wrong in this conclusion, it was a custom, uniform and without exception, that they should have the right to furnish them supplies so long as they worked upon the road; and this custom became a term of the contract between Sisson, Wallace & Co. and the railroad and construction companies attached to every order to the firm to furnish men, as fully as though it had been incorporated in each order given. "Any local or special custom or usage upon the subject will govern as an implied term in the contract between the parties." *Hayes v. Wells, Fargo & Co.*, 23 Cal. 189. See also, *Taylor v. Castle*, 42 Cal. 367, 371.

"Every legal contract is to be interpreted in accordance with the intention of the parties making it. And usage, when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form part of the contract, and to enter into the intention of the parties."

Walls v. Bailey, 49 N. Y. 464, and cases there cited. If it be said that the railroad and construction companies could not prevent others from coming into competition with Sisson, Wallace & Co. in furnishing supplies to their Chinamen, it is sufficient to reply that during construction, at least, the railroad was not open to business, and could refuse to allow their construction trains to forward supplies for laborers, except for those who had a contract right to do so. Prior to the importation of men from China, procuring Chinamen was always attended with some expense, and sometimes Chinese labor was scarce, and at such times Sisson, Wallace & Co. were compelled to pay a bonus; but when the importation of men from China, which would require the payment of the passage money and the expenses, was suggested to Wallace, he objected that the risk was too great, and hence the special arrangement afterwards made. That a written contract was made between one of the construction companies, Koopmanschap, and Sisson, Wallace & Co., concerning such importation, is clear, though such written contract was not produced on the trial, nor shown to be then in existence.

F. S. Douty testified that in 1881 and 1882 he was secretary and treasurer of the Pacific Improvement Company and of the Southern Development Company; that he remembered something of an instrument purporting to be a contract between one of those companies and Koopmanschap, and he thought Sisson, Wallace & Co., "by which Koopmanschap was to go to China, and get a thousand Chinamen; that he was to have \$15 a head, to be used as compensation for his services, and the Pacific Improvement Company or Southern Development Company were to pay this \$15 a head, which was to constitute his consideration. * * * Neither of the companies would recover any portion of it again, and these companies were to pay the transportation of the Chinamen from Hongkong, or the shipping point, to San Francisco, and Sisson, Wallace & Co. were to advance \$15 a head. This \$50 (transportation) and this last \$15 I have mentioned, were to be collected back from the Chinamen. That was the sum and substance of the thing that was to be carried out as far as it could be." He further testified that the Chinamen were guarantied work for a stated time,—he thought one year,—and were to receive \$30 per month; that he signed it as secretary, and affixed the seal of the corporation; that his recollection was that it had been signed by Koopmanschap and Sisson,

Wallace & Co., before he signed, but he was positive as to Koopmanschap's signature, and that Koopmanschap and Wallace were both present when he signed it; that he signed it by direction of Mr. Charles Crocker, and that he last saw it in the hands of Mr. Wallace, and his best recollection was that it was signed by Sisson, Wallace & Co. Koopmanschap was to act ostensibly for the Southern Pacific Railroad Company, as that corporation was better known in China than the construction companies, and was furnished with blank contracts to be executed by him as agent, and by the Chinamen. By this contract the Chinamen agreed to labor for the railroad company for 18 months from the date of the commencement of labor, at \$30 per month, they to provide their own food and lodging, but to be furnished transportation and provisions from China to the place of destination, and in this contract the Chinamen acknowledged the receipt of \$65 each as an advancement to be deducted from their wages. For the information of the agent of the Occidental & Oriental Steamship Company at Hongkong, a copy of the above-mentioned contract was sent to said agent with the following letter: "Per Gaelic. Occidental and Oriental Steamship Company. General Office. San Francisco, July 7, 1881. Mr. C. H. Haswell, Jr., Agent, Hongkong—Dear Sir: Mr. Koopmanschap goes to Hongkong by Oceanic, which follows the bearer, to arrange for the hiring of about 1,000 Chinamen for labor on the Southern Pacific Railroad. They are to be forwarded in two lots by our steamers, and contracts will be made by Mr. Koopmanschap, as per copy inclosed. The object of this letter is to make the following authorizations to you: First, advance to Mr. Koopmanschap the sum of fifteen dollars (\$15) per head, to cover expenses in Hongkong; second, advance to the agent of the Chinamen fifteen dollars (\$15) for each man as a bonus to him; third, issue tickets for the Chinese at the regular rates, taking the acknowledgment of the proper person. These advances are, of course, not to be made until the Chinamen go on board. You will then send me a draft on Messrs. Sisson, Wallace & Co., of San Francisco, for the entire expense, namely, passage money and \$30 each extra in U. S. gold coin by the steamers bringing the men. In order that you may have sufficient funds to cover the advances referred to, we have cabled you to make no remittances to us at present. Very truly yours, Charles F. Crocker, Vice President." The first shipment of the Chinamen arrived at San Francisco, September 29 or 30, 1881, two or three days before the death of Mr. Wallace, whose condition had not permitted his presence at the office of Sisson, Wallace & Co. for some weeks, and whose illness had lasted for several months. Mr. Sisson testified that before the arrival of the steamer he had arranged with the Merchants' Exchange to notify Sisson, Wallace

& Co. of the approach of the steamer; that he met the steamer in the bay with a lighter, received the lists of the Chinamen, and the contracts they had executed with Koopmanschap, took the Chinamen on the barge to the Oakland wharf, put them on the cars, and went with them to the places at which they were to labor. On September 30th the draft drawn by Haswell, the agent of the steamship company at Hongkong, for \$22,560, pursuant to the above letter from Charles F. Crocker, was presented to Mr. Scott, the head man of Sisson, Wallace & Co., Mr. Wallace being then on his deathbed, Mr. Crocker absent in Europe, and Mr. Sisson absent with the Chinamen on their way to the front. Concerning the payment of this draft, Mr. Douty testified that he had some conversation with Scott by telephone to the effect that Scott contended that he should not pay it; that witness told him to look at his contract, and Scott replied that he had no contract. "Well," I said, "then find it, because you are to handle this; but, whatever there is, if it is not perfectly understood, we will make you good in that matter." This draft was for \$80 per man, (\$22,560,) and was afterwards repaid by the Southern Development Company, except the \$15 per man advanced by Sisson, Wallace & Co., and which they were to collect from the Chinamen.

The foregoing conversation between Douty and Scott, in reference to the contract and payment of the draft, occurring while the matter was still fresh in Mr. Douty's recollection, is strong evidence, not only that the contract was made and signed by Sisson, Wallace & Co., but that it provided for the payment of these drafts by them. Besides, the letter of Charles F. Crocker to Haswell not only corroborates Mr. Douty as to the terms of the contract, but it is inconceivable that he would direct the agent of the steamship company to draw drafts upon Sisson, Wallace & Co. for each of the two contemplated shipments, amounting to \$40,000 each, without a contract right so to do. If further corroboration were needed, it would be found in the fact testified to by Mr. Douty that Mr. Charles Crocker sent for him; that he found Koopmanschap and Wallace there; that Mr. Crocker directed him to execute the contract; that Koopmanschap and Wallace were both present when he signed it; that he last saw it in the hands of Wallace, and that the importations were in fact conducted in the manner and according to the terms of the contract, as narrated by him. It is true it is not stated by Mr. Douty, nor by any witness, that the written contract provided in terms that Sisson, Wallace & Co. were to have the right to supply these Chinamen during their term of labor, nor was it necessary that it should, in view of the long-continued custom or usage existing in that regard. Sisson, Wallace & Co. advanced \$15 per man, and took their chances

of collecting it from the wages of the men. They had no recourse to the development company in any event. If the steamer and all the Chinamen had gone to the bottom of the ocean, they would have been liable for the \$15 per man advanced for them by the steamship company, and this was a good consideration for the contract. Nor was their connection with the matter to end with the collection of this \$15 out of the wages of the Chinamen. They were to collect the \$50 passage money for the development company by keeping out of their wages "as much as they could stand" until it was repaid, as appears by the testimony of Mr. Crocker, who made the arrangement. Mr. Horn, a witness for plaintiffs, testified that he copied a contract relating to the importation of those Chinamen, in the office of Sisson, Wallace & Co., and, while he is clearly in error in some particulars, and inconsistent in others, it is apparent that he had a knowledge of facts that he could not have known unless he had seen such a contract, or learned them in some manner in Sisson, Wallace & Co.'s office; and, if the firm and its other employes had no knowledge of such contract or agreement, he could not well have learned it from them.

Respondents contend that, however the fact may be in regard to a contract of the character above stated, there was such a conflict of evidence as will not permit the finding to be disturbed. It is true Mr. Crocker testified, as did other witnesses, that under the prior course of business Sisson, Wallace & Co. had a mere privilege of supplying the men which they procured; that there never was any contract; that it was simply an understanding. But that is a conclusion erroneously drawn from the facts to which they testify; and as to the imported men Mr. Crocker did not remember that there was a contract, and the defendants and their employes testified that they never knew of such, or any, contract. A careful reading of the testimony, however, will show that these witnesses also testify to conclusions, rather than to the facts which constituted the terms of the contract, and they especially emphasize their denial that there was any contract giving them the right to supply the imported men with food and other merchandise. These denials are not sufficient, in view of the whole evidence, to create a doubt that there was a contract or agreement for the importation of these Chinamen to which Sisson, Wallace & Co. was a party, and which, at least by force of usage, gave them an exclusive contract right to supply them during the term of their employment; and evidence not sufficient to create a doubt cannot be held sufficient to raise a material conflict.

It is further contended that plaintiffs had as full knowledge of all the facts at the time of the settlement as the defendants. Mrs. Wallace admitted that she had known

for 10 years the general course of the business, and expressed her belief that there must have been a contract relating to the importation of these Chinamen; but defendants denied that there was such a contract, and this they still deny. They cannot, therefore, contend that she knew of a contract which they say never existed, for to do so would be to admit what they deny. Nor does it appear that they ever informed her of the existence or contents of the letter to Haswell, which had been copied in their office; nor that the drafts had been drawn upon and were paid by them; nor that the firm advanced \$15 to each Chinaman, and which they were to collect from his wages; nor that they were to collect and pay to the construction company the \$50 passage money; nor that, so far as the evidence discloses, all the communications sent by Koopmanschap while he was in China, in relation to this business, were addressed to Sisson, Wallace & Co., all of which were known to defendants before the settlement. The finding, therefore, that they did not conceal from plaintiffs, "or fail to disclose to them, any fact within their knowledge concerning the same," cannot be sustained.

Respondents further contend that, if the contract of settlement was procured by fraud, misrepresentation, or concealment, plaintiffs' only remedy is by rescission; that they cannot affirm in part and reject in part, and are, therefore, not entitled to recover on their complaint. It is true, as a general rule, that a rescission must be entire; that a party to a contract, who desires to rescind it, must surrender up everything he has received under it; and these rules apply generally to contracts of purchase and sale. They do not apply, however, to all cases of contracts. In this case Wallace's heirs could not become partners in the firm without the consent of the survivors. Mrs. Wallace testified that Sisson proposed to her to permit the interest of the estate to remain in the business at least for a year; that it would be profitable, and that she understood until about January 3, 1882, that it would so remain, when she was informed that such an arrangement would not be made; that it was proposed to take into the firm four of their employees; that they would pay the estate what the annual statement would show they were entitled to, viz. \$153,748.20; that she insisted the estate should be allowed for the good will of the business, and for the profits which would accrue from supplies furnished the imported Chinamen, and that she had been offered by a business man \$25,000 more than the sum they offered. Plaintiffs could not retain their interest in the firm, nor sell to a stranger, without defendants' consent. The sum offered she was at least entitled to. It did not belong to the surviving partners. In paying that sum they did not part with their own money or property. It was a

settlement of the partnership affairs. It was not a voluntary transaction in the broad sense of an ordinary contract. She (and we use the term as representing the heirs) had her choice of two alternatives; to take what was offered, or submit to a liquidation, and to this extent only was it voluntary. If it be true that there was concealment or misrepresentation, that all that was valuable was not brought into the transaction, that something was withheld that should have been estimated, can it be said that before she can have the wrong corrected she must refund to the defendants all that she has received, when she could not receive, hold, own, and control that she had parted with, and which defendants retained, and that a court of equity cannot compel them, without such rescission and surrender, to account for that in which she had an interest, and which was not brought into the accounting upon which the settlement was had? Even if it were necessary to set aside the agreement, it could not be necessary that the money paid should be refunded. It is not claimed that defendants were in any manner deceived or wronged, or that they have paid money that plaintiffs were not in any event entitled to. The law does not require idle or unnecessary acts to be performed, and surely it cannot be necessary that plaintiffs should put back in defendants' hands the money they have in order that they may recover it back with other moneys in addition thereto. These views are fully sustained by the authorities. See *Watts v. White*, 13 Cal. 321; 2 Pars. Cont. 1, *p. 277, and note R; *Pierce v. Wood*, 3 Fost. (N. H.) 519; *Elfelt v. Hart*, 1 McCrary, 11, 1 Fed. Rep. 264. But in strictness this is not an action for rescission, nor is a rescission necessary. The surviving partners have the legal right to the possession of the partnership property and assets, but for which they are required to account. The settlement had was but an accounting, and this action is only for an accounting of a matter not taken into the former accounting. The conclusion to which we have arrived renders it unnecessary to consider alleged omissions to find, and exceptions to evidence, none of which seem to cover any vital point. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

for such appointment, must be taken within 60 days after such judgment or order is entered.

2. Where two petitioners for letters of administration on the estate of a deceased are heard together, under Code Civil Proc. § 1374, but no issue is joined as to any fact alleged in either petition, and no objection is made as to the competency of either party, a motion for a new trial is unauthorized, and no appeal will lie from an order denying the same.

Department 2. Appeal from superior court, Mendocino county; Robert McGarvey, Judge.

Petitions by R. B. Markle and another for letters of administration on the estate of Frederick Heldt, deceased. The petitions were heard together, under Code Civil Proc. § 1374, and letters of administration were granted to Markle. From the order granting such letters, and from an order denying his motion for a new trial, the other petitioner appeals. A motion was made to dismiss the appeals. Appeals dismissed.

J. H. Seawell, for appellant. J. A. Cooper, for respondent.

PER CURIAM. There are two appeals in this case. The first is from a judgment or order of the superior court granting letters of administration upon the estate of Frederick Heldt, deceased, to R. B. Markle, and refusing appellant's application for such letters; and the other is an appeal from an order denying appellant's motion for a new trial in the same matter. The respondent moves to dismiss both appeals, and we think the motion should be granted.

1. The appeal from the judgment or order appointing an administrator, and denying appellant's application for such appointment, was not taken within 60 days after the same was entered, and therefore was not taken in time. Code Civil Proc. § 1715; Estate of Harland, 64 Cal. 379, 1 Pac. Rep. 159; Estate of Burton, 64 Cal. 428, 1 Pac. Rep. 702; Estate of Fisher, 75 Cal. 523, 17 Pac. Rep. 640; Estate of Wiard, 83 Cal. 619, 24 Pac. Rep. 45; Estate of Backus, 95 Cal. 671, 30 Pac. Rep. 796.

2. In this case both the appellant and respondent filed a petition asking for the issuance of letters of administration upon the estate of the deceased, in each of which petitions the applicant stated that he had been requested to act as such administrator by the widow of the deceased, and both of the petitions were heard together, as provided by section 1374 of the Code of Civil Procedure. But no issue was joined as to any fact alleged in either petition, nor any objection made as to the competency of either of the parties. In such a proceeding, when no issues of fact are made by the pleadings, a motion for a new trial is not authorized; and if such a motion is made, and not entertained, or is denied by the court, no appeal will lie from such an order. This is not in conflict with what was decided by us in Estate of Bauquier, 88 Cal. 313, 26 Pac. Rep.

178, 532. In that case the right of an executrix named in a will to letters testamentary was contested upon certain alleged grounds of incompetency. In such a contest the Code expressly provides that the objections shall be in writing and that they shall be heard and determined by the court, (Code Civil Proc. § 1351,) and in that case it was held that when a trial of such a contest had been had, and findings of fact made by the court, a motion for a new trial was proper, and that the party against whom the decree was made might ask the court to re-examine the questions of facts involved, and that an appeal would lie from an order denying a new trial of such a contest. But in that case the court very clearly intimated that a new trial in a probate proceeding was only proper in cases where there are issues arising upon pleadings authorized by the Code. We there said: "It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceeding, but it may be stated generally that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises which, after its decision, may be re-examined by the court upon a motion for a new trial." And these views were reaffirmed in the later case of *Leach v. Pierce*, 93 Cal. 615, 29 Pac. Rep. 235, in which it was held that a motion for a new trial was not authorized in the matter of an application for a family allowance. In *1 Hayne on New Trial* (section 5) it is said: "It may sometimes be difficult to decide what determinations in probate proceedings amount to orders merely, and what to decisions which are subject to re-examination on motion for a new trial. In *Estate of Crosby*, 55 Cal. 576, it was held that, whenever 'issues of fact' are tried in probate proceedings, findings are proper. Perhaps it may be said that, wherever findings are proper, a motion for a new trial may be made." We are clearly of the opinion that no findings were necessary in this case, and that the Code does not contemplate a motion for a new trial in a case where ex parte applications for letters of administration are heard together, and no issues joined as to the right or competency of either of the parties to act as such administrator. Appeals dismissed. Remittitur stayed 30 days.

98 Cal. 490

TOBY v. OREGON PAC. R. CO. et al.
(Nos. 14,225, 14,979.)

(Supreme Court of California. June 9, 1893.)
FORECLOSURE OF MORTGAGE—SALE BY RECEIVER—
DEFICIENCY JUDGMENT—FRAUD AS DEFENSE—
DEPOSITIONS AND EXHIBITS.

1. In an action to foreclose a mortgage on a steamer a receiver was appointed for defend-

ant corporation, and subsequently, on a showing that the steamer was deteriorating in value, the receiver was authorized to sell the vessel, which he did. The sale was confirmed, judgment was given for the amount of the mortgage, and execution awarded against defendant corporation for the deficiency. Held, that a personal judgment for the deficiency was properly entered, though Code, § 726, provides in terms for such judgment only "if it appears from the sheriff's return that the proceeds are insufficient."

2. A trustee to whom a chose in action has been transferred for collection is, in contemplation of law, so far the owner as to be entitled to sue in his own name.

3. Where a purchaser retains the article without any offer to rescind, and does not plead failure of consideration in an action on the purchase-money notes, he cannot set up, as a defense to such action, fraudulent representations by the seller in making the sale.

4. In the absence of a positive statutory provision, exhibits properly identified need not be attached to the depositions in connection with which they are offered in evidence.

Commissioners' decision. Department 2. Appeals from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Simeon B. Toby against the Oregon Pacific Railroad Company and the Oregon Development Company. From a judgment for plaintiff, defendants appeal. Affirmed.

Milton Andros and Jas. L. Crittenden, for appellants. Page & Eels, for respondent.

SEARLS, C. There are two separate appeals in this cause by the defendants,—one from the final judgment, and the other from an order denying a motion for a new trial. As they depend to some extent upon the same statement, they will be considered together.

The action was brought to foreclose a mortgage upon the steamer *Eastern Oregon*, executed at the city of New York by the Oregon Pacific Railroad Company, a corporation, on the 10th day of February, 1887, to the Florida Steamship Company, to secure the sum of \$115,000, with interest at 6 per cent. per annum, evidenced by 12 promissory notes of even date with the mortgage, 11 of which were for \$10,000 each, and one for \$5,000, and all payable 12 months after date. The Oregon Development Company, a corporation, was made a party defendant, upon the averment that it had, or claimed to have, some interest in the steamship, etc. Both the defendants are corporations organized and existing under the laws of the state of Oregon. The steamship in question was purchased for the trade between San Francisco and Southern Oregon, was brought from New York to this coast, and was within the jurisdiction of the courts of this state. The complaint averred the mortgagor defendant to be insolvent, and a receiver was appointed February 17, 1888, who took possession of the steamship, and continued in charge of her until sold, as hereinafter stated, on the 26th day of April, 1890, for the sum of \$80,030.

The cause was tried by the court without the intervention of a jury, and written findings filed April 11, 1890, in which, upon the facts as found, the court ordered judgment in favor of plaintiff for \$115,000 and interest, and a decree of foreclosure and a sale of said steamship, as prayed in the complaint. On the 14th day of April, 1890, plaintiff filed a petition and affidavit showing that the steamship was deteriorating in value; that the expense of her maintenance, repairs, taxes, etc., amounted to about \$300 per month, etc.,—and asked that the receiver be authorized to sell her. Such proceedings were thereupon had that the steamship was, by order of the court, sold at public auction on the 26th day of April, 1890, subject to the confirmation of the court. The sale was confirmed by the court April 29, 1890. Thereafter, and on the 22d day of May, 1890, the court entered a decree in the cause, in which, after reciting the filing of its findings and decision; that the court had ordered the receiver to sell the mortgaged property at public auction, *pendente lite*, to prevent further deterioration in its value, (the same being perishable,) and to pay the expenses and disbursements of said receiver, etc.,—the decree further recites the sale for \$80,030; the confirmation thereof; the settlement of the receiver's accounts, leaving a balance of \$70,224.62 in his hands. The decree then proceeds to award judgment in favor of plaintiff, and against the mortgagor defendant, for \$137,655, (being the amount of the principal of said promissory notes, \$115,000, and interest due thereon,) and costs of suit. The decree requires the receiver to pay the plaintiff the amount in his hands, (\$70,224.62,) and awards execution in favor of plaintiff, and against the defendant the Oregon Pacific Railroad Company, for the balance remaining unpaid after crediting the judgment as aforesaid.

The first point by appellants, in the appeal from the judgment, is that the court had no jurisdiction or authority to enter a personal judgment for a deficiency until after a sale of the mortgaged property by the sheriff, and a sheriff's return showing a deficiency. This theory proceeds upon the basis that the mode of procedure provided by section 726 of the Code of Civil Procedure is exclusive. That section is as follows: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property, * * * and the application of the proceeds of the sale to the payment of the costs of the court, and the expenses of the sale, and the amount due to the plaintiff; and if it appears from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then

be docketed for such balance against the defendant," etc. The contention is that a foreclosure and order of sale are essential to authorize the sheriff to sell, and a sale by him, and a return showing a deficiency, are prerequisite to a personal judgment; that it is the return of the sheriff, showing a deficiency, which operates to crystallize the personal liability of the mortgagor, and to assess the amount for which the court is authorized to decree that a personal judgment may be docketed. A glance at the law, as it existed prior to the adoption of our statutes in relation to mortgages, will tend to make manifest the evils sought to be obviated by those enactments. At common law a mortgage was regarded as a conveyance upon condition, to become absolute upon nonperformance of the condition. Upon such nonperformance the courts of law held the estate to be vested in the mortgagee, and refused to recognize the right of redemption. They conceded the jurisdiction of courts of equity to grant relief from the forfeiture, but that was the extent of the mitigation permitted until the passage of the judicature act of 36 & 37 Vict. c. 66, §§ 24, 25, which provide that when the rules of law and equity are in conflict those of equity shall prevail in all the courts. In the United States there has been no uniform doctrine in respect to mortgages. A majority of the states adopted the English doctrine. In Delaware, Mississippi, and Missouri the doctrine is that before default the title remains in the mortgagor, but passes to the mortgagee upon his taking possession after default, subject to be defeated upon payment of the debt. Another hardship upon the mortgagor needed a remedy. The mortgagee could bring an action at law to recover the mortgage debt, and although he obtained judgment, and (where permitted so to do by law) imprisoned the mortgagor, it did not, without payment, impair his mortgage. The first of the hardships indicated was remedied by section 744 of our Code of Civil Procedure, which provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the property without a foreclosure and sale." The right to a personal action to recover a debt secured by a mortgage is inhibited by section 726, Code Civil Proc., hereinbefore quoted. Under that section there can be but one action for the recovery of any debt, etc., which must be in accordance with the provisions of that chapter. It further provides that a personal judgment may be entered for a balance remaining due, if the proceeds of the incumbered property shall be insufficient, etc. To confine a recovery in such classes to one action, to make the mortgaged property the primary fund out of which satisfaction is to be had, and to give the plaintiff a personal judgment for such bal-

ance as may remain due after the exhaustion of the mortgaged property, are the three essential things provided for.

The contention of appellant that there can be no deficiency judgment without a sale, and formal return by the sheriff, seems to me too technical to give effect to the evident intent of the lawmakers in many cases. Suppose, in the present case, the steamship mortgaged had been lost by perils of the sea, *pendente lite*. Would the plaintiff have been without remedy? Or can it be claimed that the court would have been forced to the useless expedient of foreclosing the mortgage, ordering a sale, and awaiting the return of the sheriff, before a deficiency judgment could be docketed? Would it not rather be said that the court, having obtained jurisdiction of the parties and of the subject-matter, would, under the rules of equity, proceed, under the altered circumstances, and in view of the fact that the security was exhausted, to do justice by the entry of judgment for what would then become the deficiency, viz. the full amount due? Again, suppose the ship had been insured in favor of the plaintiff against the perils of the sea, and lost. Can it be doubted that the insurance money, if paid into court, could be applied to the satisfaction of the mortgage without a judgment over for the balance, if any, due? I think not. It is true the statute provides for docketing a personal judgment for the balance shown to be due by the return of the sheriff. Doubtless this language is used because it is the usual manner by which the application of the primary fund and a deficit remaining are ascertained, but after all it is the existence of these facts which entitles the plaintiff to a personal judgment against the defendant; and where they exist, and can only reasonably be ascertained by other means, they are not to be ignored because made apparent in a different way.

The court was authorized, in a proper case, to appoint a receiver of the mortgaged property. Code Civil Proc. § 564. That the court had jurisdiction of the subject-matter, and was authorized to foreclose the mortgage, will not be disputed. Section 187 of our Code of Civil Procedure provides for cases of this character. It is as follows: "Whenever jurisdiction is, by the constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." The mode of proceeding adopted by the court was a suitable one, under the circumstances. *Mawson v. Mawson*, 50 Cal. 539.

I am of opinion that a sale of the whole

of the mortgaged property under the interlocutory decree of the court, *pendente lite*, by a receiver, and the application of the proceeds to the extinguishment of the amount found due the plaintiff, were such an ascertainment of the balance as warranted the court in rendering judgment therefor. I have examined *Biddel v. Brizzolaro*, 64 Cal. 362, 30 Pac. Rep. 609, and *Brown v. Willis*, 67 Cal. 235, 236, 7 Pac. Rep. 682, and find nothing in them in conflict with the views herein expressed.

It is objected that the decision of the court called for the entry of a decree of foreclosure. Subsequent to the decision, and prior to the entry of the decree, the mortgaged property had been sold by the receiver under order of the court. The decree recites these facts which show the changed conditions, and rendered the decree of foreclosure and order of sale unnecessary. It dealt with the property in its altered form, as money, and decreed that it be applied upon the amount found due. If the court had a right, at that stage of the proceedings, to order that property to be sold as perishable, it certainly possessed the power of applying the proceeds as would have been done by the sheriff had the sale taken place under a final decree.

The second point made by appellant, that "the said judgment is against law," is supported by the same argument made in favor of the first point, and need not receive further elaboration.

The further objection that the judgment is not in accordance with the findings in which the difference is between the decision ordering a decree of foreclosure and sale, and the decree finally entered, has also been referred to. It is also urged that the plaintiff was not entitled to a judgment upon the findings, for the reason that the plaintiff, in his complaint, avers that the Florida Steamship Company assigned to him the mortgage and 12 promissory notes, and that he is estopped to prove that he holds the notes or mortgage as a trustee. The allegation of the complaint is "that on the 27th day of January, 1887, the said corporation, the Florida Steamship Company, assigned, transferred, and set over to this plaintiff the said mortgage, and the said promissory notes thereby secured, and this plaintiff is now the holder of said notes and mortgage." Defendant does not deny, in its answer, that the notes and mortgage were assigned to the plaintiff, or that he now holds them. It does aver that he is not a bona fide holder for a valuable consideration, and that he holds them for collection, without consideration, and as the agent of said steamship company, which is the real owner thereof, and that the action is prosecuted for the use and benefit of the steamship company. It will be seen that the issue is not as to the fact of the transfer, but the character of it, which defendant attacks. The court

finds that the plaintiff is not a bona fide holder, in his own right, or for a valuable consideration, of the notes and mortgage, but that he holds the same for collection, and as the trustee of the real owners, and that the action is being prosecuted by said plaintiff for the use and benefit of the real owners of said notes. The finding then proceeds to set out the real owners of the notes, who are parties other than the mortgagee, and, except the Quintard Iron Works, a copartnership owning two of the \$10,000 notes, the owners are found to have taken the notes in the regular course of business, before maturity, and for a valuable consideration, without notice, etc. Now, a trustee to whom a chose in action had been transferred for collection is, in contemplation of law, so far the owner that he may sue on it in his own name. *Goodnow v. Litchfield*, 63 Iowa, 275, 19 N. W. Rep. 226; *Logan v. Cassell*, 88 Pa. St. 288; Code Civil Proc. § 369; *McPherson v. Weston*, 64 Cal. 275, 30 Pac. Rep. 842; *Wetmore v. San Francisco*, 44 Cal. 294; *Poorman v. D. O. Mills & Co.*, 35 Cal. 118; *Wedderspoon v. Rogers*, 32 Cal. 569. In such a case the defendant may urge any defense which he could have interposed against the beneficiary, had the suit been brought in his name. That is what the defendant sought to do in the case at bar, by averring the Florida Steamship Company to be the beneficiary, and urging a defense against that company. Proof that such company was the beneficiary, or that other persons occupied that relation, was an element going to the defense, but not touching plaintiff's abstract right to maintain the action in his own name under the pleadings. The legal title to the notes and mortgage was admitted by the pleadings to be in plaintiff, and there is nothing in the findings, or in the fact that it was taken in trust for collection, which impairs the validity of such title, except as against it; and, in plaintiff's hands, defendants could, as before stated, urge any defense good against the beneficiaries. The finding of the court that the notes were transferred by the Florida Steamship Company, at the dates specified, to the several parties designated, was simply another method of traversing the averment of defendant that the Florida Steamship Company was the holder and owner thereof, and that the action was prosecuted for its benefit.

The more serious question under this branch of the case relates to the right of the plaintiff to recover upon the two promissory notes of \$10,000 each, held by the Quintard Iron Works. The Quintard Iron Works is a copartnership composed of Nicholas F. Palmer and George W. Quintard, the latter of whom, at the time of the sale of the steamship and execution of the notes in suit, was an officer of the Florida Steamship Company, and made the false and fraudulent representations in regard to the speed, capacity, etc., of

the steamship, as found by the court. He stands charged with notice of the misrepresentations, and his copartnership is in no better position. Upon the pleadings and findings, can a recovery be had upon these two notes? There are three methods by which, in cases like the present, a party defrauded may obtain relief: (1) Cancellation or revision, whereby the defrauded party procures an instrument, obligation, or other matter affecting his rights and liabilities to be set aside and annulled, and be restored to his original position; (2) affirmative relief, by an action to recover a pecuniary compensation for the injury sustained by the fraud of the defendant, where no cancellation is necessary as to the basis of such recovery; (3) defensive relief, whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability. Defendant pleaded an offer, upon discovery of the fraud, to return the steamship, and a demand of the return to it of the notes and mortgage made by it, etc. The finding of the court was against defendant on this issue. There is nothing in the record to indicate that any attempt was made to set up a claim for damages, by way of recoupment, to reduce the amount of the recovery. The whole effort of defendant, so far as this record shows, was directed to a cancellation or rescission of the contract. It had retained the consideration of the notes, viz. the steamship, and, according to the finding, had not offered to reconvey it, and had not "rescinded the notes or mortgage, or the said sale of said steamship," and therefore failed in its defense.

The evidence is not before us on the appeal from the judgment, and there is nothing to show that any specific damage was established, or that defendant sought to amend its pleadings so as to permit such defense. This court, in the absence of such a showing, can only guess how much the defendant was damaged by the fraud of the Florida Steamship Company. In other words, there was no basis whatever established, upon which a reduction can be had. The notes were not void, but voidable, and as defendant elected to retain the consideration, and has not pleaded a failure of consideration, it must be held to pay the notes. Sections 3406-3408, Civil Code, which provide for rescinding written contracts by the judgment of the court in any of the cases mentioned in section 1689, do not authorize a rescission where the party seeking it had not exercised reasonable diligence, as provided in section 1691. The findings support the judgment, and the appeal from such judgment should be affirmed.

Appeal from the order denying defendants' motion for a new trial: The point is made that the twelfth finding of the court, to the effect that defendant never, before the commencement of the action, demanded the return of the notes, mortgage, etc., and never

offered to reconvey the steamship, etc., is not supported by the evidence, and is contrary thereto. The testimony upon the question solved by this finding was conflicting. T. E. Hagg, the president of the Oregon Pacific Railroad Company, testified that in New York city, in June, July, and August, 1887, he had, as well as before that time he had had, numerous conversations with Quintard, in some of which, soon after the arrival of the steamship at San Francisco, he had called upon the latter (then president of the Florida Company) to take back the steamship, and that later, on learning that Talmadge had become president of the Florida Company, he demanded of him, as president, the return of the notes, and that the steamship be taken back. The reply of Talmadge was that Quintard had charge of the matter. Talmadge was not called on as a witness, and it is claimed by appellant that this testimony is not contradicted. It is true Talmadge was not called as a witness in rebuttal to contradict the statement, but his deposition had been previously taken in New York; and in it he says he became president of the Florida Company in July, 1887, and that he "never heard of any objection to the steamship by Col. Hagg's company until they brought suit against the Florida S. S. Co.;" and again, "I never heard or knew of any proposition to return the ship to the Florida Steamship Company on any terms." This testimony is emphatic, and negatives the statement of the witness Hagg. This witness was contradicted by other witnesses in important particulars relating to the same subject. The steamship had been chartered by the Oregon Pacific Railroad Company, before she left New York, to the Oregon Development Company, and was thence, until taken into possession by the receiver in this action, in the possession of, and under the control of, the last-named company; a fact which may have led the court, in connection with the other evidence, to conclude that no offer of rescission was made. He who would rescind a sale for fraud must act diligently upon discovering such fraud, and must show himself not only willing, but able, to return the property received by him, if any, by virtue of such sale. The evidence is sufficient to support the finding.

The third and fourth points made by appellant relate to five depositions taken by stipulation in New York city. These depositions relate to the indorsement of the several notes by the Florida Company for a valuable consideration, and without notice, to sundry parties, and by the latter to plaintiff for collection. The notes were produced before the referee, and marked for identification from A to L inclusive, by the commissioner. When the depositions were offered in evidence it was objected "that the exhibits which were put in evidence are not annexed to it, [the deposition,] and the commission had not been properly executed." Counsel for respondent

replied to the objection by saying: "There is no reason why they should be attached. They are identified." And the court overruled the objection, and admitted the depositions, to which ruling defendants excepted. There was not at the trial any suggestion or objection by appellant that the exhibits were not sufficiently identified. The objection was, as above stated, that they were not attached to the several depositions. Our Code is silent upon this question, and, in the absence of a positive statute, exhibits properly identified need not be attached, and, if proven, may be identified by parol. *Dailey v. Green*, 15 Pa. St. 118; *Weeks*, Dep. §§ 527, 358, 194, and cases there cited. The objection that the exhibits were not properly identified is made here for the first time, and cannot be considered.

The objection to the admission in evidence of the certificate of W. L. Criglar is without merit. Criglar was a witness for the defendant, and had testified that he was a mechanical engineer employed by the Oregon Development Company as their port engineer; that he had regulated the quantity of coal taken on the steamship in question during each trip, amount used by her, the kind and character of coal used, etc.—and on cross-examination said: "Cumberland or anthracite is about twenty per cent. better for steaming purposes than Wellington or Sidney." The certificate was identified by the witness as being in his handwriting, and signed by him, directed to his company, and certified as to the quantity of Sidney coal the ship consumed ordinarily in a passage from San Francisco to Baquina, and that "the best quality of Sidney coal is at no time equal, for steaming purposes, to within twenty per cent. of best quality of George's creek Cumberland coal." The certificate was offered while the witness was on the stand, and we may suppose for the purpose of contradicting what he had just said as to the relative value of two kinds of coal. It was competent for that purpose, although there was no material contradiction. The finding on the question involved was in favor of defendant, and, had the admission of the certificate been erroneous, defendant could not have been injured by its admission. The proofs were sufficient to warrant the findings.

The other errors assigned are either unimportant, or are in substance the same as urged upon the appeal from the judgment, and have been noticed elsewhere. Sections 3406, 3408, of the Civil Code, authorizing courts to rescind contracts upon the application of a party aggrieved, give no rights to the parties in cases of this character, not accorded by courts of equity prior to their adoption. It is recommended that the judgment in case No. 14,225, and the order appealed from in case No. 14,979, be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.
PER CURIAM. For the reasons given in

the foregoing opinion the judgment in case
No. 14,225, and the order appealed from in
case No. 14,979, are affirmed.

the face of such notes on the attorney for the executor of a certain estate; that such attorney accepted the order, reciting in the acceptance that "certain moneys will in the future, in all probability, become due and payable to" defendant out of the income from certain real estate belonging to such estate, and that the order was payable only out of moneys coming from such estate, "and not claimed or affected by attachments or other claims." *Held* that, though an accord and satisfaction was pleaded, it was not error to exclude such account, order, and acceptance from the evidence, in the absence of any offer to show by other evidence that they were intended or accepted as satisfaction of either of the notes, or that either the account or order had been paid.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by James Hogan against Joseph T. Burns on promissory notes. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles F. Hanlon, for appellant. John H. Dickinson, (Henry E. Monroe, of counsel,) for respondent.

VANCLIEF, C. Action on twelve promissory notes,—two for \$80 each, eight for \$75 each, and two for \$60 each. The answer of defendant admits the making of the notes, but alleges that each note "was without good or valid or legal consideration; that the only consideration therefor was an account for the sale and delivery by plaintiff to defendant by retail, or by the drink, of spirituous and malt liquors, wine, and cider; and that the amount of said account exceeded the sum of five dollars, but did not exceed the sum of twenty-five dollars; and that such an account constituted the only consideration for each of said notes." Further answering, the defendant denies that the first four of said notes had not been paid, but alleges that they have been "satisfied and discharged." The court found as follows: "All the allegations of the complaint are true. Each of the promissory notes set forth in said complaint was made to plaintiff by the defendant upon valuable consideration therefor. No part of the consideration for either of said promissory notes was the sale or delivery by plaintiff to the defendant of any liquor, spirituous or malt, or of any wine or cider, and neither one of said promissory notes has been paid, satisfied, or discharged in whole or in part;" and thereupon rendered judgment for the full amount of principal and interest of all the notes. The defendant has appealed from the judgment, and from an order denying his motion for a new trial.

1. The appellant contends that the findings of fact are not justified by the evidence. There is no merit in this point. The plaintiff and defendant were the principal witnesses, and their testimony was directly in conflict upon all material issues; and no reason appears why the court should have believed the defendant, rather than the plaintiff.

2. Appellant claims that the court erred in rejecting the following papers offered as evidence for the defendant:

"San Francisco, May 1, 1887. Joseph T. Burns, to James Hogan, Dr. For board, lodging, goods furnished, services rendered, and in full of all claims to date, \$200.

"The above is correct. James Hogan.

"I have personally examined all items in the above bill, and find them correct. J. T. Burns."

"Charles F. Hanlon, Esq. Dear Sir: Please pay out of any moneys coming to me out of the estate of J. H. Burns, deceased, after payment of debts, expenses of administration, and claims against the estate, the above bill of two hundred dollars (\$200) to James Hogan, and out of moneys coming to me which are not attached or claimed or interfered with by other parties. June 24, 1887. J. T. Burns."

"Whereas, certain moneys will in the future, in all probability, become due and payable to Joseph T. Burns out of the income of certain real estate now belonging to the estate of James H. Burns, deceased, and whereas, it is now difficult to state exactly at what time or when such moneys will be due or paid: Now, therefore, I certify that the foregoing bill of two hundred dollars (\$200.00) having been agreed upon as being correct by both James Hogan and J. T. Burns, that I will accept the foregoing order of J. T. Burns to pay such moneys out of said moneys coming to him in the regular way, after paying the expenses of the administration, commissions advanced or paid, and other claims against the estate, and other moneys required by law and the order of court. The acceptance of said order is understood not to be holden against the undersigned personally in any way, shape, or manner, the order being accepted payable out of the moneys coming to J. T. Burns in said J. H. Burns' estate, and not claimed or affected by attachments or other claims. Dated San Francisco, June 24, 1887. Charles F. Hanlon, Attorney for Executor."

The date of the stated account (May 1, 1887) is between the date of the fourth note and that of the fifth, and counsel for appellant contends that the rejected papers tend to prove an accord and satisfaction of the first four notes, which amounted to \$270, besides interest. While I think an accord and satisfaction was not pleaded by defendant, (*Sweet v. Burdett*, 40 Cal. 97; *Coles v. Soulsby*, 21 Cal. 47,) yet, conceding that they were, there is nothing on the face of the rejected papers tending to prove that they were intended or accepted as satisfaction of any one of the notes; and there was no offer to prove by other evidence any such agreement or understanding, nor any offer to prove that either the stated account or the order on Hanlon had been paid, (*Holton v. Noble*, 83 Cal. 7, 23 Pac. Rep. 58;) nor is it pretended that any such payment was ever

made. Indeed, Mr. Hanlon testified that "there was no money coming to Burns. He is executor of his brother's estate." So that the condition upon which Hanlon accepted the order might never happen, and, if it should, it is not apparent that Hanlon was authorized to pay the money from the estate of James H. Burns, to which he appears to have borne no other relation than that of counsel for the executor. As the papers offered had no apparent tendency to prove either accord and satisfaction or payment, they were properly rejected. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

98 Cal. 557

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. GLENS FALLS INS. CO. OF NEW YORK. (No. 14,685.)

(Supreme Court of California. June 9, 1893.)

INSURANCE—ARBITRATION—MISREPRESENTATIONS
—PLEADING—JUDGMENT—APPEAL.

1. A complaint alleging the issue of a fire policy, a loss, the submission of the amount thereof to arbitration, and a promise made after the determination of the arbitrators to pay the amount found by them, states an action on the final agreement.

2. The submission to the arbitrators being merely the amount of the loss, and not a general one of liability, it is necessary to a recovery that an express promise be found.

3. In such case the allegation as to a promise cannot be disregarded, and the action treated as based on the policy.

4. An award made not as the result of the judgment of the arbitrators, but on an agreement between one party and the arbitrators authorized by the other party, is not binding where the consent of a party was obtained by fraudulent means.

5. A policy of insurance on goods manufactured by insured provided that insured be indemnified for actual loss, not exceeding the cost of replacement; and further provided that in case of loss insured would produce for the inspection of insurer its books of account and other vouchers. On demand of insurer the board of directors of insured directed its chief bookkeeper to allow an examination of all its books. He, however, withheld a book containing an estimate of the cost of the destroyed articles, made by him by order of the directors. *Held*, that this amounted to a representation that there was no such book, and that the insurer, having been induced thereby to agree that arbitrators as to the amount of the loss should make an award of a certain amount, would be released from its agreement.

6. Insured's chief bookkeeper having been acting within the scope of his authority when he withheld the book after being directed by the directors to exhibit all in his possession, insured would be bound by his acts, and it was unnecessary that the directors should have made or known of any concealment.

7. A decree merely disposing of defendant's cross complaint, and not purporting to dispose of all his defenses, is not a final judgment from which an appeal will lie.

In bank. Appeal from superior court, San Joaquin county; J. G. Swinnerton, Judge.

Action by the Stockton Combined Harvester & Agricultural Works against the Glens Falls Insurance Company of New York. Judgment for plaintiff. Defendant appeals. Reversed.

Haggin & Van Ness, (Paul W. Bennett and Jas. H. Budd, of counsel,) for appellant. W. L. Dudlen and Baldwin & Campbell, for respondent.

DE HAVEN, J. The complaint in this case alleges, in substance, the issuance of a policy by the defendant insuring plaintiff in an amount not exceeding \$2,500 against loss by fire upon certain described property, and that plaintiff had other insurance upon said property and upon other property, all of which insurance aggregated \$127,000; that during the term of such insurance the said insured property was greatly damaged and partially destroyed by fire, and immediately after such fire plaintiff, in accordance with the terms of its policies, presented to defendant and all its other insurers, jointly, proofs of its loss, and claim for damages sustained thereby. The complaint further alleges that plaintiff and its insurers were unable to agree upon the amount of plaintiff's damage, "and under and in accordance with the terms and conditions of said policies" the question of the amount of such loss was submitted to the arbitrament of two persons, who, being unable to agree, selected an umpire, as they were authorized to do, and that said arbitrators investigated plaintiff's claim of loss, and decided and reported to plaintiff and its insurers that the amount of plaintiff's loss was \$90,000, "and thereupon said loss was adjusted at \$90,000, and the said defendant and the said other insurers agreed to pay, and plaintiff herein agreed to accept, said sum of \$90,000 in full settlement of said loss." The complaint then alleges that the proportionate amount of that sum to be paid by defendant was \$1,859.25, and that defendant promised and agreed to pay the same to plaintiff on or before December 31, 1888, and demands judgment against defendant for that sum and costs. The defendant answered, and also filed what it termed a "cross complaint," in which cross complaint defendant asked, upon grounds which will be hereafter noticed, that the award or decision of the arbitrators should be annulled, and the issues arising upon this cross complaint and plaintiff's answer thereto were tried first; and the court filed its findings of fact and conclusions of law, denying the prayer of defendant's cross complaint, and thereupon, on December 19, 1890, the other issues in the case being undisposed of, entered a decree to the effect that defendant take nothing by reason of the matters alleged in its cross complaint, "and that the cause proceed to trial upon the com-

plaint and answer thereto." Thereafter the defendant filed an amended answer in which it denied, among other things, the appointment of the umpire named in the complaint; and further denied that any of the arbitrators named in the complaint investigated, determined, or reported the amount of plaintiff's loss to be \$90,000, or any other sum; and denied that plaintiff's insurers ever agreed jointly to pay plaintiff \$90,000, or any other sum, or that defendant ever agreed to pay plaintiff \$1,859.20, or any other sum, as its proportion of plaintiff's loss. The court found all the allegations of plaintiff's complaint to be true, except those relating to the promise of defendant and the other insurers to pay the amount of the award referred to in the complaint, and in relation to this the court found: "(9) That, after said awards were rendered, neither the defendant nor the other insurers ever expressly covenanted, agreed, or promised with the plaintiff, as an adjustment of said loss, to pay to said plaintiff the sum of \$90,000, or any other sum;" and "(11) that after said award had been made defendant never expressly promised or agreed to pay to plaintiff \$1,859.25, or any other sum." Upon these findings the court, on January 7, 1891, entered a judgment for plaintiff in accordance with the prayer of its complaint. The defendant appeals both from this judgment and the so-called decree of December 19, 1890, denying to defendant the relief demanded in its cross complaint.

1. The judgment cannot be sustained upon the findings. The cause of action stated in the complaint is not upon the policy of insurance issued by defendant to plaintiff, nor upon an award in the nature of a judgment fixing the liability of defendant upon such policy, but is upon an agreement alleged to have been made by defendant with plaintiff after the amount of plaintiff's entire loss had been appraised by arbitrators, and by which agreement it is alleged that defendant promised to pay to plaintiff a certain proportionate share of such appraised loss. *Saville v. Insurance Co.*, 8 Mont. 419, 20 Pac. Rep. 646; *Wagner v. Insurance Co.*, 143 Pa. St. 338, 22 Atl. Rep. 885. The finding of the court that such alleged agreement was never made is fatal to the judgment upon this appeal. The distinction between the cause of action stated in this complaint and one upon a policy of insurance, or an action upon an award fixing the liability of an insurer thereon, is marked and important, not only by reason of the difference in the facts required to be shown in order to maintain the different actions, but also because of the fact that in an action like this the defendant is cut off from defenses which might be interposed to an action upon the policy. "Where an insurance company, after the loss, has adjusted the claim therefor, and has agreed to pay a certain sum in liquidation of the claim, it cannot,

in an action setting forth such facts, object that the action was not brought within the time limited in the policy. In such a case the action is not upon the policy, but upon the agreement to pay. Neither, in such a case, can it set up a breach of warranty, or of any of the conditions of the policy in defense, for adjusting the loss and promising to pay it is a waiver of all breaches on the part of the assured, and of all defenses which might have been made, except for such waiver." 2 Wood, Ins. § 450; *Smith v. Insurance Co.*, 62 N. Y. 85; *Saville v. Insurance Co.*, 8 Mont. 419, 20 Pac. Rep. 646; *Stache v. Insurance Co.*, 49 Wis. 89, 5 N. W. Rep. 36; *Wagner v. Insurance Co.*, 143 Pa. St. 338, 22 Atl. Rep. 885.

The plaintiff claims, however, that it was not necessary for the court to find an express promise on the part of defendant to pay the award referred to in the complaint, because such promise is implied as a matter of law; but this is only true in the case of an award following a general submission of some controversy. In an action upon such an award, which is in the nature of an adjudication of the rights and liabilities of the parties thereto, it is not necessary to allege or prove that the defendant expressly promised to perform the award, for the law implies the promise to perform from the fact of such general submission. *Robinson v. Templar Lodge*, (Cal.) 31 Pac. Rep. 609; *Valentine v. Valentine*, 2 Barb. Ch. 430. But this is not such a case. The complaint does not allege any such general submission for the purpose of determining the liability of defendant upon the policy issued by it, nor does the court find the fact of any such submission or award. On the contrary, the complaint alleges that the matter submitted to the arbitrators was the question of the amount of the loss sustained by plaintiff, and the court so finds. In addition to this, the record shows that in the submission itself there was an express provision to the effect that the appraisal or award to be made thereunder should not operate or be taken as a waiver by the insurance companies, or any of them, of any provision or condition of their policies. An award in pursuance of such submission does not fix the liability of the insurer to pay under a policy, but only determines the amount to be paid in the event that there is any liability at all; and no action can be maintained upon an award of this character standing alone. *Soars v. Insurance Co.*, 140 Mass. 343, 5 N. E. Rep. 149; *Whipple v. Insurance Co.*, 11 R. I. 139; 2 Wood, Ins. § 450. After an award of this nature has been made, and the insurer has expressly promised to pay it, the insured may maintain an action either upon the policy, alleging the fact of the award for the purpose of fixing the amount of the recovery, or he may sue upon the new or subsequent agreement to pay it, in which latter case the fact of the agree-

ment is material, and must be proven. It is urged, however, in one of the briefs filed in behalf of plaintiff, that this action can be treated, not only as based upon the award, but "also upon the policy, so far as the policy forms the foundation and basis of the award." The argument is, in effect, that the allegation of the complaint regarding defendant's express promise to pay its proportion of the award may be disregarded, and in that event the finding of the court that such agreement was not made would not be material. But we are not at liberty to construe the complaint as if this allegation did not appear therein. The matter alleged is not superfluous, and without any relation to other parts of the complaint, but it is material, giving precision to the cause of action alleged, and showing that the complaint states a cause of action upon the new agreement, and not upon the policy.

2. The real question in the case, and which may become important upon another trial, if the complaint should be so amended as to state a cause of action upon the policy of insurance, and the evidence should be in accordance with the special findings contained in this record, relates to the binding force of the award given by the arbitrators selected to appraise the amount of plaintiff's loss. The defendant alleges in its cross complaint that this award was not the result of the judgment of the arbitrators, but was based solely upon the consent or agreement of the insurance company to the effect that the arbitrators might fix the amount of plaintiff's loss, as stated in such award, without any examination, and without the exercise of any judgment of their own. The defendant further alleges that such consent was obtained by reason of plaintiff's fraudulent concealment of certain books and inventories in its possession, and which would have shown the amount of its loss to have been much less than the sum fixed in the award. The submission to arbitration grew out of the fact that plaintiff and the insurance companies were unable to agree upon the amount of damage sustained by plaintiff, and undoubtedly contemplated that the award when made should be the result of the honest judgment of the arbitrators, after a full examination and investigation of the matters upon which the award was to be made, and after due consideration of all the proofs which should be submitted to them by the parties to the submission. The court does find that after such submission the arbitrators proceeded to make such investigation, and made their decision and award under oath, as required by the terms of the submission; but the court also made special findings in conflict with this general finding, and to the effect that the arbitrators did not hear the proofs or appoint any time for the parties to be heard in relation to the matters submitted, and that in making the award they did not exercise any in-

dependent judgment of their own, and that the award was made under an agreement between the insurance companies and one of the arbitrators, who represented that he had authority to act for the plaintiff in the matter, and by which agreement the loss of plaintiff was fixed at \$30,000, and the arbitrators were authorized to render an award for that amount. If the facts are as stated in these specific findings, it is clear that the award can have no greater force than the agreement upon which it is based; and, if the consent of defendant and the other insurers to such agreement was not fairly obtained, then the award is not binding upon defendant.

The policy issued by defendant was upon a stock of agricultural implements manufactured and in process of construction by plaintiff, and the agreement of defendant was to make good to plaintiff such immediate damage to the property insured as might be caused by fire, the loss or damage to be estimated according to the actual cash value of the property, not exceeding the cost of replacement; and it was further agreed that in case of loss the plaintiff would, if required, produce and exhibit for examination by defendant its books of accounts and other vouchers. It will be easily perceived that this provision of the policy in relation to the production of books and vouchers was one of very great importance to the defendant, and was intended to aid the defendant in ascertaining the cost or value of the property insured in case of its destruction by fire; and the court below found that after the plaintiff had made its claim for the loss alleged to have been sustained by it the defendant and the other insurance companies "requested an inspection of the books of the corporation plaintiff, for the alleged and avowed purpose of ascertaining the amount of plaintiff's loss and damage by said fire;" and thereupon one Shippee, a director of plaintiff, who had been appointed as its agent to effect a settlement of plaintiff's loss with defendant and the other insurance companies, gave directions to one Palmer, the principal bookkeeper of plaintiff, and in charge of its business office and books of account, to permit the defendant and other insurers to examine all books of plaintiff. In accordance with this direction, certain books were produced by Palmer for the inspection of defendant and the other insurers, but none of them showed the cost of construction or value of the property destroyed. Upon being informed of this fact, Shippee stated to defendant and the other insurance companies that neither he nor any of plaintiff's officers knew of any books showing the cost of construction, or had ever been able to ascertain the cost of construction, of the property insured. This statement was made before the submission to arbitration, but was substantially repeated to the arbitra-

tors at the time of their selection,—that is, they were informed in the presence of Shippee that such statement had been made by Shippee, and that they must look elsewhere than to plaintiff for information as to the cost of constructing the property insured; and the court finds that "Shippee did not, nor did any of the officers of said plaintiff, know the cost of construction or value of said implements, * * * nor did they, or any of them, know of the existence of any books showing such cost of construction or value," and that such representations were not falsely or fraudulently made for the purpose of defrauding or deceiving defendant or any of the other insurers. But in this connection the court below also found that prior to the destruction of plaintiff's property by fire, Palmer, by direction of plaintiff's board of directors, had caused to be prepared inventories of the amount of material in the various harvester machines destroyed by fire, and had caused "estimates of the cost of said machines to be made, all for the purpose of informing the directors of plaintiff of the cost of construction of said machines; and the said estimates, as aforesaid, had been written out in the books of plaintiff, * * * and said books containing said estimates were in said office, and in the care and custody of said Palmer, at the time that he was directed to show to the defendant and plaintiff's other insurers all the books as aforesaid;" and that Palmer had also, prior to the fire, caused to be made and recorded in the books of plaintiff inventories purporting to show the value of plaintiff's stock on hand, and the said books were in the office of plaintiff in the custody of Palmer when he was directed to show to defendant and the other insurers the books of plaintiff, but that "said Palmer did not exhibit or produce for the examination and inspection of the defendant, or any of the said other insurers, any of the books containing the estimates of the cost of construction or inventories purporting to show values as aforesaid, but expressly and intentionally withheld the same from their inspection and examination, for the purpose and with the intention that they should not see that the cost of construction and value of the said machines above mentioned, as shown by said books, was less than the cost of construction and value of the same as stated in the claim of loss by plaintiff presented to defendant, as hereinbefore found." The court below also found that defendant and the other insurers consented that the arbitrators might find the amount of plaintiff's loss to be \$90,000, "because of the absence of any book or books of account kept by plaintiff showing the cost of construction or value, and the previous inability of the arbitrators * * * to agree upon an umpire, and of the inability of the insurance companies to establish a less amount than \$90,000 as the

loss, and rather than go to a lawsuit, and acting upon the statements theretofore made to them that there were no books showing cost of construction or value;" and "that, if defendant and plaintiff's other insurers had known of the books in the possession of plaintiff showing cost of construction and value," they would not have given such consent. We think also the findings show that the actual value of the property destroyed and which was insured by defendant was very much less than the amount fixed by the award.

It would seem very clear from these facts that the conduct of Palmer in concealing from defendant the books and inventories referred to, and which conduct was the same in effect as a representation that there were no such books and inventories in existence, was a substantial inducement to the action of defendant in waiving its right to have an appraisal of plaintiff's loss in accordance with the terms of its policy, and in consenting that such loss might be fixed at \$90,000, without any examination or exercise of judgment upon the part of the arbitrators. In determining whether fraudulent representations or concealments are material to the contract sought to be avoided therefor, the supreme court of Maryland, in the case of *McAleer v. Horsey*, 35 Md. 439, says: "No better rule can be given for deciding the question than this: If the fraud be such that, had it not been practiced, the contract could not have been made, or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done in the same way if the fraud had not been practiced, it cannot be deemed material." This same rule is also embodied in section 1569 of the Civil Code of this state. Nor is it necessary, in order to avoid a contract for false representations, that such representations should have been the sole inducement to the contract. Others may have concurred, and yet the party upon whom the deceit was practiced be entitled to relief. 2 Pom. Eq. Jur. (2d Ed.) § 890; *Addington v. Allen*, 11 Wend. 375; *Reynell v. Sprye*, 1 De Gex, M. & G. 660; *Safford v. Grout*, 120 Mass. 20; *James v. Hodsden*, 47 Vt. 127; *Bigelow, Frauds*, p. 6. The facts as found by the court below stated, and hereinbefore stated, bring this case squarely within the rule of the foregoing cases, and entitle the defendant to be released from its consent to the formal award if plaintiff is affected by the fraudulent conduct of Palmer. The plaintiff insists that the fraudulent concealment of which defendant complains was the unauthorized and willful act of Palmer alone, and in violation of the instructions given him by plaintiff in the matter of exhibiting its books, and that for this reason the plaintiff should not be held responsible for such concealment. In support of this contention cases are cited to the effect that where the

acts of an agent are willful, and beyond the scope or limit of his employment, the principal is not bound thereby; but this case does not fall within the principle thus invoked. Palmer was the agent and representative of plaintiff. He was plaintiff's chief bookkeeper, in charge of its office and books, and was the person to whom defendant was referred by plaintiff when a demand was made for an inspection of the books. The plaintiff could only act in the matter through the agency of some living person, and Palmer was the person selected for that purpose, and in all that he did or omitted to do in the matter thus referred to him he was acting within the scope of his employment; and the plaintiff, as his principal, is bound by his acts and omissions in the performance of the duty intrusted to him, notwithstanding he may have disobeyed the instructions which he received. Story, Ag. p. 452; Mechem, Ag. § 743; Wolfe v. Pugh, 101 Ind. 293. And most certainly the plaintiff cannot be permitted to derive any advantage from the fraud of its agent in the manner of transacting its business, upon the claim that such conduct was not authorized by it. Bennett v. Judson, 21 N. Y. 239; Mechem, Ag. § 148. The finding of the court below, therefore, that Shippee and the other directors of plaintiff were innocent of any personal participation in the fraud of Palmer, and did not themselves make any representations or concealments with intent to deceive and defraud defendant and the other insurers, is immaterial, and does not give to plaintiff the right to enforce an agreement which the court finds would not have been made but for the fraud of Palmer.

It is lastly claimed by plaintiff that the books and inventories concealed were only the estimates of Palmer, and were incorrect, and had never been approved by plaintiff, and that for this reason the defendant was not injured by their nonproduction. The court below found "that the estimates of the cost of construction of the said machines as entered in said books did not include an allowance for interest upon investment in the plant of plaintiff, nor for salaries paid to its superintendent and other principal employes, nor for power, wastage, or tools, but did include an allowance of 10 per cent. over and above estimated cost, intended to cover the wear and tear upon the plant of plaintiff." It is not material to the question under consideration to determine whether any or all of the matters referred to in this finding would properly enter into the cost of the construction of the property destroyed, although it is plain that some of them would not. It is sufficient to say that the estimate of such cost was made by the person selected by the plaintiff for that purpose, and the court finds that such estimate was made pursuant to the directions of its directors, and was entered in the books of

plaintiff, and kept and retained by it in its business office. This being so, it was the duty of the plaintiff to exhibit the books containing such inventories and estimates, when requested by defendant, and it could then have accompanied the same with such explanation as it deemed necessary in regard to the method adopted in arriving at such estimated cost, and it would then have been a matter for the consideration of the parties whether or not such estimate was based upon all the items of cost which should have been included therein. The books would have afforded some information to the defendant, and to that information it was entitled, not only under the terms of the policy issued by it, but also upon the plainest principles of right and fair dealing; and the plaintiff cannot be permitted to enforce an agreement which the court found would never have been made but for the fraud of plaintiff's agent in withholding such information from the defendant,—an agreement by which, under the findings of the court, as we construe them, the defendant agreed to pay more than the value of the property destroyed.

3. The judgment or decree of December 19, 1890, denying to defendant the relief demanded in what is termed its "cross complaint," was not a final judgment, and the attempted separate appeal therefrom must be dismissed. There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy. Elliott, App. Proc. §§ 90, 91; W. U. Tel. Co. v. Locke, 107 Ind. 9, 7 N. E. Rep. 579. This the decree of December 19, 1890, did not attempt to do, but only purported to dispose of one of the defenses to the action. Such a judgment is, to say the least, irregular; but, as it is merged in the final judgment, the reversal of the latter will also operate to vacate the former. The appeal from the so-called decree of December 19, 1890, is dismissed, and the appeal from the final judgment in the action entered on January 7, 1891, will be reversed. Judgment reversed, and cause remanded for a new trial.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. HARTFORD FIRE INS. CO. (No. 14,686.)

(Supreme Court of California. June 9, 1893.)

In bank. Appeal from superior court, San Joaquin county; J. G. Swinnerton, Judge.

Action by the Stockton Combined Harvester & Agricultural Works against the Hartford Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

Haggin & Van Ness, (Paul W. Bennett and Jas. H. Budd, of counsel,) for appellant. W. L. Dudley and Baldwin & Campbell, for respondent.

PER CURIAM. The same principles announced by us in the case of Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co., 33 Pac. Rep. 633, (No. 14,685,) are applicable to the facts disclosed by this record, and upon the authority of that case the attempted appeal from the judgment or decree of December 1, 1890, will be dismissed, and the final judgment entered in the action on January 7, 1891, reversed. Judgment reversed, and appeal from decree of December 19, 1890, dismissed.

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. HAMBURG-MADGEBURG FIRE INS. CO. (No. 14,687.)

(Supreme Court of California. June 9, 1893.)

In bank. Appeal from superior court, San Joaquin county; J. G. Swinnerton, Judge.

Action by the Stockton Combined Harvester & Agricultural Works against the Hamburg-Madgeburg Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

Haggin & Van Ness, (Paul W. Bennett and Jas. H. Budd, of counsel,) for appellant. W. L. Dudley and Baldwin & Campbell, for respondent.

PER CURIAM. All of the questions involved in this case were discussed at length in the opinion filed by us in Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co., 33 Pac. Rep. 633, (No. 14,685,) and upon the authority of that case the separate appeal from the so-called decree of December 19, 1890, will be dismissed, and the final judgment rendered in the action on January 7, 1891, will be reversed. Judgment reversed, and appeal from decree of December 19, 1890, dismissed.

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS et al. v. AMERICAN FIRE INS. CO. OF PHILADELPHIA. (No. 14,688.)

(Supreme Court of California. June 9, 1893.)

In bank. Appeal from superior court, San Joaquin county; J. G. Swinnerton, Judge.

Action by the Stockton Combined Harvester & Agricultural Works and others against the American Fire Insurance Company of Philadelphia. Judgment for plaintiffs. Defendant appeals. Reversed.

Haggin & Van Ness, (Paul W. Bennett and Jas. H. Budd, of counsel,) for appellant. W. L. Dudley and Baldwin & Campbell, for respondents.

PER CURIAM. Upon the authority of the case of Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co., 33 Pac. Rep. 633, (No. 14,685,) the attempted separate appeal from the judgment or decree of December 19, 1890, will be dismissed, and the final judgment in the action entered on January 7, 1891, reversed. Judgment reversed, and appeal from decree of December 19, 1890, dismissed.

98 Cal. 614
CITY AND COUNTY OF SAN FRANCISCO
v. KIERNAN et al. (No. 15,014.)

(Supreme Court of California. June 13, 1893.)

CONDEMNATION PROCEEDINGS—WIDENING STREETS
—STATUTES—TITLE OF—REPEAL—EVIDENCE.

1. Act April 25, 1863, (St. 560,) authorizes the board of supervisors of the city and county of San Francisco to widen streets, and to provide compensation for land taken by agreement with the owner, but does not authorize condemnation proceedings. Act April 4, 1864, substantially covered the provisions of the 1863

act, and, in addition, provided for condemnation proceedings. Section 21 expressly declared that "this act shall not be construed to repeal" the act of 1863. *Held*, that neither the passage of the 1864 act, nor its subsequent repeal, affected the operation of Act 1863.

2. Act April 25, 1863, providing for widening streets, being "An act to confer further powers on the board of supervisors of the city and county of San Francisco," is amendatory of the consolidation act, and hence is not repealed by Pol. Code, § 4372, providing for condemnation of private property for city use, as section 19 of that Code provides that "nothing in either of the four Codes affects any of the provisions of the following statutes: * * * (2) All acts consolidating cities and counties, and acts amendatory, or supplementing such acts."

3. Act March 6, 1883, (St. 32,) being an act merely to provide for the "improvement of streets, lanes, alleys, courts, places, and sidewalks, and the construction of sewers within municipalities," and not providing for extending or widening any street, nor for the acquisition of land for such purpose, does not conflict with, or repeal by implication, Act April 25, 1863, which authorizes the board of supervisors of the city and county of San Francisco to widen streets, and provide for the payment of land acquired for such purpose.

4. Act April 25, 1863, authorizing the board of supervisors of the city and county of San Francisco to widen any street, provides that, before the board proceed to exercise any power thereby conferred, "30 days notice shall be given of any application which may be made for the passage of any order." *Held* that, where an application to widen a certain street was made to the board in June, 1887, and a second application for the same purpose was made on October 31st following, and the 30-days notice was given on the second application alone, the action on the second application was a commencement of the proceedings, within the meaning of Act March 6, 1889, § 24, providing that any work or improvement commenced within 18 months before its passage may be continued under this act.

5. Act March 6, 1889, § 24, provides that "the proceedings in any work or improvement, such as is provided for in this act, already commenced and now progressing under any other act * * * may from any stage of such proceedings * * * be continued under this act, by resolution" declaring "an election or intention to have said work or improvement cease under such other act * * * and continue under this." *Held*, that it was not necessary to, immediately on the passage of the act, declare the intention of proceeding thereunder, but discretion might be used in determining the stage at which the change should be made.

6. Act March 6, 1889, is entitled "An act to provide for laying out, opening, extending, widening * * * any street * * * in municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose." *Held*, that the subject of section 24, providing that "the proceedings in any work or improvement, such as is provided for in this act, already commenced and now progressing under any other act * * * may from any stage of such proceedings * * * be continued under this act," is sufficiently expressed in the title to render the same valid.

7. Act April 25, 1863, authorized the board of supervisors of the city and county of San Francisco to widen streets, and to provide compensation to owners of land taken or damaged, but did not authorize condemnation of land for that purpose. *Held*, that after the board had, by proper proceedings, determined to widen a street, it could acquire the land therefor by condemnation pursuant to Code Civil

Proc. § 1238, providing that the "right of eminent domain may be exercised in behalf of the following public uses: * * * (3) roads, streets, and alleys, * * * but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized."

8. In an action by a city to condemn land for a street, and to determine the damages to the landowners, evidence that the assessment of other property for the expense of the improvement was irregular is inadmissible.

9. Act March 6, 1889, § 18, providing that "the complaint [in an action to condemn] may aver that it is necessary for the city to take or damage and condemn the said land, * * * without setting forth the proceedings herein provided for," is constitutional.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Condemnation proceedings by the city and county of San Francisco against Annie Kiernan and others. Plaintiff had judgment, from which, and an order denying a new trial, defendants appeal. Affirmed.

Henry E. Highton, for appellants. John H. Durst, for respondent.

VANCLIEF, C. Action to condemn land for the purpose of widening Mission street, in the city and county of San Francisco, in which judgment was rendered in favor of plaintiff. Six of the nine defendants have appealed from the judgment, and from an order denying their motion for a new trial. The action was commenced April 1, 1890, and the complaint conforms to the act of March 6, 1889, entitled "An act to provide for laying out, opening, extending, widening * * * any street * * * within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose." St. 1889, p. 70. But the order of the board of supervisors for the widening of Mission street, on which the proceeding to condemn is alleged to depend, was made on April 7, 1883, pursuant to a previous resolution of the board, passed November 14, 1887, declaring the intention of the board to make such order according to the provisions of "An act to confer further powers upon the board of supervisors of the city and county of San Francisco," approved April 25, 1863, (St. 1863, p. 560.)

1. The principal point made by counsel for appellants is that the act of April 25, 1863, had been superseded and wholly repealed before the board declared its intention to widen Mission street; that there was no other law in force, during these proceedings, authorizing the board to widen a street, until the passage of the aforesaid act of March 6, 1889; and, therefore, that the order to widen Mission street was without authority, and void.

First, it is claimed that the act of April 25, 1863, was impliedly repealed by the act of April 4, 1864, (St. 1863-64, p. 347,) which

was itself repealed by the act of March 30, 1868, (St. 1867-68, p. 555.) It is to be observed that while the act of April 25, 1863, authorized the board to widen streets, and to provide compensation to owners of land taken or damaged, it did not authorize the condemnation of land for that purpose. The act of April 4, 1864, substantially covered all the ground occupied by the act of April 25, 1863, and, in addition thereto, authorized the condemnation of land, and provided the mode of making compensation therefor; but by section 21 it expressly declared: "This act shall not be construed to repeal an act to confer further powers upon the board of supervisors of the city and county of San Francisco, passed April 25, 1863, but the provisions of that act shall be held not to apply to the proceedings provided for in this act." I think the effect of this section was to leave the act of April 25, 1863, in force, and available for the purpose of providing compensation, and acquiring the necessary land by agreement with the owners. Lewis, Em. Dom. § 248, and authorities there cited.

Second, it is claimed that the act of April 25, 1863, was repealed by section 4,372¹ of the Political Code. Section 19 of that Code, however, declares: "Nothing in either of the four Codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws. 2. All acts consolidating cities and counties, and acts amendatory or supplementing such acts." The act of April 25, 1863, being "An act to confer further powers upon the board of supervisors of the city and county of San Francisco," must be regarded as an act amendatory of the consolidation act, and consequently not repealed by any provision of the Political Code. In *Ex parte Simpson*, 47 Cal. 127, it was held that title 3, pt. 4, of the Political Code, in which the foregoing section is found, was intended as a system or plan under which cities might be organized and governed, and that it is not applicable to any existing city and county. See, also, *County of Merced v. Regents of University*, 66 Cal. 25, 4 Pac. Rep. 780.

Third, it is contended that the act of 1863 is repealed by section 14, art. 1, of the constitution. This point, however, is grounded on the unwarrantable assumptions that the act of 1863 provides for condemnation of land, and that this action is to condemn by authority of that act, whereas nothing in this action depends upon the act of 1863, except the authority of the board of supervisors to order the widening of Mission street. In this action the defendants were not deprived of any right or privilege guar-

anteed by section 14, art. 1, of the constitution.

Fourth, it is claimed that the act of 1863 is repugnant to the original section 19 of article 11 of the constitution of 1879, which prohibited public work or improvement upon the streets of a city, the expense of which was to be specially assessed upon private property, unless an estimate of such expense be made and levied, collected, and paid into the city treasury, "before such work or improvement shall be commenced or any contract for letting or doing the same authorized or performed." It is not perceived that the act of 1863 authorized any act prohibited by this section of the constitution. Nor does it appear that any such prohibited act was done, in the matter of widening Mission street. The order to widen, the estimates, the assessment and the collection, authorized by the act of 1863, and actually made or attempted, in the case of Mission street, seem to have been in strict accord with section 19 of article 11 of the constitution, as originally adopted. As that section was amended in 1884, the original section has no application to this case, unless the original adoption of it repealed the act of April 25, 1863, by implication.

Fifth, counsel for appellants contends that the act of 1863 was repealed by the act of March 6, 1883, (St. 1883, p. 32,) because inconsistent with the first section of the latter act, which is as follows: "No public work or improvement of any description whatsoever shall be done or made within any municipality organized and existing for municipal purposes, or hereafter organized in, upon or about the streets thereof, the cost or expense of which is made chargeable or may be assessed upon private property by special assessment, except as in this act provided." The act of 1883 is entitled "An act to provide for the improvement of streets, lanes, alleys, courts, places and sidewalks, and the construction of sewers within municipalities." The second section authorizes the city council "to order the whole or any portion of the streets, sidewalks, lanes, alleys, courts, or places of any such city graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, and to order sidewalks, sewers, manholes, culverts, curbing and crosswalks to be constructed therein, and to order any other work to be done which shall be necessary to make and complete the whole or any portion of said streets, sidewalks, lanes, alleys, courts or places," but does not authorize the city council to open, extend, widen, or close any street, nor does it authorize the acquisition of land for these purposes by any method, and consequently does not authorize assessments to pay for such lands, or for any other purpose than to pay for the work and improvements author-

¹The section provides for condemnation of private property for city use.

ized by the second section. It therefore follows that the act of 1883 is not inconsistent with the act of 1863, in so far as the latter act authorized the board of supervisors to widen streets, and to provide the means of payment for such lands as it might be necessary to acquire for that purpose. The act of 1883, neither expressly nor by implication, prohibits the widening of streets, nor any act necessarily implied or involved therein; and the acquisition and payment for the requisite land are necessarily involved in the widening of a street. No work or improvement, in the sense of the act of 1883, could be done or made on the addition to the street made by the widening, until after the widening. All the work and improvements authorized by the act of 1883 are to be done upon existing streets. Work and improvements upon existing streets constitute the whole subject-matter of the act, and therefore the prohibition in the first section cannot extend to the subject of creating, or partially creating, streets. *Lewis, Em. Dom. § 256; Knowles v. Muscatine, 20 Iowa, 248.* In this connection it should be observed that heretofore it seems to have been the policy of the legislature to provide for improvements upon existing streets by acts entirely distinct from acts providing for opening, extending, and widening streets. Examples of the former are the acts of 1856, (page 156,) of April, 1872, (page 804,) of March 6, 1883, (page 35,) and of March 18, 1885, (page 147,) amended in 1889 and 1891. Examples of the latter are the acts of April 25, 1863, (page 560,) of 1889, (page 70,) and numerous other more special acts.

Sixth, and finally, it is claimed that the act of 1863 was repealed by the act of March 6, 1889, (page 70.) This is answered by section 24 of the act of 1889, as follows: "The proceedings in any work or improvement, such as is provided for in this act, already commenced and now progressing under any other act now in force, or by virtue of any ordinance passed by any city council or board of supervisors of any city, county, or city and county, by virtue of any other act now in force, may, from any stage of such proceedings already commenced and now progressing, be continued under this act by resolution of the city council. The said work or improvement may then be conducted under the provisions of this act with full force and effect in all respects, from the stage of such proceedings under such other acts or ordinances at and from which such resolution shall declare an election or intention to have said work or improvement cease under such other act or ordinance and continue under this act; and from such election so made, all proceedings theretofore had under such other act or ordinance are hereby ratified, confirmed, and made valid, and it shall be unnecessary to renew or conduct over again proceedings had under such other act or ordinance. This section shall not apply to

any work or improvement proceedings in which were commenced more than eighteen months prior to the passage of this act." On May 10, 1889, the board of supervisors, in accordance with section 24 of the act of 1889, passed a resolution electing to continue the proceeding to widen Mission street, under the act of 1889, from and after the filing of the report of the commissioners who had theretofore been appointed and acting under the act of April 25, 1863. The report of the commissioners was filed June 15, 1889, from and after which date the proceedings were conducted under the act of 1889. It is claimed by appellants that section 24 of the act of 1889 has no proper application to this case, because, it is said, the proceeding to widen Mission street was commenced more than 18 months before the passage of the act of 1889. This point raises the single question as to when the proceeding under the act of 1863 was commenced. The act of 1863 provides that, before the board proceed to execute any power thereby vested in them, "thirty days notice shall be given of any application which may be made for the passage of any order." It appears that only two applications were made for the widening of Mission street,—the first, on June 20, 1887, by 20 property owners; and the second, by 9 additional property owners, made October 31, 1887, and within 18 months before the passage of the act of 1889. It would appear by the second application that, for some reason not disclosed by the record, the board had not acted on the first, and the record shows no action by the board until after the filing of the second, to wit, November 14, 1887, when the board ordered the publication of the 30-days notice required by the act of 1863. This order of publication of notice was the first action of the board in regard to the widening of Mission street, and I think it was the commencement of the proceeding, in the sense of section 24 of the act of 1889. The act of 1863 does not require the board to act upon the first, or upon any particular, application, but does require 30 days' notice of the application on which the board proposes to act, before it proceeds to execute any power conferred by that act.

Again, counsel for appellants contend that, in order to continue the proceeding under the act of 1889, the board must have elected and resolved to do so immediately after the passage of this act, and was not at liberty to continue the proceeding from that stage thereof at which the commissioners, under the act of 1863, filed their report on June 15, 1889. I think a careful reading of section 24 will be convincing that the proceeding was properly connected with, and continued under, the act of 1889. The language of the section is, "from the stage of such proceedings * * * at and from which such resolution [of the board] shall declare an election or intention to have said work or improve-

ment cease under such other act or ordinance, and continue under this act." This clearly implies the discretion of the board to elect a stage of the proceeding after the passage of the act of 1889. The resolution of the board declared that the proceeding under the act of 1863 should cease at the stage thereof at which the report of the commissioners should be filed, and thence be continued under the act of 1889.

It is further claimed that the part of section 24 of the act of 1889 which purports to validate former proceedings is unconstitutional, because this subject or purpose is not expressed in the title of the act. I do not think it necessary, for the purpose of sustaining the judgment in this case, that any former proceeding therein should have been ratified or validated by the act of 1889, for the reason that, so far as relates to the action to condemn the lands of the appellants, all the essential proceedings affecting appellants appear to have been valid and regular, as will more fully appear hereafter. Nevertheless, I think the subject of validating irregular proceedings to acquire land for the purpose of widening streets in municipalities is sufficiently expressed in the title of the act. The act is entitled "An act to provide for laying out, opening, extending, widening * * * any street * * * in municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose." Surely, the ratification of proceedings to widen streets, and to condemn land for that purpose, is embraced in the subjects expressed in the title of the act, and directly operates as means to promote the objects of the act expressed in the title. *Davies v. City of Los Angeles*, 86 Cal. 43, 24 Pac. Rep. 771.

2. If the foregoing views are correct, it is unnecessary to inquire whether the board of supervisors was authorized by any other act of the legislature than that of April 25, 1863, to widen streets, and to provide means for the payment of all expenses of the improvement. After the respondent had, by proper proceedings thereunder, determined to widen Mission street, it was competent for it, under the principles laid down in *City of Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. Rep. 197, to acquire by condemnation the lands of the appellants in the manner prescribed in the Code of Civil Procedure. Section 1238 of that Code provides that the right of eminent domain may be exercised in behalf of the following public uses: "* * * 3. Roads, streets and alleys * * * but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized."

3. Numerous objections were made by counsel for appellants on the ground of defects and irregularities in the proceedings taken to assess property for the costs and expenses of the improvement, which were

overruled by the court below, and the rulings upon such objections are here assigned as errors. The most that could have been properly claimed was that evidence of those proceedings to assess property was totally irrelevant to any issue in this action to condemn appellants' lands which were not assessed. There is neither allegation nor evidence that any property of the appellants was assessed, and whether the property of others was lawfully assessed or not had no possible bearing or effect upon any material issue in this action. The verdict of the jury, according to a form stipulated by the parties, found (1) generally, for the plaintiff; (2) specially, the value of the property of each defendant sought to be condemned; and (3) the damage which will accrue to the portion not sought to be condemned by reason of its severance from the portion condemned, and by the construction of the improvement. There is no exception to the verdict on the ground that it is not justified by the evidence. The court first rendered an interlocutory judgment, requiring the plaintiff, within 30 days, to pay to each defendant, or to the clerk of the court for his use, the sums of money awarded to him by the jury for the value of his land condemned, and for damages to his land not condemned. After plaintiff's compliance with the interlocutory order, by paying into court the money awarded to each defendant, the court rendered final judgment of condemnation. Whether the money thus tendered and paid into court for their use had been obtained by plaintiff through regular or irregular assessments on the property of others, did not concern the appellants, nor affect the right of the plaintiff to condemn their lands which had not been assessed. The proceedings to assess, and to enforce the payment of assessments, are entirely distinct from actions to condemn land. There is no pretense that the money tendered was not the property of the plaintiff, nor that it did not amount to just compensation. Therefore the rights of the appellants in this action could not have been prejudiced by defects in proceedings to assess the property of others.

4. Section 18 of the act of 1889 provides that "the complaint [in an action to condemn] may aver that it is necessary for the city to take or damage and condemn the said lands, or an easement therein, as the case may be, without setting forth the proceedings herein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of such necessity." It is contended that this provision is unconstitutional, both as to the form of the complaint, and as to the conclusiveness of the evidence. As to the form of the complaint, in an action merely to condemn, I think the provision unobjectionable. Whether such a complaint, in an action to enforce an assessment, would be subject to the objection here made, is a question not involved

in this action. Nor does the record on this appeal raise any question as to whether the resolution or ordinance of the board is conclusive evidence of the necessity for taking or damaging appellants' lands, since it does not appear that any evidence upon this issue was offered by appellants, or rejected by the court; and, since it is not claimed nor specified that the evidence was insufficient to justify the verdict in any particular, it cannot be presumed that the bill of exceptions contains the evidence applicable to this issue.

5. It is contended that the court erred in excluding proffered evidence of damage to the business of three of the appellants,—Reilly, Matthai, and Collins,—which had already accrued, and which would still further accrue, “by reason of said proposed widening;” it appearing that Reilly kept a saloon, Matthai, a blacksmith shop, and Collins, a bakery, “on the line of the proposed improvement.” The offer to prove such damage was as general as above stated. It did not specify the nature of the alleged damages. Nor does it appear that such business was done on the land taken, or on the land damaged, for which compensation was awarded by the jury. The general rule is that, in actions to condemn land for public use, no damages can be allowed for injury to business caused merely by the improvement, and not by the taking of property. *Lewis, Em. Dom. § 487.* If there is any exception to this general rule, it must depend upon the specific nature of the injury, which should have been stated, in order to enable the court to determine whether it was within the exception. All that was stated was that the damage was such as had accrued, and would accrue, to particular kinds of business carried on somewhere on the line of the improvement, not by reason of the taking of appellants' lands, but “by reason of the said proposed widening.” To say the least, the record does not show that the proffered testimony was competent, and therefore does not show that the court erred in excluding it. I think the order and judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HEFFERNAN et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,144.)

(Supreme Court of California. June 13, 1893.)

In bank. Original petition by Michael Heffernan and others for a writ of prohibition to the superior court of the city and county of San Francisco and A. A. Sanderson, judge of such court. Writ denied.

Henry E. Highton, for petitioners. John H. Durst, for respondents.

PER CURIAM. The alternative writ of prohibition heretofore issued in this case is discharged, and the application to make the same perpetual is denied, upon the authority of *City and County of San Francisco v. Kiernan*, 33 Pac. Rep. 720, (No. 15,014, this day decided.)

98 Cal. 633

GRAY v. GALPIN et al. (No. 15,028.)

(Supreme Court of California. July 10, 1893.)

FRAUDULENT CONVEYANCES—EVIDENCE.

1. The mere fact that the person to whom an assignee of a mortgage assigned it was the father of the mortgagee is no evidence that he was not a bona fide purchaser, but was participating in a fraud, by which the property should be gotten out of the reach of the mortgagee's creditors.

2. The father paid his assignor for the mortgage a certain amount in cash, giving his notes for the balance. To raise the money, he gave a mortgage on his homestead. When this became due, he was unable to pay it, for the reason that the notes and mortgage assigned him had not been paid. Held, that the fact that the father's assignor paid the mortgage on the homestead, and took an assignment thereof to himself, was not evidence that the assignment of the other mortgage to the father had been fraudulent.

Department 1. Appeal from superior court, city and county of San Francisco. John F. Finn, Judge.

Action by Sheldon Gray against Philip G. Galpin, executor of Helen F. Gleason, deceased, and others, to foreclose a chattel mortgage. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Reversed.

P. Reddy and W. H. Metson, for appellant. W. E. Zeigler, J. B. Casserly, and H. Eickhoff, (Philip G. Galpin, of counsel,) for respondents.

PATERSON, J. This is an action to foreclose a chattel mortgage on the furniture of a lodging house in the city of San Francisco. On the 19th of May, 1886, Mrs. Laura Brotherton was the owner of the property, and on that day sold it to Helen F. Gleason for the sum of \$5,500, \$2,500 of which was paid in cash, and the balance in three promissory notes for \$1,000 each, and payable, respectively, in two, four, and six months after date. On May 19, 1886, the mortgage and notes were transferred to C. K. Goodwin, and on July 3, 1886, he transferred the same to the plaintiff, Gray, for the consideration of \$2,800, \$1,300 of which was paid in cash, and the balance in three notes for \$500 each, payable one year after date. The defendant Helm is an attaching and judgment creditor of Mrs. Brotherton, his attachment having been levied on June 4th, and judgment entered December 6, 1886. Mrs. Brotherton filed her petition of insolvency on January 3, 1887, and on February 7th the defendant Seligman was elected an assignee of her estate. The court found—the facts being within the issues raised by the answers—that Mrs. Brotherton “did not indorse or deliver the notes hereinabove set forth, or either or any of them, to C. K.

Goodwin, for a good, valuable, or other or any valid, consideration, and that the C. K. Goodwin aforesaid did not indorse or deliver the same to the plaintiff herein for a good, valuable, or any valid, consideration; * * * and the indorsement of said notes by her to said Goodwin, and by said Goodwin to said plaintiff, was sham and fraudulent, not made bona fide, but made for the purpose of defeating defendant Gleason's cause of action, by reason of her counterclaim set forth in said answer. * * * Said transfer was made by said C. K. Goodwin, and received by said plaintiff, for the purpose and with the intent, by each of them, of thereby hindering, delaying, and defrauding defendant J. H. Helm, and the sundry other creditors of said Laura Brotherton aforesaid, and the transfer last aforesaid was made by the parties thereto collusively, for the purpose of placing the said notes and mortgage beyond the reach of the aforesaid creditors of said Laura Brotherton."

So far as these facts connect the plaintiff with any bad faith or fraudulent purpose in the transaction, they are utterly unsupported by the evidence. There is no circumstance shown in the evidence upon which a suspicion of fraud can be founded, unless it be the fact that the plaintiff is the father of Mrs. Brotherton, and that the latter and Goodwin were visiting the former when the assignment was made to the plaintiff, but the mere fact of relationship cannot be resorted to as a badge of fraud. Fraud must be specifically charged. It cannot be presumed, and the burden of proof is upon him who alleges it. The conduct of the plaintiff was in all respects entirely consistent with fairness and honesty. The evidence shows, without contradiction, that the plaintiff purchased the notes and mortgage before maturity for a valuable consideration, and that the same were immediately delivered to him. He paid to Goodwin \$1,300 in coin, and gave him three notes of \$500 each, payable in one year, and no part of this consideration has ever been returned to him. In order to raise the \$1,300 cash which he paid to Goodwin, he mortgaged his homestead to Mr. Crew, cashier of the Bank of Chico. When this mortgage became due, the plaintiff was unable to pay it, for the reason that Mrs. Gleason had not paid the notes and mortgage which had been assigned to him. Thereupon, Goodwin—to protect himself, doubtless—paid Mr. Crew the amount of the debt, and took an assignment of the note and mortgage. We see no evidence of fraud in this. It was a simple business transaction, by which Goodwin protected himself, in preventing a foreclosure sale of his debtor's property. The order appealed from is reversed, and the cause is remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

98 Cal. 654

In re LEVINSON'S ESTATE. (No. 15,200.)
(Supreme Court of California. July 13, 1893.)
EXECUTORS AND ADMINISTRATORS—DISTRIBUTION
—PETITION—BONDS.

1. Testator gave his interest in a firm to one of the partners in trust, to retain half the profits for his services, and to pay \$200 per month to his mother; the trust to continue for the life of his mother, or, if she died before he did, for five years; \$3,000 to be paid S. on the death of the mother, and the balance to be then paid his sisters. The partners having refused to allow testator's capital to remain in the firm, and the trust having been renounced, testator's mother and sisters petitioned for a partial distribution, stipulating that \$3,000 should be paid S., and the balance distributed equally among them. *Held* that, having thereby obtained an order of distribution, neither they nor the executor could object to the payment of the \$3,000 to S. on the ground that she was not entitled to the income thereof during the life of the mother, or for five years after testator's death.

2. Such distribution to S. will not be denied on the possibility that testator's sisters may have issue who may become entitled to the income.

3. The petition for distribution stated that a year had elapsed from the issue of letters testamentary; that notice had been given creditors; that the time for presenting claims had expired; that all claims had been paid; that testator had bequeathed to petitioner \$3,000; that the other legatees had agreed to a distribution by which this amount should be paid petitioner, and that the legacy could be paid without loss to the creditors or any person interested in the estate. *Held*, that this was sufficient, as the court could properly take judicial notice of other matters.

4. Whether a bond shall be required of any of the parties to a partial distribution is a question for the court making the distribution.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Sallie Levinstone petitioned for partial distribution of the estate of John Levinson, deceased. From an order granting the petition, James W. Goodwin, administrator with the will annexed, appeals. Affirmed.

Horace W. Philbrook, for appellant. A. H. Loughborough, for respondent.

PATERSON, J. This is an appeal by the administrator with the will annexed from an order of partial distribution requiring the appellant to pay to Sallie Levinstone the sum of \$3,000. By the terms of the will of the decedent his interest in the copartnership of Newman & Levinson was given to Benjamin Newman, one of his copartners, in trust, to retain one-half of the annual profits for his services during the life of the testator's mother, and out of the other half of the profits to pay her \$200 per month, and the surplus of the profits, if there should be any, to be left in the business of the firm as a portion of his share of the capital. The testator directed that upon the death of his mother there should be paid to Sallie Levinstone \$3,000 out of the copartnership interest, and that the remainder should be paid over to his sisters, Julia and Ada. Newman

renounced the trust on July 10, 1890. The inventory filed July 16, 1890, shows that the estate consisted of wearing apparel of the decedent, gold watch and chain, diamond ring, and the interest of the testator in the partnership of Newman & Levinson. It was shown that the surviving partners refused to allow the capital of the testator to remain in the firm. On September 18, 1891, Fannie, (the mother,) Julia, and Ada Levinson applied for an order of partial distribution to them upon the stipulation made between themselves. This stipulation recited the fact that the provision of the will was based upon an expectation that the interest of the testator in the firm would continue, and that the profits coming to the estate from his interest in the firm would be sufficient to pay the annuity given to his mother, but that such expectation had not been realized. The petitioners had therefore agreed that the estate might be distributed as follows: First, to Sallie Levinstone, \$3,000, and the diamond ring; second, the residue of the estate to Fannie, Julia, and Ada Levinson in equal shares. The court found that the facts stated in the petition were true. It further found that, after reserving sufficient money to pay Sallie Levinstone and the executor's commissions, and a sum sufficient to cover all future expenses, there remained in the hands of the executor \$9,000, which could be distributed without injury to the petitioners. An order was made distributing \$9,000 to the petitioners without bonds. The final account of the executor was filed December 22, 1891, showing that he had received \$20,965.78, and, after paying \$9,000, distributed to the mother and sisters of the testator, he had in his hands the sum of \$5,523.80. Sallie Levinstone did not join in the petition of Fannie, Julia, and Ada Levinson, but after the settlement of the executor's account she made an application for distribution to her in accordance with the agreement made by the other legatees.

It is claimed that by the terms of the will the \$3,000 should not be given to Sallie Levinstone until after the death of Fannie Levinson; that until that time the income thereof is to go to other persons, some of whom may be born hereafter. We think this contention is unsound. Neither the mother nor the sisters certainly could raise such an objection after having procured an order of distribution upon the faith of their consent to an immediate distribution of the legacy of this respondent, and certainly the executor stands in no better position than they would under the same circumstances. The supposition that the sister may marry, and die, leaving issue entitled to the income, is a contingency too remote to be considered. Furthermore, the contention assumes that under no circumstances can there be any payment of the \$3,000 legacy until after the expiration of five years. It is true the testator contemplated the continuance of the

trust for the term of five years, expecting that the trustee would carry out his wishes. This expectation has not been fulfilled; the trust cannot be executed. A fair construction of the various provisions of the will we think supports the view taken by the court below. The testator's chief concern was for the care and support of his mother during her lifetime. If she did not survive him, it was provided that the one-half of the profits set aside for her should go to his sisters "during the continuance of this trust." It is expressly provided that "upon the termination of said trust said Benjamin Newman shall transfer * * * the sum of three thousand dollars to Miss Sallie Levinstone, * * * the rest and residue of said partnership interest and share to be transferred * * * and paid over to * * * Julia and Ada Levinson." There being no trust to carry out, time does not enter into the question to be considered, except for the protection of the mother. So long as she is willing to accept a sum certain, instead of a monthly allowance of \$200, and the other legatees are willing that she should be paid that amount, there is no ground of complaint.

The objections to the sufficiency of the petition for distribution are not well taken. It shows that a year had elapsed from the date of the letters; that due notice to creditors had been published; that the time for presenting claims had expired; that all claims had been paid; that the testator had bequeathed to the petitioner the sum of \$3,000; that Fannie, Julia, and Ada had agreed to a distribution as above stated, and that the legacy could be paid over to petitioner without loss to the creditors or any person interested in the estate. Other matters the court properly took judicial notice of.

The question whether a bond should be given by any of the parties to a partial distribution is one entirely within the discretion of the court below. The order appealed from is affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.

EXCELSIOR PAV. CO. v. PIERCE. (No. 19,163.)

(Supreme Court of California. July 25, 1893.)

STREET-PAVING CONTRACT—PROVISION FOR REPAIRS BY CONTRACTOR.

1. A requirement in a street-paving contract that a contractor shall keep the street in repair for five years imposes an additional burden on the property owners, and therefore vitiates the assessment made under it, unless such requirement is authorized by the statute providing for the letting of contracts for street improvements.

2. The objection as to the additional burden is not removed by testimony of the contractor that the requirement did not enhance the amount of his bid, as others might have bid a less sum if the contract had not contained such requirement.

Brown v. Jenks, 32 Pac. Rep. 701; followed.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the Excelsior Paving Company against Emily M. Pierce on an assessment for street paving. Plaintiff had judgment, from which, and an order denying a new trial, defendant appeals. Reversed.

Luce & McDonald, Oscar A. Trippet, and Trippet, Boone & Neale, for appellant. C. T. H. Palmer and Shaw & Holland, for respondent.

PER CURIAM. Upon the authority of *Brown v. Jenks*, (opinion filed March 27, 1893,) 32 Pac. Rep. 701, the judgment and order denying a new trial herein are reversed.

(98 Cal. xvii)

BROWN v. PARKER et al. (No. 19,172.) (Supreme Court of California. July 25, 1893.)

Department 1. Appeal from superior court, San Diego county.

Action by one Brown against one Parker and others. Plaintiff had judgment, and defendants appeal. Reversed.

Oscar A. Trippet and Trippet, Boone & Neale, for appellants. C. T. H. Palmer and Shaw & Holland, for respondent.

PER CURIAM. Upon the authority of *Brown v. Jenks*, (opinion filed March 27, 1893,) 32 Pac. Rep. 701, the judgment herein is reversed.

(98 Cal. xvii)

BROWN v. WINSHIP et al. (No. 19,171.) (Supreme Court of California. July 25, 1893.)

Department 1. Appeal from superior court, San Diego county.

Action by one Brown against one Winship and others. Plaintiff had judgment, and defendants appeal. Reversed.

Oscar A. Trippet and Trippet, Boone & Neale, for appellants. C. T. H. Palmer and Shaw & Holland, for respondent.

PER CURIAM. Upon the authority of *Brown v. Jenks*, (opinion filed March 27, 1893,) 32 Pac. Rep. 701, the judgment herein is reversed.

(98 Cal. 665)

PEOPLE ex rel. FIELD v. EEL RIVER & E. R. CO. (No. 14,977.)

(Supreme Court of California. July 13, 1893.) HIGHWAY—DEDICATION OF LAND BY RAILROAD COMPANY—WHEN ULTRA VIRES—EVIDENCE.

1. Where the owner of land opens a road thereon, and the public use it uninterruptedly for some five years, the placing of a gate across it at one end, which is left open during the day and closed only at night, and which was placed there to prevent injury to those using the road, or to prevent the public from driving on the owner's wharf, is not inconsistent with an intention to dedicate the road to public use.

2. Where such owner is a corporation it is not necessary that its intention to dedicate the road to public use should be shown by the records of its proceedings, but such intention may be shown by its acts and the testimony of its directors.

3. The dedication by a railroad company of

a portion of its land as a public highway is not ultra vires.

4. The fact that in the resolution of such company authorizing the purchase of such land no authority was given its representatives to agree that it should be used as a highway, does not render inadmissible evidence that its representatives made such agreement, where there is evidence that such agreement was afterwards ratified.

5. Nor is such evidence inadmissible on the ground that it is contradictory of the instrument of conveyance, where it is not offered for such purpose, but to show the intention of the company to dedicate the road to the public.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by the people of the state of California by George A. Johnson, attorney general, on the relation of Waterman Field, against the Eel River & Eureka Railroad Company to obtain a judgment declaring a certain strip of land to be a public highway, and to compel the removal of certain obstructions therefrom. From a judgment for plaintiff, defendant appeals. Affirmed.

Horace L. Smith, for appellant. W. H. H. Hart, Atty. Gen., and J. F. Coonan, Chamberlin & Wheeler, and D. Sevier, for respondent.

HARRISON, J. Plaintiff seeks by this action a judgment that a certain strip of land 60 feet in width by 1,500 feet in length, extending from the defendant's station at Field's Landing, in Humboldt county, to the county road, is a public highway, and to compel the removal of certain obstructions thereon. Judgment was rendered in its favor, and the defendant has appealed.

In November, 1882, the land in question was owned by one Waterman Field, and was by him conveyed to the defendant. Field was also the owner of a tract of land which the defendant purchased from him for its use as a station, and this strip of land, extending from the main tract of land to the county road, was included in the same conveyance. In the early part of 1883 the defendant constructed a road over this strip of land, opening into the county road at one extremity, and connecting at the other extremity with the other tract of land, and this road was thereafter used by the public as a highway without interruption until 1887, when the defendant erected a gate near the western end of the road, to prevent driving onto its wharf in the night. This gate was left open during the daytime, but was closed at night. In 1890 the defendant built a warehouse directly across the road near its station, and placed a permanent gate at the extremity, near the county road, which it kept securely locked, and thereupon this action was brought. The court found that in July, 1883, the defendant dedicated this strip of land for the use of the public as a public highway, and that the public accepted such dedication by user, and had used the same as a highway continuously from that time until its obstruction by the defendant in 1890. There is ample evidence in the record in

support of these findings, and, although there is also much contrary evidence, yet, as it was the function of the trial court to determine what consideration it should receive both in weight and character, we must accept its conclusion as determinative of the issue. That the road had been used by the public without interruption from the time of its construction in 1883 until the gate was erected in 1887 was not seriously controverted by the defendant, and there was testimony before the court to the effect that this gate was not placed there to prevent the public from using the road as a highway, but as a protection against danger in its use. While the placing of a gate across a road may be evidence of an intention not to dedicate the road to public use, yet it is not conclusive, and the act itself is consistent with an intention to dedicate the road as a public highway. The fact that the gate was left open during the day, and only closed at night for the purpose of preventing injury to those who use it, or of preventing the public from driving upon the defendant's wharf, is not inconsistent with its dedication to the public. So, too, the inference that the placing of the gates across the road evidenced a permissive user is impaired by the fact that such use had been uninterrupted for several years prior thereto. If the road was dedicated when it was first opened in 1883, such dedication could not be revoked in 1887 by placing gates across it. It was also shown by the testimony of persons who were the directors of the defendant, and acting in its behalf at the time the road was constructed, that it was the intention of the company to make it a public road, and that the land was purchased from Field for that purpose. This testimony was competent in support of the proposition that it was the intention of the defendant to dedicate the land as a highway when it constructed the same. It was not necessary that a formal resolution of its intention should be entered upon its records. A corporation as well as an individual may dedicate a portion of its land as a highway by its acts, and it is no more necessary that it should have a formal resolution of dedication upon its records than that an individual should execute a written declaration of his purpose to make a dedication. The objection that it is *ultra vires* for a railroad corporation to dedicate a portion of its land as a highway for the public is not tenable. *Green v. Town of Canaan*, 29 Conn. 166. See *Los Angeles Cemetery Ass'n v. City of Los Angeles*, (Cal.) 30 Pac. Rep. 523.

The defendant objected to the introduction of certain evidence on the part of the plaintiff, to the effect that when its representatives were negotiating with Field for the purchase it was agreed between them that it should be used for a public highway. The reasons presented in support of this objection are that in the resolution of the defendant authorizing the purchase, no author-

ity was given to make such an agreement; and also that all the negotiations respecting the purchase were merged in the instrument of conveyance. The fact that the resolution under which the defendant's agents acted only authorized them to purchase the land does not of itself impair any agreement that might have been made with Field if the defendant subsequently approved such agreement and ratified their action. It was competent for the defendant to ratify the act of any one of its directors without having given him previous authority by a resolution in writing, and it was equally competent for it to ratify any act that the director might have done in excess of the authority conferred by resolution. The evidence referred to was not offered for the purpose of varying or contradicting the terms of the instrument by which the land was conveyed to the defendant. It was, however, admissible for the purpose of showing the intention of the defendant to dedicate the road which it should construct upon the land conveyed. Upon the issue whether the road that it constructed was intended to be a private or a public road, evidence that at the time it purchased the land declarations were made on its behalf that it intended to construct a public highway would be relevant and pertinent. If such an agreement had been made there would be an inference that its subsequent act in constructing the road was in pursuance thereof, and would corroborate the testimony of those who declared that at the time of its construction it was intended for a public highway.

There are other assignments of error in the admission of certain evidence, but none of them need any special attention.

The judgment and order are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

98 Cal. 422

McKISSICK v. ASHBY. (No. 18,069.)

(Supreme Court of California. June 3, 1893.)

LANDLORD AND TENANT—UNLAWFUL DETAINER—EJECTMENT—PLEADING—EVIDENCE.

1. Code Civil Proc. § 1161, provides that a tenant of real estate for a term less than life is guilty of unlawful detainer where he remains in possession after the expiration of his term without permission, but in the case of tenancy at will it must first be terminated by notice. *Held* that, where a tenant from year to year is notified before the termination of his lease that it will not be renewed, an action for possession can be maintained without previous notice or demand.

2. A complaint in ejectment alleging the leasing of the premises to defendant; that the lease had expired; and that defendant refused to vacate the premises, and "has withheld, and still withholds, the possession thereof from the plaintiff,"—sufficiently avers that defendant is in possession.

3. Though a tenant remained in possession without renewing his lease, he cannot deny his landlord's title without first surrendering to him the possession.

4. In ejectment to recover possession of premises from a tenant, it was proper to show that defendant had continued in the occupancy of the land, and was withholding possession.

5. As such action can be maintained without plaintiff's showing privity with the government, the admission of improper evidence to show such privity is harmless error.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by Jacob McKissick against Thompson Ashby. Judgment for plaintiff. Defendant appeals. Affirmed.

Spencer & Raker, for appellant. Goodwin & Goodwin, for respondent.

BELCHER, C. This action is in the nature of ejectment, and was commenced April 22, 1889. It is alleged in the complaint that the plaintiff now owns, and for more than eight years he and his grantors have owned, certain described lands in Lassen county; that defendant leased the said lands of plaintiff from year to year, commencing on the 1st day of March, 1886, down to the 1st day of March, 1889, for the sum of \$180 rent, which defendant agreed and promised to pay plaintiff annually thereafter; that on the 27th day of February, 1889, plaintiff duly notified defendant that he would not renew the lease, and requested him to vacate and surrender the premises; that defendant refused, and still refuses, to vacate the premises, or to deliver the same to the plaintiff, and has withheld, and still withholds, the possession thereof from the plaintiff, and has ousted and ejected plaintiff therefrom, to his damage in the sum of \$50; that defendant has failed and refused to pay to plaintiff the said rent for the year next before the 1st day of March, 1889, amounting to \$180; and that the whole of that sum is due and owing to plaintiff from defendant. Wherefore judgment is asked that defendant be ejected from the said lands, and the plaintiff restored to the possession thereof, and also for damages in the sum of \$50, and for rents due in the sum of \$180, with costs. A general and special demurrer to the complaint was interposed by the defendant, but what ruling, if any, was made upon it does not appear from the record. An answer was also filed by defendant, denying all the averments of the complaint. The case was tried by the court, without a jury, and the findings upon all the issues were in favor of the plaintiff, except that the damages were fixed at one dollar. Judgment was then entered in accordance with the findings, from which, and from an order denying his motion for new trial, the defendant appeals.

1. Appellant contends that the complaint fails to state facts sufficient to constitute a cause of action, because—First, if it is regarded as a complaint for unlawful detainer, then, in order to maintain the action, it was necessary that a demand for the possession of the premises should have been made after

the expiration of the term, and no such demand is alleged to have been made; and, second, if it is regarded as an ordinary complaint in ejectment, then an averment that defendant was in possession of the demanded premises, or of some part thereof, at the time of the commencement of the action, was necessary, and that no such averment was made. Section 1161 of the Code of Civil Procedure, cited by appellant, provides as follows: "A tenant of real property for a term less than life is guilty of unlawful detainer (1) when he continues in possession, in person or by subtenant, of the property or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be: but in case of a tenancy at will, it must first be terminated by notice as prescribed in the Civil Code." Here the defendant was not a tenant at will, but for a fixed term, which expired March 1, 1889. The hiring of a thing terminates at the end of the term agreed upon. Section 1933, Civil Code. The notice served was only to the effect that plaintiff would not renew the lease, and that defendant must give up possession of the property. Such a notice was not necessary, but it served to inform defendant that, if he continued in possession of the property after the expiration of the term for which it was let to him, he would do so without the permission of his landlord, and would be guilty of unlawful detainer. Under the facts stated, we think the plaintiff had a right to re-enter when the term expired, and to maintain an action for possession without previous notice or demand. Section 793, Civil Code; *Canning v. Fibush*, 77 Cal. 196, 19 Pac. Rep. 376. And, if the complaint is regarded as an ordinary one in ejectment, we think the same conclusions must follow. It alleges, in substance, that plaintiff leased the demanded premises to the defendant; that the lease had expired; and that defendant refuses to vacate the premises, and "has withheld, and still withholds, the possession thereof from the plaintiff." This clearly implies that defendant is in possession; and it must be held a sufficient averment of that fact, certainly, in the absence of a demurrer that the complaint is ambiguous or uncertain in that regard. But no such objection was taken.

2. Appellant also contends that the findings were all contrary to the evidence, and not justified thereby. There was, however, evidence tending to support the findings, and, under the well-settled rule as to conflicting evidence, we think it must be held sufficient here. The defendant did not, in giving his testimony, deny, so far as we can discover, that he held the land in controversy during the years 1886 and 1887 under leases from the plaintiff, but he claimed that the lease was not renewed for the year 1888. Admitting this to be so, still he could not

deny the plaintiff's title without first surrendering to him the possession, and this he had evidently failed and refused to do.

3. When the plaintiff was upon the stand as a witness in his own behalf, his attorney asked him the following questions: "State whether or not, since he went on it, in 1886, up to the time you made the demand on him, he continues to occupy and use the land. State whether or not the defendant still occupies this disputed tract of land." The questions were objected to as irrelevant, incompetent, and immaterial, and the objections were overruled, and exceptions taken. It is urged that these rulings were erroneous, but we see no error in them. It was entirely proper for the plaintiff to show that defendant continued in the occupancy of the land, and was withholding its possession from him.

4. The plaintiff was permitted, over the objections of defendant, to read in evidence a copy of the record in the United States land office at Susanville, certified by the register of the office to be a true and correct copy, showing that on May 15, 1880, one John P. McKissick had entered the lands in question as desert lands; and also a deed executed by the said McKissick on December 9, 1881, conveying the said lands to the plaintiff. It is urged now that the copy offered was not competent evidence to show the entry; that the only competent evidence for that purpose would have been a certified copy of the certificate of purchase or receiver's receipt, the original of which was in the general land office at Washington; and that the deed was not admissible, for the reason that the plaintiff failed to connect himself with the government title, or show that the title had passed from the government. We see no prejudicial error in the rulings complained of under this head. The object undoubtedly was to show privity with the government, but, without such showing, the action might be maintained. We advise that the judgment and order be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

98 Cal. 623

WOOLVERTON v. BAKER et al. (No. 15,156.)

(Supreme Court of California. July 1, 1893.)

JUDGMENT — RES JUDICATA — NEW CAUSE OF ACTION — WHAT CONSTITUTES — ACTS SUBSEQUENT TO JUDGMENT.

1. A judgment in an action by plaintiff to compel a reconveyance to her of certain land, on the ground that she had conveyed it to defendant B. in trust to apply the proceeds to her support, and that he had failed to execute the trust, is a bar to a subsequent action by her against the same defendants, in which she alleges that defendant B. had failed to per-

form a contract to apply a sufficient portion of the rents for her support, solely in consideration of which she had conveyed it to him, and asks that defendants be directed to reconvey it.

2. The failure of B. to apply any of the rents to plaintiff's support subsequent to the judgment in the first action gave plaintiff no new cause of action.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Elvira B. Woolverton against Erastus J. Baker and others to compel a reconveyance to plaintiff of certain land. From a judgment for defendants, plaintiff appeals. Affirmed.

J. H. G. Weaver and E. W. Wilson, for appellant. Buck & Cutler and Chamberlin & Wheeler, for respondents.

HARRISON, J. The plaintiff alleged in her complaint that on December 3, 1878, she was the owner of certain land in Humboldt county, which on that day she conveyed to the defendant Erastus J. Baker, upon the consideration and condition that he would henceforth apply a sufficient portion of the rents thereof for her support and maintenance during the remainder of her natural life; that this was the only consideration for the said conveyance; and that the said defendant accepted the same upon the said consideration and condition; and that he has not since the 1st of July, 1890, applied any portion of the rents to her support, or performed any of the conditions expressed in said conveyance; and the plaintiff prayed the judgment of the court that the defendants be directed to reconvey the lands to her. The defendants answered, denying the allegations of the complaint, and set up as a special defense that in a former action between the same parties, involving the same cause of action, judgment had been rendered in their favor, and against the plaintiff. Upon the trial the court sustained this defense, and judgment was entered in their favor, from which the plaintiff has appealed. The question presented for determination on this appeal is whether the plaintiff is estopped by the former judgment. In the former action the plaintiff sought a judgment that she was the owner of the lands and premises, as against the defendants, and that they be directed to reconvey them to her. In her complaint she set up the same conveyance that is averred in the present action, and alleged that the same had been made by her upon the sole consideration that the defendant should hold the same in trust for her, and that the rents, issues, and profits thereof should be applied in providing for and maintaining her during her natural life, and alleged that the defendant had not in any manner, or at all, provided for or maintained her. Upon the trial of the issues therein the court rendered its judgment that the plaintiff was not the owner of the lands, but that the defend-

ants, as against the plaintiff, were the owners in fee simple thereof, free and clear of any and all trusts, exceptions, limitations, and conditions set forth and alleged in said complaint. By that action the plaintiff brought into judicature the title to the land as between herself and the defendants, so far as the same depended upon the conveyance made by her to Erastus J. Baker. She challenged their title by impeaching the transaction out of which the conveyance had been made, and the judgment which she sought was the cancellation of her deed, and the destruction thereby of the title claimed thereunder by the defendants. Whether she averred as the ground of the relief sought that the consideration for the conveyance was the agreement of the defendant that he would hold the land upon a trust for her, which he had violated, or that the conveyance was made by her and accepted by him upon the condition, subsequently broken by him, that he would thereafter support her, and would apply the whole or a portion of the rents to her support, was immaterial. The real issue which she brought before the court for its judgment was the sufficiency of the defendants' title to the land, under the deed which she had executed to Erastus J. Baker. Her cause of action was the breach of the agreement under which she alleged that this conveyance had been made, and involved the determination of the rights of the parties flowing from that transaction, and it was incumbent upon her to set out in her complaint all the facts which constituted this cause of action. She is estopped by the judgment therein rendered from thereafter asserting any cause of action depending upon the facts so omitted, as fully as she would be if at the trial she had omitted to introduce evidence in support of her averments or present argument to satisfy the court of the justice of her claim. A party cannot litigate his cause of action by piecemeal, and, after a judgment against him, seek in another action to obtain relief dependent upon the transaction therein adjudged, by bringing forward claims and demands properly belonging to the first action. The judgment against him is conclusive, not only of what was in fact determined, but also of all matters which might have been presented in support of his cause of action, and litigated therein. The rule is stated by Vice Chancellor Wigram in *Henderson v. Henderson*, 3 Hare, 115: "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was

not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." See, also, *Whart. Ev.* § 717; 2 *Black, Judgm.* § 729; *Rogers v. Higgins*, 57 Ill. 244; *Stockton v. Ford*, 18 How. 418; *Sullivan v. Mining Co.*, 39 Cal. 464; *Taylor v. Castle*, 42 Cal. 367; *Parnell v. Hahn*, 61 Cal. 131.

The plaintiff has no new cause of action by reason of the failure of the defendant, subsequent to that judgment, to apply any portion of the rents to her support. That issue—the breach of this condition—was presented in the former action, and, as the judgment makes no mention thereof, is presumed to have been included therein. *Code Civil Proc.* § 1963, subd. 18; *Stickney v. Goudy*, 132 Ill. 231, 23 N. E. Rep. 1034. "The dismissal of a bill in chancery will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings, or in the decree of the court." *Freem. Judgm.* § 270. The judgment was that the defendants, as against the plaintiff, were the owners in fee simple of the land described, free of all the conditions set forth in the complaint. If the defendants held the land freed from the conditions set forth in her complaint, that a portion of the rents should be applied to the support of the plaintiff, any subsequent failure to so apply the rents would not impair their tenure.

The judgment is affirmed.

We concur: PATERSON, J.; McFARLAND, J.

MERCED BANK v. ROSENTHAL et al.
(No. 14,874.)

(Supreme Court of California. July 20, 1893.)

NOTICE OF APPEAL -- ADVERSE PARTY -- APPEAL FROM JUDGMENT--JUDGES -- TERMS OF OFFICE--DE FACTO JUDGE--MORTGAGE OF HOMESTEAD.

1. Where a defendant is not served with summons, and makes no appearance, and no judgment is entered against him, and judgment is entered against the other defendants, who are served and appear, the defendant not served is not an "adverse party," within the meaning of *Code Civil Proc.* § 940, requiring in case of appeal an undertaking to be filed unless the same be waived "by the adverse party, in writing."

2. Where a proceeding is in form a judgment, which, although void, is entered of record, so that it might be made oppressive by the issue of final process thereon, it constitutes a grievance, which may be remedied on appeal to a tribunal for the correction of errors.

3. Const. art. 6, § 6, provides that "the term of office of judges of the superior courts shall be six years from and after the first Monday of January next succeeding their elections." Article 20, § 20, provides that the terms of officers provided for by the constitution "shall commence on the first Monday after the 1st day of January next following their election." *Held*, that article 20 applies to superior judges, and controls, it being intended to provide generally the exact date of commencement, so that all officers of the state should take office on the same day.

4. Where the judge elect was attorney in a proceeding pending, and his predecessor in office assumed jurisdiction by the entry of judgment on the first Monday of January, which was also the first Monday after the 1st day of January, both judges acting in good faith, and believing that the term of the judge elect did not commence till Tuesday, the judge acting was a *de facto* judge.

5. Const. art. 17, § 1, requires the legislature to protect by law the homestead from forced sale. Civil Code, § 1241, declares a mortgage foreclosure sale a "forced sale." Section 1242 provides that "the homestead of a married person cannot be conveyed or incumbered unless the instrument is executed and acknowledged by both husband and wife." *Held*, where a husband and wife conveyed their homestead by a deed, absolute on its face, and by a contemporaneous oral agreement made the conveyance a mortgage for an existing indebtedness and for future advances to the husband, that the premises retained their homestead character; and the incumbrance for future advances being a mere oral agreement, constituting power in another to incumber at will, and not executed and acknowledged by husband and wife, it was not enforceable. *Bull v. Coe*, 18 Pac. Rep. 808, 77 Cal. 54, distinguished.

31 Pac. Rep. 849, affirmed.

In bank. On rehearing. Affirmed.

For former report, see 31 Pac. Rep. 849.

PER CURIAM. Upon due consideration of this cause, after hearing in bank, we are satisfied with the conclusion reached and the opinion rendered in department, (31 Pac. Rep. 849;) and, for the reasons therein given, the judgment and order appealed from are reversed, and the court below is directed to enter judgment for the defendants on the findings.

99 Cal. 100

STRONG v. GRANT, Judge. (No. 15,255.)

(Supreme Court of California. July 21, 1893.)

MANDAMUS — WHEN LIES — DISMISSING CRIMINAL INFORMATION.

Pen. Code, § 1382, subd. 2, provides that "if a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the filing of the indictment or information," the court must order the prosecution to be dismissed, unless good cause to the contrary is shown. *Held*, that mandamus does not lie to compel such dismissal. *Beatty*, C. J., dissenting.

In bank.

Original petition by John B. Strong for mandamus to W. H. Grant, judge of the superior court of Yolo county. Petition denied.

C. W. Thomas, J. Craig, and J. E. Strong, for petitioner. Wm. H. H. Hart, Atty. Gen., for respondent.

DE HAVEN, J. This is an original proceeding, in which this court is asked to issue a writ of mandamus commanding the judge of the superior court of Yolo county to dismiss a certain criminal action pending in that court against the petitioner, John B. Strong. It appears that on September 8, 1892, an information was filed in that court charging the petitioner with the crime of assault with intent to commit murder, but he was not arraigned thereon until the 26th day of November following. The petitioner neither applied for nor consented to this delay, and upon his arraignment moved the court to dismiss the prosecution, upon the ground that he had not been brought to trial within 60 days after the filing of the information. The superior court, after listening to an oral statement of the district attorney, in which that officer gave his reasons for not moving in the matter of the petitioner's arraignment and trial at an earlier date, denied the motion. In passing upon the motion the court also took judicial notice of the fact that in the arrangement of business upon its calendar the trial of jury cases had been fixed to commence on October 7, 1892, and that the jury appearing on that day was excused from attendance upon the court until November 15, 1892, at which time the trial of criminal cases, having precedence over that against the petitioner, was proceeded with, and not concluded until the date when the petitioner was called for arraignment. It also appears that the reason for the postponement of the trial of the cases referred to from October 7th to November 15th, and the dismissal of the trial jury until the latter day, was because of the election campaign then in progress, and the fact that the district attorney was engaged in such campaign as a candidate for re-election.

In the view we take of the matter, it is unnecessary to determine whether the ruling of the superior court in denying the motion of petitioner was correct or not. Even if it should be conceded that the motion was improperly denied, the error is one which cannot be corrected in this proceeding. Section 1382 of the Penal Code provides: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) * * * (2) If a defendant whose trial has not been postponed upon his application is not brought to trial within sixty days after the finding of the indictment or filing of the information." When a motion is made for the discharge of a defendant under this section, the question presented is a judicial question, involving in its decision the exercise of judicial discretion; and when such motion has been submitted to the court in which the

prosecution is pending, and denied, such judgment or determination cannot be reversed by a proceeding in mandamus. The rule is so well established that it may be said to be universal that the writ of mandate cannot be used to correct the errors of a court in passing upon questions regularly submitted to it in the course of a judicial proceeding, or to control the exercise of its discretion. High, Extr. Rem. §§ 24, 149, 152; Merrill, Mand. § 187. See, also, the following cases which illustrate and declare the same principle: *State v. Court of Common Pleas of Passaic*, 38 N. J. Law, 132; *Mooney v. Edwards*, 51 N. J. Law, 479, 17 Atl. Rep. 973; *Davis v. Commissioners*, 63 Me. 396; *Judges of Oneida Common Pleas v. People*, 18 Wend. 79; *Ex parte Johnson*, 25 Ark. 614; *State v. Norton*, 20 Kan. 506; *Ex parte Koon*, 1 Denio, 644; *People v. Weston*, 28 Cal. 640; *People v. Pratt*, Id. 166; *Smith v. Judge*, 17 Cal. 548; *Lewis v. Barclay*, 35 Cal. 213. In this last case the application was for a writ of mandamus to compel the county judge of Calaveras county to reinstate an appeal which it was claimed he had wrongfully dismissed, and in denying the application this court said: "Mandamus lies to compel an inferior tribunal to perform a duty enjoined by law, if it refuses to do so; but, if the duty is judicial, the writ cannot prescribe what the decision of the inferior tribunal shall be. The duty to be performed by the respondent in this case was strictly judicial, and there was no refusal on his part to perform it. He may or may not have erred in the disposition of the case, but, whether he did or not, his action cannot be reviewed by mandamus, nor, indeed, by any other means, for the case is one in which the county court had final jurisdiction, and, if error was committed, there is no remedy." So in this case the petitioner invoked a judicial decision when he submitted his motion to the superior court for a dismissal of the prosecution there pending against him, and, although the judge may have erred in the decision of the question thus submitted, the error cannot be corrected by mandamus.

It follows, from these views, that the petitioner is not entitled to the relief demanded in the petition, and judgment must be ordered in favor of the defendant.

Judgment for the defendant.

We concur: HARRISON, J.; PATERSON, J.; FITZGERALD, J.

BEATTY, C. J., (concurring.) A person charged with a criminal offense has a right to a speedy trial, in order that if innocent he may go free. To detain him in custody, or to compel him by the exaction of bail to dance attendance upon a court while his trial is arbitrarily postponed without his consent, is not only a wrong and injustice to him, but is a detriment to the public. The

design of the statute, quoted in the opinion of the court, is to prevent these evils. The effect of that opinion, however, coupled with other decisions in similar cases, is to deprive the statute of its intended operation,—so far, at least, as its enforcement by this court is concerned,—and to pervert it to a use wholly foreign and inimical to its purpose. In effect, it has been held that, no matter how unjustifiably the right secured by the statute has been disregarded by the superior court, the party injured has no remedy except by an appeal to this court; and this obviously is no remedy at all for an innocent man whose trial has been unreasonably delayed, because upon his acquittal he has nothing to appeal from. The only persons who can appeal are those who have been found guilty, and they, if their convictions are otherwise illegal, have no occasion to resort to this statute for their deliverance. The only person, therefore, who can secure its benefits through the intervention of this court is one who stands convicted under a judgment in all other respects free from error, or, in other words, one who is actually guilty of the crime charged against him. *People v. Morino*, 85 Cal. 515, 24 Pac. Rep. 892. It is very safe to say that the legislature would never have enacted such a law if this were the only case in which it could be made effective. The truth is, the law was enacted, like all similar provisions relating to criminal procedure, for the benefit of the innocent, and not for the sake of screening the guilty. It is true, with respect to this, as with respect to all rules of procedure deemed necessary for the security of innocent men, unjustly accused, guilty men, also, being deemed innocent until proved guilty, may take advantage of it; but it is a most extraordinary result that for the wanton and deliberate violation of this rule an innocent man has no remedy, while one justly convicted of a crime may by means of it evade the penalty. To me it seems there must be a mistake somewhere in the decisions that lead to such a result, and I think the mistake consists either in holding that the injured party cannot resort to a mandamus, as this opinion holds, or in holding that he cannot resort to habeas corpus, as was held upon a former proceeding by this petitioner. 31 Pac. Rep. 574. If an innocent man, who is kept in jail month after month, while his trial is arbitrarily postponed, cannot resort to this court for relief, either by habeas corpus or by mandamus, I know of no other remedy he has. Appeal, as above stated, is no remedy, for he cannot appeal until after a trial, and the refusal to bring him to trial is the very wrong of which he complains; and, moreover, being innocent, it is to be presumed he will be acquitted if he ever is brought to trial, and that he will have nothing to appeal from. I cannot bring myself to admit that for such a wrong there is no

remedy, and consequently I feel satisfied that either habeas corpus or mandamus must lie. In either case, however, I concede that the petitioner ought not to be discharged unless it should appear that the superior court had abused its discretion in postponing the trial. In this case I think there were some circumstances, in addition to those mentioned in the above opinion,—more especially the facts that the petitioner was on bail, that he was in no wise harmed by the delay, and that material witnesses for the prosecution could not be found,—upon which the court could, without an abuse of its discretion, hold that there was cause for the delay in proceeding against the petitioner. On this ground I concur in the judgment.

99 Cal. 36

SPRING VAL. WATERWORKS v. BARBER, Tax Collector. (No. 15,015.)

(Supreme Court of California. July 20, 1893.)

TAXATION—FRANCHISE OF WATER COMPANY.

Where a water company is chartered to supply a certain county and city therein with water, the mere fact that the pipes of the company pass through the adjoining county does not make the company's franchise taxable there.

In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Application by the Spring Valley Waterworks against James B. Barber, as tax collector, for an injunction. Decree for defendant, and plaintiff appeals. Reversed.

Fox, Kellogg & King, (Wm. F. Herrin, of counsel,) for appellant. Geo. W. Reed, for respondent.

PER CURIAM. This action was brought to restrain the defendant, as tax collector of Alameda county, from making a sale for alleged delinquent taxes upon the assessment of a "franchise" for the fiscal year 1889-90. A general demurrer to the complaint was sustained, and judgment rendered for defendant, and plaintiff appeals. No question as to proper remedy is raised, and the case is submitted upon the sole question of the legality of the assessment and tax.

As appears from the complaint, the plaintiff is a corporation organized under a general law approved April 22, 1858, entitled "An act for the incorporation of water companies," (St. 1858, p. 218,) for the purpose of supplying the city and county of San Francisco, and the inhabitants thereof, with pure, fresh water; and ever since its incorporation, on June 10, 1858, its principal place of business has been in said city and county, where its works furnish the main supply of water to said city and county, and the inhabitants thereof. It further appears that its "franchise" was assessed for said fiscal year, in said city and county, for a large sum, and the tax levied thereon paid

by appellant. The complaint further shows that the board of supervisors of Alameda county, on March 26, 1888, passed a general ordinance giving to "any person, firm, association, or corporation engaged in the business of supplying fresh water to any city or town, or any city and county, in the state" the privilege of laying and maintaining pipes as conduits therefor, in or through any of the roads and highways of said county, subject to certain conditions stated in the ordinance; and afterwards the appellant, being desirous of bringing a part of its supply of water for San Francisco across said adjoining county of Alameda, laid a part of its pipe used for that purpose along portions of certain roads in said county. Taxes were assessed and levied in said county upon said pipe and pipe line, and upon other property owned by appellant in said county, and were paid; but, in addition to these taxes, said county is endeavoring to collect further taxes upon an assessment of its "franchise." The only franchise asserted rests upon the pipe for carrying water to San Francisco, before mentioned.

While all ordinary real and personal property owned by appellant in Alameda county, and used in connection with its business of supplying San Francisco with water, is to be taxed in Alameda county, in common with other property, we do not think that its mere ownership of water pipe there, as aforesaid, creates a "franchise" assessable in that county. It had a mere right of way in common with all other persons, entirely unconnected with any privilege granted by the county to take tolls, collect water rates, or enjoy any other special prerogative or advantage. Such a right was certainly not, at common law, a franchise. Blackstone makes a clear distinction between franchises and ways. In the cases cited by respondent it was held that, in determining the assessable value of the franchise of a water company in the city which it supplies with water, its right to run pipes through the streets might be considered in connection with its other corporate rights, and particularly in connection with its franchise to collect water rates. In *Waterworks v. Schottler*, 62 Cal. 109, the court say: "A franchise conferred on an individual, to lay down pipes in the streets of a city, and to collect rates for water furnished a city or its inhabitants, is to be taxed," etc. In *Gas Co. v. January*, 57 Cal. 614, the plaintiff was a corporation "engaged in the manufacture and selling of gas to the city and inhabitants of the city of San Jose," and its entire "franchise" was assessed as a whole. In that case the court held that a proper method of arriving at the assessable value of the franchise was to deduct the cash value of all the real and personal property of the corporation from the market value of its capital stock, which, of course, could not have been done in the case at bar; and

it may be presumed that, when the franchise of the appellant was assessed in San Francisco, everything was included which the county of Alameda undertook to assess under the head of "franchise." In none of the other cases cited was there any question about a mere right of way in an adjoining county, entirely unconnected with any franchise granted by that county to collect tolls or water rates. We think that whatever franchise the appellant has came from its charter, and is assessable at San Francisco, its principal place of business, under section 3628 of the Political Code. Indeed, it is difficult to see how the respondent can claim that the general right given to lay pipes is a franchise, for the board of supervisors have power to grant franchises only as follows: "To grant licenses and franchises, as provided by law, for constructing, keeping and taking tolls on roads, bridges, fences, wharves, chutes and piers." Pol. Code, § 4046. Our conclusion is that, under the circumstances here disclosed, the appellant had no franchise assessable in Alameda county, and the demurrer should have been overruled. The judgment must be reversed, and, if respondent shall present no other defense than the one involved in the demurrer, a decree should be entered in accordance with the prayer of the complaint.

Judgment reversed, and cause remanded.

DE HAVEN, J., did not participate in the foregoing decision.

99 Cal. 153

D'OYLY v. CAPP et al. (No. 15,125.)

(Supreme Court of California. July 27, 1893.)

MORTGAGE—MISSTATEMENT AS TO DEBT—EFFECT.

A mortgage in terms given as security for the payment of \$2,500, and "of such additional sums as may be loaned by said mortgagee to said mortgagor before the discharge" thereof, is effective to secure notes afterwards given for loans made before the execution of the mortgage, as against a subsequent judgment creditor, who is not prejudiced by such misstatement on the face of the mortgage.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Nigel D'Oyly against James B. Capp and others. From a judgment for plaintiff, defendants appeal. Affirmed.

John H. Yoell, for appellants. H. V. Morehouse and Hiram D. Tuttle, for respondent.

PATERSON, J. On March 1, 1890, the defendants J. B. and A. B. Capp were indebted to the plaintiff in the sum of \$11,000, and on that day executed and delivered to him their promissory note for the sum of \$2,500, secured by a mortgage on certain real property. The mortgage provided that it should stand as security for the payment of said \$2,500, and "of such additional sums as may be loaned by said mortgagee to said mortgagor before the discharge hereof, and the interest

thereon; each additional loan to be evidenced by the promissory note of said mortgagor." On March 10, 1890, the Capps gave another note to the plaintiff for \$5,000, which recited that it was given to evidence advances made in accordance with the mortgage, and on the same day executed and delivered another note for the balance of the \$11,000 they were owing plaintiff, (\$3,500,) which contains the same recital. All of these notes came due on March 1, 1891. On December 21, 1881, the defendant Houghton filed in the recorder's office of Santa Clara county, where the mortgaged property is situated, a transcript of a deficiency judgment on foreclosure, docketed in the superior court of Monterey county on that day. Appellant Houghton contends that his judgment is superior to the lien of the mortgage for the payment of the \$5,000 and \$3,500 notes. His claim is, as we understand it, that, as neither the \$5,000 nor the \$3,500 note represented an additional sum advanced by the mortgagee to the mortgagor after the execution of the mortgage, they cannot be included in the amount for which the mortgage was given as security.

We do not think there is any merit in the contention. The mortgage, it is true, ought to have stated the true consideration for which it was given, "but the omission to disclose the real transaction on the face of the mortgage will not make it invalid, unless some one has been prejudiced by the misrepresentation." *Collins v. Carlile*, 13 Ill. 259. Where the mortgage is given in good faith, to secure a present indebtedness and future advance, whether the true object be stated in the mortgage or not, it is valid as between the parties, and as against any subsequent lienholder not prejudiced by the misstatement. *Hendrix v. Gore*, 8 Or. 408. In *Bell v. Fleming's Ex'rs*, 12 N. J. Eq. 16, the court said: "It was insisted as an objection to its validity that this mortgage was false on its face; that, while it purports to be a security for a debt of \$100,000 actually due, the debt really existing was but little over one-third of that amount. In *Shirras v. Caig*, 7 Cranch, 34, it was part of the argument of counsel that the mortgage untrue recited the whole transaction, and that the mortgage was made only to cover future contingent responsibilities. Chief Justice Marshall, in his opinion, says: 'It is true the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000, 6s., sterling, due to all the mortgagees. It was really intended to secure different sums due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. It is not to be denied that a deed which misrepresents the transaction it recites and the consideration on which it is executed is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable fairly and plainly to state the truth. But if, upon in-

vestigation, the real transaction shall appear fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation.' * * * The incumbrance can never stand for a larger amount than the record calls for. * * * If the transaction is a fair one, there can be no objection to state it as it really exists. * * * The bona fides of the transaction is apparent from the manner and promptness with which the advances were made. There is no one before the court who makes any complaint that he has been misled or been placed in a worse position in consequence of the character of the mortgage." The mortgage must always give the requisite information, so that a junior creditor may, by inspection of the record, and by the exercise of common prudence and ordinary diligence, ascertain with certainty the extent of the incumbrance. When this is done, although the instrument may not truthfully state its object on its face, if the transaction is otherwise fair, there is nothing inequitable in enforcing it. *Bank v. Finch*, 3 Barb. Ch. 303; *Craig v. Tappin*, 2 Sandf. Ch. 78; *Hall v. Crouse*, 13 Hun, 560. For the reasons given, the variance between the allegations and the proof is immaterial. The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

99 Cal. 89

BORLAND v. NEVADA BANK OF SAN FRANCISCO. (No. 14,213.)

(Supreme Court of California. July 21, 1893.)

LIABILITY FOR CORPORATE DEBTS—PLEDGE OF STOCK—WHAT CONSTITUTES.

A debtor of defendant bank, who contemplated going into bankruptcy, was told by defendant that if he would turn over all his property to the bank it would carry him through, and he accordingly turned over various properties. Three years later the bank, having learned that he had corporate stock which had not been turned over, demanded it, whereupon he had the stock transferred on the books to a trustee for the bank, and delivered the stock certificate to the bank. Nothing was said at the time of this last transfer as to the value of the stock, or as to crediting him with anything on his notes, which were still held by the bank to a large amount, and no credit was given him for any of the securities transferred by him, except as they were disposed of. *Held*, that the bank held the stock last transferred as collateral security, only, and hence, under Civil Code, § 322, was not liable, as a stockholder, for the debts of the corporation.

In bank. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by Agnes Borland, executrix, against the Nevada Bank of San Francisco. From a judgment for plaintiff, and an order

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denying a new trial, defendant appeals. Reversed.

Lloyd & Wood, R. S. Mesick, and Wm. F. Herrin, (H. L. Gear, of counsel,) for appellant. McKoon & Towle and Geo. W. Towle, Jr., (Warren Olney, of counsel,) for respondent.

HARRISON, J. The plaintiff seeks to recover from the defendant, as a stockholder in the Wyoming & Dakota Water Company, its proportionate liability of certain indebtedness of that corporation to the plaintiff. The case was tried in the court below without a jury, and judgment rendered in favor of the plaintiff, from which, and an order denying a new trial, the defendant has appealed.

In 1877, August Hemme, being heavily indebted, contemplated going into bankruptcy, and as the defendant was one of his creditors, to the amount of several hundred thousand dollars, Mr. Flood, who was its vice president, proposed to him that, if he would turn over to the bank what property and securities he held, it would carry him through. Hemme's indebtedness to the bank was evidenced by several promissory notes, upon which he had given collateral security, and, in response to this proposition of Mr. Flood, he turned over to the bank various properties, upon which the bank thereafter, from time to time, realized by sales, and applied the amounts to his credit. In March, 1880, Flood, having learned that Hemme had certain shares of stock in the above-named corporation, which he had not turned over to the bank, sent for him; and, upon his demand that this stock should be given up to the bank, Hemme caused the same to be transferred on the books of the corporation from the name of his wife into that of George B. Bailey, trustee, and delivered the certificate therefor to Flood. Bailey was an employe in the bank, in whose name all securities held by the bank, whether as proprietor or collateral, were placed and held by him, as trustee for the bank. It does not appear that any entry of the transaction was made upon the books of the bank, and the certificates for the stock were themselves placed by one of the employes of the bank in an envelope, and marked as held as security against Hemme's account. At this time the bank still held some of the other property which had been turned over to it in 1877, undisposed of, and disposals thereof were thereafter made from time to time, and the proceeds placed to the credit of Hemme's account. This stock, however, was never disposed of by the bank, but diminished in value so that it was regarded of no value whatever, and the notes themselves became outlawed, and in 1882 were surrendered to Hemme, at which time he made a written assignment of the stock to the bank. It is contended by the

plaintiff that the transaction between Hemme and Flood was an absolute transfer of the stock, by which the entire title thereto was vested in the bank, while the defendant contends that the stock was received and held by it only as a collateral security for the indebtedness of Hemme; and upon the determination of this disputed point hinges the liability of the defendant, for if it took the stock as security, merely, it was not a stockholder, liable for the debts of the corporation, while, if it became the absolute owner thereof, it is chargeable with its proportionate liability of the corporate debts.

Section 322 of the Civil Code declares: "Each stockholder of a corporation is individually and personally liable for such portions of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. * * * The term 'stockholder,' as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another. * * * Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor or person or estate represented is to be deemed the stockholder as respects such liability." The parties to the transaction under consideration did not, by any words or instrument, attempt to define the relation which they should hold to the property after it had been delivered by Hemme to the bank, and the evidence relating to the transaction itself is exceedingly meager. There was no express agreement of any kind between them. Their relations at the time were evidently of an unfriendly character, and they were dealing with each other in the attitude of a creditor seeking to get from his debtor that which he had agreed to give him, and a debtor reluctantly parting with what he had agreed to give. Although Hemme, when asked at the trial whether he delivered that stock absolutely to Flood, or whether he retained an interest in it, stated that he delivered the stock absolutely to Mr. Flood, as the property of the bank, he did not testify that anything of that nature was said either by Flood or himself at the time it was delivered, or at any time, and his testimony cannot be considered as anything more than either his own opinion of the transaction, or as a purpose which he then had, but which he did not disclose. The transaction cannot be regarded as a sale of the stock from Hemme to the bank. There was nothing said by

either party in reference to buying or selling the same, nor was the value of the stock agreed upon, or even discussed, nor was any price fixed at which Hemme would part with it, or Flood accept it. Story, in his Treatise on Sales, (section 1,) defines a sale to be "a transfer of the absolute title to property for a certain agreed price," and, in section 217 of the same treatise, states that the price required in a contract of sale must be: (1) Money or its negotiable representative; (2) certain and definite, or capable of being rendered definite; (3) an actual price seriously intended to be exacted. Section 1721, Civil Code, defines a sale to be "a contract by which, for a pecuniary consideration called a price, one transfers to another an interest in property." It is not necessary, however, that the price for which property is sold shall be money, only, or that it shall be actually delivered at the time of the transaction. The term, as here used, is equivalent to "compensation." *Iron Co. v. Alger*, 54 N. Y. 177. But, as values are expressed in money units, a sale implies a reciprocal transfer of this compensation, past, present, or future, of a value in money, agreed upon between the parties. It is, however, the agreement to pay a price, rather than the actual payment of the price, which is the essential element of a sale; but the price itself must be definite, or the agreement must contain such elements that the price can be ascertained therefrom. In addition to the necessity for a price, there must be the assent of the parties that the transaction shall be a sale. This must be an express agreement, or such an implication must follow from the nature of the transaction itself. The mere transfer of possession, without the agreement, express or implied, that such transfer is a sale, on the one hand, and a purchase, on the other, will not be a sale, or have the effect to transfer the title. The testimony of Grayson, that, at some time subsequent to the transfer of the stock, Flood spoke of the transaction as a "purchase," cannot be used to determine the nature of the transfer. Flood, as the agent of the defendant, could not bind it by any admissions or declarations respecting the character of the transaction which he might subsequently make in reference thereto. *Beasley v. Fruit-Packing Co.*, 92 Cal. 388, 28 Pac. Rep. 485. Neither can the transaction be regarded as a payment by Hemme upon the amount of the indebtedness against him, held by the bank. Payment, like sale, can result only from the mutual agreement of the parties that the transaction shall have that effect, and without such consent the transaction cannot be treated by the court as a payment. Technically, payment can be made only in money. It is defined in the Civil Code to be "performance of an obligation for the delivery

of money only." Section 1478. Payment may, however, be made in merchandise, or any commodity other than money which the parties to the transaction agree shall be accepted as payment, but the consent of the creditor to accept as payment the thing received is as essential as the purpose of the debtor that it shall have that effect. "The acceptance of any valuable thing in discharge of the debt amounts to payment, but it is the distinct agreement of the creditor to accept the thing in discharge of the debt that gives it the character of payment. Without this, the transaction is regarded either as furnishing matter of set-off, or as security collateral to the original debt, according as the subject received is in possession or in action." *Covely v. Fox*, 11 Pa. St. 174. But although the receipt of a commodity by a creditor from his debtor at an agreed valuation, with the agreement that the sale shall be applied in a credit upon the debt, is equivalent to a payment, both of these elements are wanting here. If it was the purpose of Hemme to transfer the stock in part satisfaction or in payment of his obligation to the bank, such purpose was ineffectual without the assent of the bank.

Inasmuch as no express agreement between the parties, relative to the character of the transaction, and no statement by them, or either of them, of the character in which it should be treated, was shown at the trial, we are compelled to determine their rights according to the principles of law applicable to such a transaction, in the absence of any agreement. In other words, we are to ascertain what legal presumption would arise from the transaction, in view of the circumstances under which it was had, having reference, also, to the relation which the parties held to each other. If there had been no previous relations between them, the deposit of the stock would constitute a mere bailment, for there is nothing indicative of a gift, and it is not pretended that such was the intention of either of the parties. The owner of property remains such until he is divested of his ownership by law, or by his voluntary act. The mere transfer of his property to another does not divest him of his ownership, unless such was his intent, and manifested by suitable acts. If the person to whom the transfer is made is his creditor, his ownership will none the less be retained, in the absence of any evidence respecting his motives in making the transfer; and even if it was his purpose to divest himself of his title thereto, or to make a transfer in satisfaction or payment of his obligation, either in whole or in part, such purpose would be ineffectual without the consent of the creditor to receive it therefor. Yet, as it must be presumed that the parties to such transaction made the transfer for some purpose, and as their act is entitled to receive consideration, the transaction will be regarded as having been

made in accordance with their presumed motive. The law will make the inference therefrom that by the transaction they intended to effect that which would be of mutual benefit to each, without causing a loss to either, or giving to either an advantage which would not be presumed to have been within their contemplation. Hence, when a debtor deposits property with his creditor, in the absence of any showing as to the purpose with which the deposit is made or received, it is presumed that it was intended as a collateral security for the debt. Unless there is some evidence tending to show an intention on the part of the debtor to give, and also on the part of the creditor to receive, the property in satisfaction of the debt, either in whole or in part, the law presumes that it is given only as a collateral security. Especially does this presumption arise if the property given is itself a chose in action, or a security of a different nature from the debt, whose value is neither intrinsic nor apparent, and is not agreed upon by the parties, for the reason, as was said by the supreme court of Pennsylvania in *Leas v. James*, 10 Serg. & R. 315: "Such assignment is not in its nature a payment. It puts no money in the hands of the creditor, but only gives him the means of collecting money from another." The duty of establishing the contrary is affirmative, and it rests upon the debtor. If he fails to perform this duty, the law makes the positive inference that the assignment is only as collateral security. *Jones, Pledges, § 17; Colebrooke, Collat. Sec. § 29; Eby v. Hoopes*, 1 Penny. 177; *Bayard v. Shunk*, 1 Watts & S. 94; *Stone v. Miller*, 16 Pa. St. 450; *Perit v. Pittfield*, 5 Rawle, 166; *Caldwell v. Fifield*, 24 N. J. Law, 150; *Sutphen v. Cushman*, 35 Ill. 186; *Harris v. Lombard*, 60 Miss. 29. The debtor cannot make his creditor a forced purchaser of the property, or compel him to exchange his obligation for the property transferred; and this is eminently the case where no value is agreed upon, or even spoken of, at the time of the transfer. The burden is always upon the debtor to show that a substituted performance of his obligation to pay money was accepted by the creditor as the equivalent of payment, or in satisfaction of the obligation. Taking the promissory note of a third party from the debtor will always be regarded as given for collateral security, unless proof is made that it was given and received as payment. *Brown v. Olmsted*, 50 Cal. 162. "The mere acceptance by the creditor of a negotiable note of a third person makes it but collateral security. When such note is given for a pre-existing debt, the presumption is that it was not the intention of the parties that it should operate as an immediate and absolute satisfaction and discharge of the debt; and nothing short of an actual agreement, or some evidence from which a positive inference of discharge can be made, will suffice

to produce such effect." *Wilhelm v. Schmidt*, 84 Ill. 187.

There is no evidence in the record herein which tends to rebut this presumption that the stock of the water company was taken and held by the defendant as collateral security for the debt of Hemme. Hemme testified that in March, 1880, when Flood sent for him, and demanded the stock, he went out, and brought in a certificate for 24,000 shares, which stood in the name of his wife, and that at Flood's request he thereupon caused it to be transferred on the books of the corporation to the name of Bailey, and then delivered the certificate to Flood; that he estimated the stock to be of the value of from \$2.50 to \$3 per share; that nothing was said, either by Flood or himself, about the value of the stock, or concerning the amount with which he should be credited therefor, nor was anything said as to the amount of the purchase price, or any sum, fixed at which he should be allowed credit upon his account; that in June, 1880, Flood, having learned that he had 4,000 other shares of stock, again sent for him, and demanded this stock, also; and that, after having it transferred into the name of Bailey, he brought the certificates to the bank, and laid them down on the desk, in front of Flood, and walked out, without saying anything, and that no mention was then made of money or price to be allowed him therefor. This is, in substance, all the evidence of what was said by either Flood or Hemme at the time of the transaction, and in the absence of any statement or agreement by the parties concerning the relations thereafter to be held by them, respectively, to the stock, it becomes necessary to apply the foregoing principles of law to determine that relation. For this purpose it is also proper to consider the relations which Hemme and the bank held to each other, as well as any circumstances which would give to Flood a reason for demanding the stock, or to Hemme a reason for delivering it. Hemme was still heavily indebted to the bank upon the obligations for which he had given various collateral securities in 1877, many of which were still held by the bank, undisposed of. His indebtedness at that time amounted to several hundred thousand dollars, and Flood had said to him that, if he would give him what securities he had, he would carry him through. Accordingly, Hemme turned over to the bank a line of securities whose value was estimated to be nearly \$400,000, and the bank thereafter proceeded to realize upon them, but they were insufficient to meet the amount of the indebtedness. In view of the fact that Flood's agreement with Hemme was based upon the implied promise of Hemme that he would turn over what he had, we find ample reason for Flood, when he learned that Hemme had this water stock, to demand that it should be turned over to him, and also for Hemme to comply therewith;

and, even if there were no other evidence in the case, it would follow that the bank would be regarded as holding the stock in the same capacity as it held the property which was turned over to it in 1877. There is no evidence in the record tending to show that the transfer in 1877 had any other character or effect than to operate as a collateral security for the indebtedness, and the relation of the parties at the time it was made as well as the interview between Flood and Hemme prior thereto, and the subsequent dealings of the bank with the property, as well as the statement of some of the plaintiff's witnesses, are confirmatory of the presumption that it was held as collateral security for that debt. The notes of Hemme, by which that indebtedness was evidenced, were retained by the bank after the transfer was made, and it does not appear that any credit was indorsed thereon, or that any amount was placed to the credit of Hemme's account, except as the various securities were realized upon from time to time. In *Sutphen v. Cushman*, supra, the supreme court of Illinois said: "The appellant was indebted to the appellee at the time the conveyance was made, and there is no evidence whatever of the discharge of that indebtedness. The bond and note by which the greater portion of it was evidenced were retained by the appellee, as well as the Lighthall notes, which had been pledged as security, and the payment of the indebtedness might have been enforced at any time thereafter. Until the contrary is shown the presumption is that the indebtedness was not satisfied by the conveyance. And absolute certainty in regard to the facts takes the place of presumption, in case the creditor retains the evidences of the indebtedness, the securities pledged for its payment, and collects the money due upon such securities." In the present case the indebtedness of Hemme was retained upon the books of the bank as one of its assets, and the retention of the notes by the bank, without any indorsement of payment thereon, is persuasive evidence that it was the intention of the parties that the indebtedness should remain for its full amount until it should be reduced by the application of the proceeds resulting from the sale of the securities. In the absence of any evidence tending to show an agreement to reduce the indebtedness by any fixed amount, this is the necessary presumption, for it is not to be supposed that the bank became the owner of the property turned over to it, and at the same time held the indebtedness against Hemme for its full amount; and, in the absence of any agreement regarding the amount for which the property had been accepted by the bank, there would be no means of determining that the indebtedness had been reduced in any amount. In any attempt to enforce the indebtedness against Hemme, he could have compelled the bank to first exhaust these se-

curities before calling upon him for any deficiency, whereas, if the bank was the owner of the securities, he would have had no such right, and the bank could enforce its indebtedness for the full amount, and still remain entitled to the property turned over to it by him. We have carefully examined the record, and are satisfied that there was no evidence before the court to sustain its finding that the defendant was the owner of the stock in question, and for that reason its judgment and order denying a new trial are reversed.

We concur: McFARLAND, J; GAROUTTE, J.; PATERSON, J.; DE HAVEN, J.

90 Cal. 9

KOHLER v. AGASSIZ et al. (No. 14,197.)
(Supreme Court of California. July 19, 1893.)

ATTACHMENT AGAINST NONRESIDENT—SUBSCRIPTION TO CORPORATE STOCK—PROCEDURE.

1. A complaint in an action by the assignee of an insolvent corporation alleged that defendants subscribed for 500 shares of capital stock of \$100 each, and agreed to pay the par value thereof at such times as, under the laws of the state, they might be called upon to pay the same; that they received the stock; that the corporation had been adjudged an insolvent; and that the full amount of the stock subscription would be insufficient to pay the debts. The prayer was for an account of the debts of the corporation; that it be decreed that the whole amount of the subscriptions were necessary to pay the debts; and that judgment be rendered against defendants for the sum owing by them. *Held*, that the complaint showed the action to be "upon a contract, express or implied," within the meaning of Code Civil Proc. § 537, providing for an attachment against a nonresident defendant in such an action.

2. In such a case it is not necessary that the specific amount claimed to be due be shown by the complaint, nor by the contract itself, but, under Code Civil Proc. § 538, it must appear from the affidavit for attachment.

3. A motion to dissolve an attachment does not reach defects in the complaint.

4. Where persons subscribe for a certain number of shares of stock in a corporation, and agree to pay \$100 for each share, in such installments and at such times as, under the laws of the state, they may be required to pay the same, a decree in chancery or an assessment by the board of directors is not necessary in order to sustain an attachment against such persons as nonresidents in an action to recover on the contract of subscription.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Charles Kohler, assignee, against A. E. R. Agassiz, Quincy A. Shaw, and others. From an order refusing to dissolve an attachment issued against said Agassiz and Shaw, they appeal. Affirmed.

Edward J. Pringle, for appellants. Pillsbury, Blanding & Hayne, for respondent.

PATERSON, J. This is an appeal from an order of the superior court refusing to dissolve an attachment. The action is brought by the assignee of an insolvent corporation, organized under the laws of the

state of California, against Agassiz, Shaw, and a number of others, to recover the balance due from them severally upon their subscriptions to the capital stock of the company.

The point made by appellants (Agassiz and Shaw) is "that the cause of action is not an attachable cause of action." So much of the affidavit of the plaintiff upon which the writ of attachment issued, as is essential here, is as follows: "Defendants A. E. Agassiz and Quincy A. Shaw in the said action are indebted to him in the sum of thirty-five thousand dollars, lawful money of the United States, over and above all legal set-offs and counterclaims, upon an express contract, for the direct payment of money, to wit, a subscription by said defendants to the capital stock of said California Land and Timber Company, which said subscription has been duly assigned in the matter of said corporation in insolvency to plaintiff, and that such contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge upon personal property. That both said defendants reside in the state of Massachusetts, and neither of them resides in the state of California. That the said attachment is not sought, and the said action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendant." The statements of the affidavit are more ample than are required by statute in support of an attachment against a nonresident of the state.

The several subdivisions of section 537 of the Code of Civil Procedure provide that the plaintiff may have the property of the defendant attached "in an action upon a contract, express or implied, against a defendant not residing in this state." In the case of resident defendants, the right to the writ is only given in cases of contract made or payable in this state, and other limitations are prescribed, not mentioned as necessary in the case of nonresident defendants. There is also a marked difference in the requirement of the affidavit as between resident and nonresident defendants. As to the latter, it is only required to show "that the defendant is indebted to the plaintiff, (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims,) and that the defendant is a nonresident of the state; and (3) that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant." As against a nonresident defendant, the affidavit is not required to show that the payment of the claim is not secured by mortgage lien or pledge, or that it is upon a contract made or payable in this state, or upon a contract for the direct payment of money, or even upon a contract at all. The right to an at-

tachment is only given by the statute quoted, *supra*, "in an action upon a contract, express or implied;" hence it can only properly issue in such an action, but that fact is not required to be shown by the affidavit. The right to an attachment, and the mode of procedure for obtaining it, are the creatures of statute, depending for their existence and regularity upon the terms of the Code.

The attachment laws of the several states differ each from the other in so many particulars that without the utmost caution in comparing their provisions with our own we are in constant danger of being led astray or unduly influenced by decisions apparently in point, but in reality resting upon a different basis. Even our own adjudicated cases, many of them growing out of questions applicable to resident debtors, have no proper application to the different status occupied by nonresidents. An attachment may be said to have been properly issued when so issued in a case provided for by section 537 of the Code of Civil Procedure. It is regularly issued when the requirements of sections 538 and 539 are complied with. The right to an attachment being given, and the mode of its exercise prescribed by the statute, and the latter being exclusive, must be held to so far limit the right that it can only be enjoyed in the manner and to the extent provided for its enforcement. The Code provides that a writ of attachment may be discharged by giving a bond on behalf of the defendant. It also gives him the right to apply to the court or judge for a discharge of the writ, upon the ground that the same was improperly or irregularly issued. The irregularities which will warrant the discharge of the writ will usually appear upon the face of the affidavit or undertaking, or, where properly but prematurely issued, by a comparison with the summons and complaint. Where, however, the attachment has improperly issued,—that is to say, in a case not provided for by the statute,—the evidence must usually be sought dehors the papers upon which it is evidently founded. It is not understood that the appellants here base their contention on any alleged irregularities in the mode of procuring the attachment, but rather that it was improperly issued,—that it issued in a case not provided for by law. For evidence in support of this contention we are referred to the complaint on file. The complaint shows that the California Land & Timber Company is, and since 1885 has been, a corporation organized under the laws of the state of California for the purpose of carrying on a general lumber business, etc., having a capital stock of \$1,000,000, divided into 10,000 shares of the par value of \$100 each; that defendants Agassiz and Shaw jointly subscribed for 500 shares of said capital stock, and then and thereby agreed and

promised to receive the same from the corporation, and to pay therefor the par value thereof, to wit, \$100 for each and every share thereof, "in such installments, and at such times, as said defendants might, under and according to the laws of the said state of California, be lawfully called upon and required by said corporation to pay the same, and then and there did pay said corporation the sum of \$15,000 on account of and in part payment of said 500 shares;" that defendants still own and hold the stock, and that no part of the sum agreed by them to be paid has been so paid except \$15,000, as aforesaid, and that \$35,000 is due and owing and unpaid by defendants; that in November, 1887, the corporation became and was duly adjudged an insolvent, and plaintiff was duly appointed the assignee of the company, and duly qualified as such. The property of the corporation is incumbered by mortgages, judgments, attachment liens, etc., in excess of its value, and owes \$295,000 of unsecured debts in addition. Some of the defendants are insolvent, and, as plaintiff believes, the full amount of the subscriptions of the defendants will be insufficient to pay the debts of the corporation. The prayer is that an account may be had of the debts and liabilities of the corporation, and that it be decreed that the whole amount of the subscriptions is necessary to pay the debts and liabilities of the corporation, and that plaintiff have judgment against the defendants for the sum owing by them, and for such other and further relief as may be proper, etc.

It will be observed that the action is not brought to recover an assessment *eo nomine*, levied by the corporation upon the stock of the company, but counts upon a contract by which they agree to pay for their stock in such installments and at such times as said defendants might under the laws of California be lawfully called upon and required by said corporation to pay the same. Under the laws of California a stockholder may be lawfully called upon and required to pay assessments upon his stock to the extent of 10 per cent. of the par value thereof, except where the whole capital is not paid up, in which case he may be required, if the liabilities of the company demand it, to pay by way of assessment the full amount unpaid upon the capital stock. Civil Code, § 332. A stockholder may expressly agree to pay the amount of his subscription immediately, or at stated times, and thus relieve the corporation of the duty of making calls. He will be liable to pay upon such contract according to its terms. *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 296-300; *Spel. Corp.* § 555. It is matter of common knowledge that in this state corporations, and especially mining corporations, are in the habit of setting aside for sale at some established price a portion of their capital stock for the purpose of raising

what is termed "working capital," or a fund to be devoted to the development of their property. Assessments must be uniform, and under our laws must be levied upon all the capital stock. By this method of selling a portion of their stock companies may make such contracts with purchasers as to price, time, and manner of payment, etc., as may be agreed upon, and for nonpayment of the agreed price for stock in such cases an action at law may be maintained. So an agreement to take stock in a corporation to be organized presently may be enforced by the corporation after its organization. *Electric Light, etc., Co. v. Johnson*, 93 Cal. 538, 29 Pac. Rep. 126; *West v. Crawford*, 80 Cal. 19, 21 Pac. Rep. 1123. The allegation of the complaint in reference to payment for the shares "in such installments, and at such times, as said defendants might, under the laws of the state of California, be lawfully called upon and required by said corporation to pay the same," is simply a limitation as to the amount which defendants could be called upon to pay at a single payment, and as to the time at which such payments might lawfully be demanded, and did not prescribe the manner of its collection.

We are not called to turn this inquiry into a demurrer to the complaint upon the ground that it is ambiguous, unintelligible, or uncertain, but simply to determine whether (1) the complaint showed the action to be founded upon contract, express or implied; (2) whether it states facts sufficient to constitute a cause of action against the defendants; and, if not, (3) does it appear therefrom that it can be so amended as to state a cause of action upon contract? As against a nonresident debtor, these questions being answered in the affirmative, we must not concern ourselves further with the complaint. We are of opinion that the complaint is sufficient in these respects, and that the affidavit is ample to warrant the writ. The affidavit for the attachment shows the specific amount claimed to be due. It is unnecessary that the complaint should show this amount; there is no such requirement in the statute. Nor is it necessary that the contract itself should show the amount due. *Dunn v. Mackey*, 80 Cal. 107, 22 Pac. Rep. 64. A statement in the complaint, therefore, as to the specific amount claimed to be due, would not aid the attachment. Such a statement in the complaint would be of no greater weight than the statement in the affidavit. It would be as much a matter of opinion or conclusion in the one case as in the other. The complaint does show that the action is upon contract, and not in tort. It shows that the defendants received the stock, for which they promised to pay. This being the case, it is immaterial that the prayer of the complaint is for an ac-

counting. Even on demurrer to the complaint the defendants cannot object to the prayer, and certainly, so long as the complaint contains every essential of an action upon contract, they cannot, upon motion for an attachment, accomplish what they could not upon demurrer. A motion to dissolve the attachment cannot reach defects in the complaint. But it is claimed that there can be no attachable cause of action until after a decree in chancery, or an assessment by the board of directors; that an assessment is a necessary element of an attachable cause of action upon a subscription like the one in the case at bar. We do not think the terms of the agreement warrant this contention. The defendants agreed to pay \$100 for each and every share of stock, in such installments, and at such times, as they might, under the laws of this state, be lawfully called upon by the corporation to pay. This provision does not say anything about the manner in which the corporation should call upon them; it simply provides for the times and amounts of payments. It is provided in the Code that, where it is necessary to pay the debts, the full amounts of the subscriptions may be called for; and the complaint here shows that this condition exists,—that the whole amount is necessary. In *Hotel Co. v. Calender*, 94 Cal. 120, 29 Pac. Rep. 859, the contract was to pay "at such times, and in such manner, as may be determined by the board of directors of said corporation, to be hereafter chosen." The court held that it was not necessary to a recovery on the contract of subscription that the directors of the corporation should have levied assessments upon the stock in the mode prescribed by the Civil Code. *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. Rep. 420, cited by appellants, was an action to recover an assessment. The court cannot assume that the corporation may turn out not to be insolvent. That question has been conclusively adjudicated by the judgment of a competent court. Furthermore, it is expressly alleged that more than all the solvent subscriptions will be needed to enable the assignee to pay the debts and liabilities of the corporation. Under the laws of this state, we think there can be no serious question as to the right of the assignee who succeeds to all the rights of the insolvent to enforce them as fully as the insolvent could have done before the insolvency. If there had been no insolvency, the corporation could have maintained the suit, if we are right in the views above expressed, without levying an assessment. Sections 17, 18, 21, Insolvent Act.

The order appealed from is affirmed.

We concur: MCFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.; HARRISON, J.

98 Cal. 636

In re SMITH'S ESTATE. (No. 15,198.)
(Supreme Court of California. July 11, 1893.)
APPEALABLE ORDERS — PERMITTING AMENDMENT
OF STATEMENT ON MOTION FOR NEW TRIAL —
NEW TRIAL—DISCRETION OF COURT.

1. An appeal does not lie from an order permitting the amendment of a statement used on motion for a new trial from a judgment refusing the probate of a will, as such judgment is not a "final judgment," within the meaning of Code Civil Proc. § 963, subd. 2, providing that an appeal will lie "from any special order made after final judgment."

2. Where, in a contest over the probate of a will on the ground that the testator was of unsound mind at the time of making it, the evidence is in substantial conflict as to such issue, the trial court did not abuse its discretion in granting a new trial from a judgment refusing the probate.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Proceeding by Harry R. Smith and Allie W. Plumb against Octavia S. Smith to contest the probate of the will of John B. Smith, deceased, on the ground of mental incapacity of the testator. There was judgment refusing the probate. From an order permitting proponent to amend her statement used on motion for a new trial, and from an order granting a new trial, contestants appeal. Dismissed as to order permitting amendment. Affirmed as to order granting a new trial.

James W. Oates, Emmet Seawell, and J. P. Rogers, for appellants. Lippitt & Lippitt and A. B. Ware, for respondent.

SEARLS, C. This was a contest in the court below over the probate of the alleged will of John B. Smith. The contest was inaugurated by Harry R. Smith and Allie W. Plumb, son and daughter of deceased, upon the grounds that at the date of the execution of the will (December 28, 1878) said testator was not of sound and disposing mind and memory. There were other objections to the will, but the evidence was confined to the one above stated, upon which the contest was determined; hence the others are unimportant here. Upon the objection stated, the following issue or question was submitted to the jury: "Was John B. Smith of sound and disposing mind and memory when he made the proposed will, to wit, on December 28, 1878?" To this the jury returned for answer, "No." A decree was entered January 27, 1892, (the day the verdict was filed,) adjudicating that said John B. Smith, at the date of the execution of the will, (December 28, 1878,) was not of sound and disposing mind and memory, and refusing to admit the alleged will to probate. Octavia Susie Smith, the proponent, in due time gave notice of a motion for a new trial, upon the grounds: (1) Insufficiency of the evidence to justify the verdict; (2) errors of law occurring at the trial, and excepted to by the proponents of

the will. A statement in support of the motion was settled and allowed by the judge, and filed June 13, 1892, and, on the 24th day of June following, the motion for a new trial was argued, and taken under advisement by the court. On the 9th day of July thereafter, the attorneys for proponent gave notice of a motion to amend the specifications of error and insufficiency of the evidence in their statement on motion in important particulars, whereupon, on motion, the court set aside the order of submission of the motion for a new trial, and on the 25th day of July, 1892, granted the motion to amend the specifications, against numerous objections on the part of plaintiffs, (contestants,) among which objections were: (1) That no affidavit or evidence of mistake, inadvertence, surprise, excusable neglect, or fraud was furnished to the court; (2) because it was not proposed to set aside the certificate of the judge settling the statement; (3) because the statement had been settled by the judge, and there was no motion to set aside or cancel the same; (4) because the several proposed amendments raise new questions not raised by the original specifications. The action of the court in the several steps was objected to in ample form, and the rulings duly excepted to. The motion for a new trial was again submitted under the statement as amended, and a new trial was granted. This appeal is from the order granting a new trial, and from the order amending the statement on motion for a new trial. Virtually, there are two appeals,—one from the order amending the statement; the other from the order granting a new trial.

The first question presented is as to the right of appeal from the order amending the statement. Counsel for appellants contend that the appeal is properly taken from both orders under subdivision 2, § 963, Code Civil Proc. The subdivision of section 963 referred to provides for an appeal from various enumerated orders, among which are "from an order granting or refusing a new trial," and "from any special order made after final judgment." It is urged that the judgment refusing to admit the will to probate is a final judgment, within the purview of the Code, and, as the order permitting the amendment to the statement was subsequent thereto in point of time, it is "a special order made after final judgment," and hence appealable. In *Estate of Calahan*, 60 Cal. 232, which was an appeal from an order of the superior court vacating a decree of distribution and settlement of the final account of the executor, this court, in determining whether or not the order was appealable, held that the orders in probate proceedings from which an appeal would lie were only those enumerated in the third subdivision of section 963, Code Civil Proc., and in referring to the provision in subdivision 2 of the section, which gives

an appeal from "a special order made after final judgment," said: "But we think that the final judgment there referred to is the one mentioned in subdivision 1, viz. a final judgment in an action or special proceeding commenced in a superior court, or brought into a superior court from another court. It seems to us quite clear that the appealable judgments and orders made in probate proceedings are all enumerated in subdivision 3, and, as this order is not therein mentioned, it is not an appealable order." In *Estate of Walkerly*, 94 Cal. 352, 29 Pac. Rep. 719, the court, through McFarland, J., said: "The general rule is well established that appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in subdivision 3 of section 963 of the Code of Civil Procedure." The court further added as follows: "And that the order here appealed from is not a 'special order made after final judgment,' within the meaning of the second subdivision of said section 963, is also settled by the authorities first above cited. *Estate of Dean*, 62 Cal. 613; In re *Moore's Estate*, 86 Cal. 58, 24 Pac. Rep. 816; *Estate of Wiard*, 83 Cal. 619, 24 Pac. Rep. 45; *Estate of Calahan*, 60 Cal. 232. If it were otherwise, the third subdivision of said section could be entirely disregarded by simply assuming that a probate order not therein mentioned was a final judgment, and that an order refusing to vacate it was a "special order made after final judgment." In *Estate of Bauquier*, 88 Cal. 302, 26 Pac. Rep. 178, 532, this court held that "the provisions in subdivision 2 of section 963 of the Code of Civil Procedure, which authorizes an appeal to be taken to the supreme court 'from an order granting or refusing a new trial,' embraces all such orders, whether made in probate proceedings or in civil actions." The reasons for the opinion are given therein, and need not be repeated here. The later case of *Estate of Walkerly*, cited supra, plainly indicates an intention in cases like the present to adhere to the former rulings of this court upon the subject of appeals from probate proceedings by confining such appeals to the cases enumerated in the third subdivision of section 963, except as clearly provided for by other sections of the Code. The statutory proceedings provided for in probate matters lead up to numerous independent decisions, some of which possess most, if not all, the essential requisites of a judgment. The question is, are they such final judgments as are contemplated by the Code when it gives an appeal from a special order made after final judgment? A judgment is the final determination of the rights of the parties in an action or proceeding. Code Civil Proc. § 577. "Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an 'order.'" Id. § 1003. The supreme court, in *Loring v. Illsley*, 1 Cal.

27, in discussing the distinction between an order and a final judgment, said: "The former [an order] is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the proceedings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect." In *Gilman v. Contra Costa Co.*, 8 Cal. 57, it was said: "An order is the judgment or conclusion of the court upon any motion or proceeding. It means cases where a court or judge grants affirmative relief, and cases where affirmative relief is denied." Every order of a court or judge is in one sense a judgment. In New York it was held that a decision upon a demurrer was a judgment. *King v. Stafford*, 5 How. Pr. 30. But it is not a judgment from which an appeal can be taken. *Elwell v. Johnson*, 74 N. Y. 80. The term "final judgment," from which an appeal can be taken under the first subdivision of section 963, Code Civil Proc., evidently means the ultimate or last judgment which puts an end to the suit or proceeding. In *Metcalf's Case*, 11 Coke, 68, "it was resolved that no writ of error lies till the last judgment." Lord Ellenborough declared in *Samuel v. Judin*, 6 East, 333: "Error can only be brought on final judgment." If the term "final judgment," as used in the first subdivision of section 963, applies to "a judgment or order admitting or refusing to admit a will to probate," then an appeal would lie to this court therefrom, under such first subdivision, and the provision in the third subdivision would be surplusage. We think the term "final judgment," as used in the section under consideration, applies only to those judgments known at common law as "final judgments," and that, as to the statutory determinations termed "orders or judgments" defined in the third subdivision, the term "final judgment" does not apply; hence the right to appeal is expressly given from certain of such "orders or judgments." As they are not final judgments, a special order made subsequent to their entry is not appealable, for the right to appeal from the special orders is only given in case of those made after final judgment. The appeal from the order permitting the amendment of the statement, not being an appealable order, should be dismissed.

Upon a careful survey of the whole testimony embodied in the statement on motion for a new trial, it cannot be said there was an abuse of discretion by the court below in granting the motion for a new trial. Much of the evidence upon which the theory of insanity was based related to a period ranging from 15 to 18 years prior to the execution of the will, and was not conclusive in character, being a relation

of facts and a description of conduct which might result either from a disordered mind or from uncontrolled passion. That subsequent to that time, and for a period of many years, he was a prudent, careful, shrewd man of business, accumulating property, and managing it with discretion, is abundantly proven. That he was a man of objectionable personal habits is apparent. Perhaps the court below was of opinion that evidence, uncontradicted, of capacity to accumulate property, to purchase, hold, sell, and convey with acumen, was evidence of capacity to convey to take effect after death, which is all there is of a will. Perhaps there was something in the attitude or appearance of the witnesses for contestant, or in their manner of testifying, that led the court, in the exercise of a wise discretion, to conclude that the matters in issue should again undergo investigation. It is sufficient for us to know that there was a substantial conflict in the evidence, and that the judge, who was entirely familiar with all its details, and in a much better position to give due weight to all its parts, has exercised the discretion conferred upon him by granting a new trial. To analyze the evidence in detail, and express an opinion of the value of its several parts, might tend to influence the result in a retrial of the issues of fact. This is not desired. On the contrary, the cause should be again tried, as though it had never before undergone investigation. It is recommended that the appeal, so far as it purports to be an appeal from the order permitting the amendment of the statement, be dismissed, and that the order appealed from granting a new trial be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the order permitting the amendment of the statement is dismissed, and the order granting a new trial is affirmed.

98 Cal. 591

FLOYD et al. v. DAVIS et al. (No. 14,551.)
(Supreme Court of California. June 12, 1893.)

TRUSTS—CONSTRUCTION—INTEREST—ATTORNEYS'
FEES—DISTRIBUTION.

1. Where property was left in trust, with provisions for the payment out of the proceeds of various sums to several institutions in the order named, with residue to other institutions, interest will not be allowed, to the detriment of the residue, to one of the institutions for which a special sum was to be paid, where for a time there were no funds from which to pay the institution, and where, after that, delay in payment was due to its unauthorized refusal to accept anything unless the entire amount was paid to it in a lump sum.

2. Under the provision of the trust deed that out of the proceeds of the trust fund there should be erected statuary "well worth \$100,000," an item for models, which proved unsatisfactory and were rejected, should not be de-

ducted from the \$100,000, but from the main trust fund.

3. Under the provision that \$150,000 should be expended in the erection and maintenance of free baths, under the direction of certain trustees, compensation of the trustees for services relative to the baths should be charged to the bath fund.

4. Under the provision that \$700,000 should be expended for purchasing land and constructing and putting thereon a telescope, expenditures for attorneys' services for the express benefit of the telescope fund, and expenses for traveling on the business connected with the telescope, should be charged to the fund therefor.

5. In an action brought by the trustees against the beneficiaries for settlement of their accounts, and for leave to make a partial distribution to the residuary donees, where the various parties asked for allowances for interest, expenses, etc., each trust should be charged with its own attorneys' fees.

6. Under the provisions of a trust deed, that, after making the various specific payments in the order named therein, the residue should be turned over to certain institutions, the court had no authority to order payments to the residuary donees before the discharge of the other trusts, though it could be done without possibility of injury to them.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Richard S. Floyd and others against Horace Davis and others. Decree, from which defendants appeal. Reversed.

S. W. Holladay, John H. Boalt, Nathaniel Holland, and Harold Wheeler, for appellants. Horace W. Philbrook, Ira P. Rankin, John O. Earl, and Boyd, Fifield & Hoburg, for respondents.

GAROUTTE, J. This action was brought by the plaintiffs, as surviving trustees of the James Lick trust, against the various beneficiaries under the trust deed, for two purposes: (1) That the accounts of the trustees might be examined, allowed, and settled, and their administration of the trust sanctioned; (2) that they might have the permission of the court to pay over to the California Academy of Sciences and the Society of California Pioneers, residuary donees, a part of what would in the end be coming to them. This application involved a modification of a prior decree, which had declared that no money or property was to be paid or transferred to the residuary donees until the preceding trusts should have been fully executed and performed. This application on their part arose from the fact that by the sale of the Lick House property in October, 1888, they had become possessed of ample funds to complete all the prior trusts, and to pay over to the residuary donees a large part of what would be coming to them. The various beneficiaries named in the trust deed appeared by answer and cross complaint, and the trial resulted in a decree of the court settling the accounts of the trustees up to the 6th day of September, 1889, and granting them permission to pay the said residuaries, the

Pioneers and Academy of Sciences, \$300,000 each. The decree also allowed the School of Mechanical Arts interest upon the sum of \$535,000 from October, 1888, that sum being the amount due from the trustees for the purpose of founding the school. Various allowances were also made from the main trust fund for the payment of attorneys' fees and other expenses. From the foregoing decree of the court the Pioneers and Academy of Sciences have appealed upon the following grounds: (1) In deciding and adjudging the sum of \$1,025, expenses incurred for legal services on account of the telescope, to be charged to the general fund, and in diminution of the residue. (2) In deciding and adjudging that the fees allowed to the attorneys, John H. Boalt, John B. Mhoon, and Horace W. Philbrook, aggregating \$1,750, be paid out of and charged to the general fund in diminution of the residue, instead of making the fees of said attorneys payable by their respective clients. (3) In deciding and adjudging that the \$661 disbursed by the president of the Lick trustees for expenses in traveling to Cleveland, Ohio, on the special business of the Lick telescope, be paid out and charged to the general fund in diminution of the residue, and not out of the telescope fund. (4) In deciding and adjudging that the \$849.90, expenses incurred by the trustees for models, etc., of the historical statuary, be paid out of and charged to the general fund in diminution of the residue, and not charged to the special trust providing for such statuary. (5) In deciding and adjudging that interest be allowed to said California School of Mechanical Arts. And (6) in deciding and adjudging that \$3,500 shall be paid to Rankin and Earl, trustees of the bath house trust, out of the general fund. The School of Mechanical Arts has also appealed from that part of the decree (1) permitting the Lick trustees immediately to pay over to the California Academy of Sciences and to the Society of California Pioneers the sum of \$300,000 each before their execution of the other trusts precedent mentioned in the trust deed; (2) from that part of the said decree which fixes the date of October 5, 1888, as the date from which interest is to be paid on the sum of \$535,000, provided in the fourteenth trust, these defendants claiming that interest should be allowed on said balance from the 31st day of December, 1884, to the final payment of the whole of said balance.

The trust deed of James Lick measures the powers of the trustees, and is their warrant of authority. Under that deed it is made their duty to convert the trust property into money, and out of the proceeds, among other things: "Three. To expend the sum of \$700,000 for the purpose of purchasing land and constructing and putting upon such land a powerful telescope, (superior to and more powerful than any telescope

ever yet made.)" "Eleven. To expend the sum of \$150,000 * * * in the erection and maintaining in the city of San Francisco of free baths, under the direction of certain trustees, [naming them,] with authority to purchase sites," etc. "Thirteen. To erect, under the supervision of the said parties of the second part and their successors, at the city hall in the city and county of San Francisco, a group of bronze statuary, well worth \$100,000. Fourteen. To found and endow, at a cost of \$540,000, an institution to be called the 'California School of Mechanical Arts,' the object and purposes of which shall be * * *. The institution shall be founded and endowed under the direction of J. D. B. Stillman, Horace Davis, A. S. Hallidie, John Oscar Eldridge, John O. Earl, and Hon. Lorenzo Sawyer, and the survivors of them, who are directed to acquire the site thereof, and form a corporation * * *." "Eighteen. After discharging the trusts and making the payments hereinbefore mentioned in the order heretofore set forth, to make over and transfer the residue of the proceeds of the property hereby transferred and conveyed, and intended to be, in equal proportions, to the California Academy of Sciences and the Society of California Pioneers."

It appears that since the sale of the Lick House property in October, 1888, the trustees have had ample funds to carry into execution the various trusts not fully administered. For reasons hereafter noticed, they cannot be charged with laches as to the founding of the School of Mechanical Arts; and as to the causes which have prevented them since the date that funds have come into their hands from erecting the statuary at the city hall, and finally closing up the telescope, free bath, and other trusts, we have no knowledge, as this appeal is before us upon a judgment roll, which does not include the evidence. As to the conduct of these various trusts by the trustees the court has found "that all the trusts provided for in said trust deed have been executed as speedily as practicable by the plaintiffs and their predecessors, who have at all times performed their duties diligently, faithfully, honestly, intelligently, and economically; and that, although there has been a great delay in executing the trust contained in the trust deed, * * * said delay did not occur through any fault or neglect of said trustees." This is a finding that the trustees have thus far done their work faithfully, diligently, and well. It is not attacked by any of the parties interested, and, as already stated, the evidence upon which it is based is not before us; hence we are not in a position to review the finding.

It was error in the trial court to allow interest to the School of Mechanical Arts upon the money coming to that corporation, and to charge the amount of such interest

to the general fund of the trustees, thereby reducing pro tanto the residue to which the Academy of Sciences and Society of Pioneers are entitled. The School of Mechanical Arts insists that interest should have been allowed it from a time long prior to 1888. A complete answer to this contention is that the Lick trustees had no funds in their hands prior to October, 1888, to which the school was entitled, and, in the absence of inexcusable delay on the part of the trustees in carrying out the various prior trusts, (and we do not hold that such delay would justify it,) no principle of law or justice would entitle the school to interest when no funds were on hand applicable to its objects and purposes. The doctrine of *Floyd v. Forbes*, 71 Cal. 588, 12 Pac. Rep. 726, completely destroys appellants' contention in this regard, for in that case interest was denied the telescope trust, although the funds which were to be applied to the execution of that trust were in the hands of the trustees. *Floyd v. Forbes* is also squarely opposed to the decree of the trial court in allowing interest to the School of Mechanical Arts upon the amount of its endowment fund from October, 1888. It was held in that case "that the proceeds of the trust property constitute one fund out of which the trustees are to execute the several trusts specified in said deed, and that the profits arising from investments of money in their hands are to be treated as a part of such fund, and not as accruing for the benefit of any of the said trusts in the execution of which a definite sum is required to be paid or expended, so as to increase the amount of such payment or expenditure." The foregoing language of the court has no uncertain meaning, and we can only account for the claims of the School of Mechanical Arts for interest upon the amount to be applied to the execution of its trust, for the reason that *Floyd v. Forbes* had not been decided when it first advanced such plea. While the learned justice used certain language in the opinion of the court in that case as to "unnecessary or great delay" by the trustees in the execution of the trust, nothing was decided upon that line, but, to the contrary, by the language itself, the court expressly refrained from passing upon the results which would follow to the beneficiaries regarding the accumulated profits if the trustees were guilty of unnecessary delay in carrying out the objects and purposes of James H. Lick, as manifested by his trust deed. *Floyd v. Forbes* closes every avenue through which interest might be claimed by the School of Mechanical Arts save the single one of delay resulting from neglect upon the part of the Lick trustees to perform their duties under the trust. Inasmuch as the "school" had the right to call to its aid the power of the court to compel a prompt administration of its trust by the Lick trustees, and inasmuch as the trustees had no direct interest in the residue of

the trust estate, but all of said residue passes to the Academy of Sciences and Society of California Pioneers, it is not plain that "unnecessary delay" upon the part of the trustees would give the school a right to interest upon the amount coming to it under the trust deed. Certainly, under no aspect of the case could funds be taken from the money received from the Lick House sale to satisfy such claim for interest, for beyond any doubt that would be reducing the residue which Lick intended should be applied in other channels, and the Academy of Sciences and Pioneers have the same rights to the "residue" that the school has to the sum of \$540,000. Yet the claims of the school for interest, as indicated by the complaint, are made in no way dependent upon the fact as to whether profits had accumulated upon the main trust fund, but its pleading outlines a right to interest by reason of "great delay" upon the part of the trustees, even though the successful assertion of such rights should deplete the residue of all the original fund derived from the Lick House sale. Such a course can neither be law nor equity. The school has an advantage over the academy and Pioneers in being entitled to priority of payment. In all other respects they stand upon the same plane, and are entitled to the same rights. Neither is favored above the other, and one cannot be allowed to encroach upon the rights of the other. The amount of the residue is entirely immaterial as furnishing light upon the question of the rights of the school to interest. If it is entitled to interest under the law it is entitled to that interest though it drain the main fund, and leave the residuary donees without a dollar. Neither is it clear that accumulated profits arising from unnecessary delay would give the school the right to interest; for, as said in *Floyd v. Forbes*, the profits from investment pass to the main fund, and become a part thereof. Thus the profits would seem to stand on common ground with the proceeds of sales of real estate, and to be expended only for the same causes. But in the present case we have neither an allegation by the school of unnecessary delay upon the part of the trustees, nor a finding of the court to that effect. The court finds that there was great delay in executing the trust, but that such delay did not occur through any fault or neglect of said trustees. Great delay has occurred, but unnecessary delay has not occurred, and the very delay of which the school now complains, and upon the basis of which it asks interest, may have been occasioned, as far as the record indicates, by the acts of the party now seeking to gain an advantage by reason of such delay.

A second conclusive reason why the school's claims in this regard should be denied is apparent from the record. No funds came to the hands of the trustees which

could be applied to the execution of such trust until October, 1888. The school never having become entitled to the principal fund could not have been entitled to interest upon that fund. If authority were necessary to justify a denial of its claims for interest prior to that date, *Floyd v. Forbes* is that authority. From October, 1888, until October, 1890, the amount to which the school was entitled was in the hands of the Lick trustees, but the school declined to touch the money unless the entire amount was paid to it in a lump sum, and appealed to the court to support its contention to that effect. This position of the school was held untenable by the court, October 7, 1890, in the case of *Floyd v. Rankin*, 86 Cal. 159, 24 Pac. Rep. 936; consequently the two years of delay occasioned by this litigation is fairly attributable to its own conduct, and it cannot take advantage of its own default or mistake, to the loss of the residuary donees, even though its claims were advanced in the utmost good faith. The date of the decision of *Floyd v. Rankin* forms the last chapter in the history of this case, viewed by the record before us, and for the reasons given we see nothing to support the decree of the trial court in awarding interest to the School of Mechanical Arts. It is urged in its behalf that the fact of the delay being inevitable, and that the trustees have done their full duty, are equally immaterial. Upon this question the dictum of *Floyd v. Forbes*, relied upon by the school, indicates to the contrary, and clearly intimates that the unnecessary or great delay which might give it rights to interest should arise from a failure of a proper performance of the trust by the trustees. But, be that as it may, there is nothing in the record, looking at the case from any standpoint, that entitles the School of Mechanical Arts to interest.

It is insisted that an item of \$849.90 for models, diagrams, etc., furnished under an advertisement by the trustees, to be used in the erection of the statuary at the city hall, should be charged to the statuary trust, and not to the general trust fund. These articles proved unsatisfactory, and were rejected, and thus were of no assistance in carrying out this trust. The trust deed provided that the group of statuary was to be "well worth \$100,000." The meaning of this provision of the deed is that \$100,000 should be honestly and intelligently expended in the erection of the statuary. This contested item did not enter into the cost of construction, and in no way added anything to its value. After this money had been expended, the balance, to wit, \$99,150, was not sufficient to erect a group of statuary "well worth \$100,000." The item should be charged to the main trust fund.

The item of \$3,500 for services rendered by Rankin and Earl as trustees in the erection of the free baths should be charged to the bath trust. The trust deed provides

that \$150,000 is to be expended in the erection and maintaining of free baths. These parties are entitled to compensation as trustees of the free bath trust, but that compensation should come from the trust fund covered by their trust. Their services were rendered in the matter of the erection and maintaining of the free baths, and clearly become a charge upon that trust fund by the language of the trust deed itself.

The items of \$1,025 for legal services for the express benefit of the telescope trust, and of \$661 traveling expenses of the president of the board of trustees to Cleveland on telescope business, should be charged to the telescope trust. By the trust deed, \$700,000 was to be devoted to purchasing a site and constructing the greatest telescope ever made. That was the limit of the appropriation, and the foregoing items were expended in the execution of that trust. Those expenditures were as necessary, and as much a part of the cost of the site and construction, as freight upon material, or labor upon the grounds.

The items of attorneys' fees allowed to attorneys appearing in this action for the various beneficiaries under the trust deed should not be charged to the main trust fund, but are matters standing between those trusts and the attorneys. Plaintiffs brought this action to have their accounts settled, and to have a partial distribution to the residuary donees, the partial distribution being a matter in which the residuary donees were directly interested, and in which the plaintiffs had no special concern. The accounts were found correct, and are approved by the court, but the School of Mechanical Arts filed a cross complaint, asking for affirmative relief. This complaint was controverted by many of the beneficiaries, and others also appeared by answer, asking affirmative relief in the nature of allowances for expenses, attorneys' fees, etc. From that time to the present the action has been transformed into a contest between the various trusts created by the trust deed as against the academy and Pioneers representing the residue, each trust zealously guarding its own interests, possibly some attempting to protect their respective trust funds at the expense of the "residue;" while it has been of equal importance to the "residue" that the various expense accounts should be paid by the secondary trusts. For these reasons each particular trust should be charged with its own attorney's fee.

The court had no authority to order paid to the Academy of Sciences and the Society of California Pioneers \$300,000 each as a portion of the "residue" eventually coming to those beneficiaries. While there would be but the slightest possibility of injury resulting to the remaining trusts from such action of the court, and while it is the duty

of the trustees to place the funds in their hands to the uses contemplated by the trust deed at the earliest moment consistent with the faithful and intelligent administration of the trust, and while it would be a great convenience to the academy and Pioneers to secure possession of these funds at the present time, all substantial and equitable reasons supporting the decrees made, yet equity is bound by rules of law. It is not above the law. It cannot controvert the law. It is strictly within the powers of a court of equity to construe the various provisions of the trust deed, and to enforce those provisions; but it cannot set them aside. It can neither create nor substitute provisions. The will of the trustor is its will. His intentions, as evidenced by his instructions, are its guiding star, and the limitation of its power. It was the intention of James Lick, as clearly expressed in the eighteenth subdivision of his deed, heretofore quoted, that the residuary donees should be entitled to the "residue" after the previous trusts were discharged, and the payments therein provided for all made. The payment of the residue is the last thing to be done, necessarily so, for until other trusts are discharged and the moneys paid there is no residue, and, considering the uncertainties of the times, there may never be. It is entirely apparent that these were the things in the mind of James Lick when he executed the paper giving away his millions for the benefit of mankind. Aside from the foregoing consideration, this matter was directly adjudicated upon in *Floyd v. Forbes*, 71 Cal. 593, 12 Pac. Rep. 726, wherein this court said: "If the construction contended for by the appellant were the correct one, there appears no good reasons why the residuaries [referring to the academy and Pioneers] should not receive their residue as soon as the property was sold, and the different funds created. It is evident that the donor intended that the entire property should remain as security for the different trusts in the order named." For the foregoing reasons let the judgment and decree be reversed, and the cause remanded, with directions to the trial court to enter judgment in accordance with the views herein expressed.

We concur: McFARLAND, J.; FITZGERALD, J.; DE HAVEN, J.; PATERSON, J.

HARRISON, J., deeming himself disqualified, did not participate in the foregoing decision.

98 Cal. 110

CLARK et al. v. CHAPMAN. (No. 18,005.) (Supreme Court of California. April 31, 1893.)

REHEARING.

Where the principal assignment of error presented and argued by the appellant is

not trivial, and is wholly ignored in the decision of the case, a rehearing should be granted. Per Beatty, C. J., dissenting.

In bank. On motion for rehearing. Motion denied.

For report on appeal, see 32 Pac. Rep. 812.

BEATTY, C. J. I dissent from the order of the court denying a rehearing of this cause, not because any of the propositions stated in the opinion of the department are incorrectly decided, but because the principal assignment of error presented and argued in the brief of appellant is entirely ignored. The action is upon the undertaking of defendant guarantying the payment of the judgment of Wofford against Fleming. The complaint shows an assignment of the undertaking of the surety, but does not show any assignment of the judgment, and the contention of the appellant is that there can be no recovery against the surety by one party while the obligation of his principal is held by another. This proposition is seriously urged, and is supported by authority. It does not answer itself, and is not trivial. I do not think the case should be disposed of without a reference to it, or that the petition for a rehearing, based upon the omission of the court to notice it, should be denied.

98 Cal. 658

FREDERICKS v. TRACY et al. (No. 15,034.)

(Supreme Court of California. July 13, 1893.)
CLAIM AND DELIVERY—COMPLAINT—SUFFICIENCY.

A complaint in claim and delivery which shows that plaintiff was the owner and entitled to the immediate delivery of the property two days before the commencement of the action is insufficient, in that it must show such facts to exist at the time the action is commenced.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action of claim and delivery by Joseph Fredericks, doing business under the firm name of Joseph Fredericks & Co., against Mary Tracy and S. Selig. From a judgment for plaintiff, defendant Selig appeals. Reversed.

Henry I. Kowalsky and T. J. Crowley, for appellant. Jos. Rothschild, for respondent.

SEARLS, C. This was an action in claim and delivery. Plaintiff had judgment, and S. Selig, one of the defendants, appeals. The cause comes up on the judgment roll. The action was commenced on the 19th day of November, 1890. The complaint avers that the plaintiff was on the 17th day of November, 1890, the owner and entitled to the immediate possession of all the following goods and chattels, to wit, (then follows a description of the goods;) that defendants, without the consent of the plaintiff,

now detain said goods and chattels from the possession of said plaintiff; that on the 19th day of November, 1890, plaintiff demanded of the defendants possession of said goods and chattels, but to deliver possession thereof the defendants refused and still refuse; that defendants still unlawfully withhold possession, etc. The residue of the complaint is in the usual form. A demurrer was interposed, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant Selig thereupon and in due time answered, averring that on the 18th day of November, 1890, he purchased the property in question from his codefendant, etc. Plaintiff had judgment as before stated.

The question is, did the complaint state facts sufficient to constitute a cause of action? Replevin (claim and delivery) is an action at law for the recovery of specific personal chattels, wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned. It is what we usually term a "mixed action," being partly in rem, and partly in personam,—in rem so far as the specific recovery of the chattels is concerned, and in personam as to the damages. To sustain this action, plaintiff must have the right to immediate and exclusive possession at the time of the commencement of his suit. It is a cardinal principle in pleading that ultimate, and not probative, facts are to be pleaded. The ultimate fact in such an action is that plaintiff was at the time the action was commenced the owner of, or had some special property in, the chattel, coupled with a right to the immediate possession thereof. The fact that he was the owner and entitled to the possession at a previous date is evidence, from which the ultimate fact may be deduced, upon the principle that "a thing once proved to exist continues as long as is usual with things of that nature." Subdivision 32, § 1963, Code Civil Proc. This principle, however, has no application to the statement of facts in a pleading. *Alden v. Carver*, 13 Iowa, 253. In *Affierbach v. McGovern*, 79 Cal. 268, 21 Pac. Rep. 837, the complaint averred that plaintiff was the owner and entitled to the possession of the personal property on the 12th day of August, 1880. The action was in claim and delivery, and was not brought until December, 1884. There was no demurrer filed to the complaint, but, as may be done under our system, it was objected that the complaint did not state facts sufficient to constitute a cause of action. After stating that the complaint was clearly bad, the court added: "There is nothing in the complaint to show that at the time the action was commenced the plaintiff had any ownership or right to possession of the property." The alleged ownership and right to possession in that case

was long before the suit brought, while here it is placed at a date only two days prior to the commencement of the action; but this does not alter the principle, which is that the plaintiff must show his ownership and right to possession at the time the action is commenced. For this defect in the complaint the judgment should be reversed, with leave to the plaintiff to amend his complaint; and in making such amendment it is suggested that the description of the goods be made more definite by describing their situation, the building in which they were situate, that they constituted the furniture in a given house, or by such other method as will clearly identify them.

We concur: VANCLIEF, J.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with leave to plaintiff to amend his complaint if he be so advised.

99 Cal. 30

In re PEARSON'S ESTATE. (No. 14,944.)

Appeal of KINSEY.

(Supreme Court of California. July 20, 1893.)

WILL—CONSTRUCTION.

Testator, 21 years old, and not a lawyer, devised to his aunts M. and B. by holographic will, "all the real property which I hold jointly with them;" and to K., "all that property which is owned by me in the block," particularly described, "excepting therefrom that portion which I hold jointly with M. and B., and which has hereinbefore been bequeathed to them." He also directed that in case he survived both his aunts the property devised to them should be sold, and the proceeds distributed to certain charities. He had title to all the land described, but his aunts were entitled to the income of an undivided half of a certain portion of it during their lives or the life of either of them, under his mother's will. He survived his aunts. *Held*, that the devise to K. did not include that part of the land, from the undivided half of which testator's aunts were entitled to the income.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceeding by the executor of the will of Hiram Arthur Pearsons, deceased, to obtain a construction of such will. From the judgment entered, Isabella Rogers Kinsey appeals. Affirmed.

Wilson & Wilson and Lloyd & Wood, for appellant. Thos. F. Barry, I. N. Thorn, John B. Mhoon, and A. H. Loughborough, (G. W. Haight and Oliver P. Evans, of counsel,) for respondents.

FITZGERALD, J. This proceeding was brought by the executor of the last will and testament of Hiram Arthur Pearsons, deceased, to obtain a construction of the second and third clauses of that instrument. The will is holographic, and was dated at San Francisco, August 9, 1882. The testator died at Chicago, Ill., July 7, 1889, at the

age of 28 years. He was the only child of Hiram Pearsons and Ann Charity Pearsons, who died prior to the execution of his will. He had no profession, was never married, and left, surviving him, uncles and aunts, parties to this proceeding, but not named in the will, who claim, as next of kin and heirs at law, that part of his estate as to which it is alleged he died intestate, by reason of the devise to charity exceeding the statutory limit. The clauses referred to are as follows: "Second. I do give, devise, and bequeath unto Betsey Frances Mathewson and Polly Barton, my aunts, all real property which I hold jointly with them; and I direct that, in the event of the death of either Betsey Frances Mathewson or Polly Barton prior to that of my own, all property, of whatever nature, herein bequeathed to them, shall revert and vest in the survivor, her heirs and assigns, forever, and furthermore, in the event of the death of both Betsey Frances Mathewson and Polly Barton prior to my decease, the aforesaid property otherwise bequeathed to them shall be sold at public auction to the highest cash bidder, the proceeds of said sale to be equally distributed among the different orphan asylums of the city and county of San Francisco, and said asylums I request to be designated by the judge of the probate court. Third. I do give, devise, and bequeath unto Isabella Rogers Kinsey, wife of my former guardian, her heirs and assigns, forever, all that property which is owned by me, bounded on the south by Clay street, on the west by Drumm street, on the north by Merchant street, and on the east by East street, excepting therefrom that portion thereof which I hold jointly with Betsey Frances Mathewson and Polly Barton, and which has hereinbefore been bequeathed to them." It appears that the property thus devised had a frontage of 178 9-12 feet on Clay street, running through the block, with a uniform depth of 115 feet, to Merchant street, and was originally owned by Hiram Pearsons, the father of the testator, who in his lifetime granted by deed absolute, to his son, the westerly 68 9-12 feet of the 178 9-12 feet of the property in question. The remaining 110 feet thereof, including other property, he devised by will to his wife, Ann Charity, and his said son, Hiram, in equal undivided halves, "share and share alike," and upon his death the title thereto was accordingly vested in them. Afterwards, Ann Charity Pearsons died, leaving a last will and testament, by the first clause of which she devised to her son, Hiram Arthur Pearsons, "all the real and personal property which I own jointly with him;" and in a subsequent clause of her will she devises and bequeaths to her sisters, Betsey Frances Mathewson and Polly Barton, for their use during the term of their natural lives, certain real and personal property, and also "the income from all property which I own jointly with my son, Hiram Arthur

Pearsons, [which description includes the 110 feet in question,] * * * and in case my son, Hiram Arthur Pearsons, shall die before the said Polly Barton and Betsey Frances Mathewson, or either of them, the above-mentioned property shall go to them, or the survivor of them, absolutely, share and share alike, to them, or her heirs and assigns, forever." The undivided one-half interest in the said 110-feet lot owned by Ann Charity Pearsons at the time of her death was afterwards distributed, in accordance with these provisions of her will, to her son, Hiram Arthur Pearsons, "subject only to the rights, interests, and uses hereinbefore mentioned, to Polly Barton and Betsey Frances Mathewson, or to the survivor of them." Such was the condition of the title of this property on the 9th day of August, 1892, when the will was written. The testator survived his said aunts, Polly Barton and Betsey Frances Mathewson, if that be material, and the fee of the whole of this property was vested in him at the time of his death. The judgment and order construing the foregoing provisions of the will of Hiram Arthur Pearsons, deceased, substantially adjudges that by the terms thereof there is devised to Isabella Rogers Kinsey the westerly 68 9-12 feet of the 178 9-12 feet of property in question, and no more. From which judgment and order this appeal is taken by Isabella Rogers Kinsey alone.

There is but one question to be determined on this appeal, and that is whether it was the intention of the testator to devise to Mrs. Kinsey the whole of his interest in the block bounded by Clay, Drumm, Merchant, and East streets, or whether he intended to devise to her only a part thereof, and the remaining portion to his aunts. He held title to the westerly 68 9-12 feet of the 178 9-12 feet of the property in the block by deed from his father, and to one undivided one-half interest in the remaining 110 feet thereof under the will of his father, and to his mother's undivided one-half interest thereof under her will, "subject only to the rights, interests, and uses hereinbefore reserved to Polly Barton and Betsey Frances Mathewson, or the survivor of them." This reservation refers to the income devised to the aunts from the undivided half of the property devised by her to the testator, of which the 110 feet referred to was a part. By the second clause of his will he devises to his aunts "all the real property which I hold jointly with them;" and by the third clause thereof he devises to Mrs. Kinsey "all that property which is owned by me in the block," bounded as therein described, "excepting therefrom that portion thereof which I hold jointly with Betsey Frances Mathewson and Polly Barton, and which has hereinbefore been bequeathed to them." The language used by the testator in his will must be held to refer to the date thereof, and not to that of his death, for the rea-

son that he refers therein "to an actually existing state of things." Such being the case, it is a familiar rule, in the interpretation of such a will, to construe its provisions with reference to the circumstances by which he was, or understood himself to be, surrounded, and the conditions present to his mind, at the time the will was written. The general words of description used by him in the third clause of his will, by which he devises to Mrs. Kinsey all of his interest in the block, are qualified and limited by his expressly excepting therefrom, in the sentence immediately following such description, "that portion thereof which I hold jointly with Betsey Frances Mathewson and Polly Barton, and which has hereinbefore been bequeathed to them." This language plainly shows that he did not intend to devise to Mrs. Kinsey the whole of his interest in the block, but only a specific part thereof; and the circumstances and conditions referred to manifestly show that the part that he did intend to devise to her was the westerly 68 9-12 feet thereof, which he acquired by deed from his father, and was thereafter owned by him in severalty. The title to the 178 9-12 feet was acquired by him at different times, and in various ways. The 110 feet he had held jointly with his mother by virtue of the provisions of his father's will, and the income from her undivided half interest therein had been devised by her to his aunts, and was thereby made a charge upon the property during the term of their natural lives; and in the event of his aunts, or either of them, surviving him, then they, or the survivor of them, would take the fee. He was therefore jointly interested with his aunts in the income derived from the 110 feet. He was but 21 years of age when the will was written, and not a lawyer; consequently, not accustomed to, or versed in, the use of technical terms, therefore, not likely to employ words having a technical meaning, but to use words in their ordinary and popular sense, for the purpose of expressing his wishes and intentions. What, then, could be more reasonable or natural for him, under such circumstances, than to refer to the 110 feet in question as property which he held jointly with his aunts. It was in that way that he had held it with his mother; and his aunts, under her will, had succeeded, not as joint owners in the fee, but to a joint interest with him in the income arising therefrom. And, as a further illustration in support of this view, it is evident from his language that he understood that he held the whole of the property in the block under different conditions; and, acting upon this understanding, he makes a significant distinction between holding and owning. To his aunts he devises "all real property which I hold jointly with them." To Mrs. Kinsey he devises "all that property which is owned by me in the block" bounded as described, "excepting therefrom

that portion thereof which I hold jointly with Betsey Frances Mathewson and Polly Barton, and which has hereinbefore been bequeathed to them." It would indeed be a strained and unnatural construction, and one totally at variance with the intentions of the testator, as plainly expressed by the foregoing language of his will, to hold that he intended, by the third clause thereof, to devise to Mrs. Kinsey all of his interest in the block therein described. But it is claimed that, as the aunts died before the testator, they could not have held jointly with him at the time of his death, and that it therefore follows that Mrs. Kinsey takes all the property owned by him at the time of his death, because there was no person living and nothing to which the said exception was applicable. It was manifestly his intention to exclude from the Kinsey devise the 110 feet in question. He survived his aunts, who were the residuary legatees and devisees under his will, having died one week after the death of the surviving aunt. But he had provided for just such a failure of the devise to his aunts by directing that in the event of their death before his own the property devised to them should be sold at public auction to the highest bidder, and the proceeds of such sale be equally distributed among the different orphan asylums of the city and county of San Francisco. The devise to Mrs. Kinsey is a specific devise, and was clearly "intended to operate on the 68 9-12 feet referred to, and no more; and that the testator manifestly intended to, and did, except from the devise the 110 feet in question, which, by clause 2, he had devised to his aunts." From these views it necessarily follows that the judgment and order of the court below should be affirmed, and it is so ordered.

We concur: McFARLAND, J.; PATERSON, J.; GAROUTTE, J.; DE HAVEN, J.

99 Cal. 17

CONLIN v. BOARD OF SUP'RS OF CITY
AND COUNTY OF SAN FRANCISCO.
(No. 15,093.)

(Supreme Court of California. July 21, 1893.)

CONSTITUTIONAL LAW—SPECIAL ACTS FOR RELIEF
OF INDIVIDUALS.

By Sp. Act 1891, (St. p. 513,) the board of supervisors of San Francisco is directed to pay one C. a certain sum, as the amount unpaid on contracts for improvement of public streets, "for which * * * he has not been able to obtain compensation according to the mode and procedure in such cases made and provided by statute," etc. *Held* that, as the courts take judicial notice of the fact that, under statutory requirements, all contracts for improvement of streets in San Francisco contain the express condition that in no case will that municipality be liable for any portion of the expenses of such work, or for any delinquency of persons or property assessed therefor, the act shows on its face to be a "gift" of public money to an individual, within the inhibition of Const. art. 4, § 31, and hence is void.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by John J. Conlin against the board of supervisors of the city and county of San Francisco for a mandate directing defendant to allow a certain claim. Plaintiff had judgment, and defendants appeal. Reversed.

John H. Durst and Dorn & Dorn, for appellants. Mich Mullany, for respondent.

HARRISON, J. The legislature of this state, at its session in 1891, passed the following act, (St. 1891, p. 513:—) "The board of supervisors of the city and county of San Francisco are hereby authorized and directed to order paid to John J. Conlin, or his assigns or legal representatives, the sum of fifty-four thousand and fifteen dollars and thirty-seven cents, said amount being the principal, together with all the interest thereon, that remains due and unpaid to the said John J. Conlin, on contracts entered into with the said John J. Conlin by the superintendent of streets of the said city and county, for work done upon the public streets of said city and county, and for material furnished for the improvement of the said public streets; for which work done and material furnished he has not been able to obtain compensation, according to the mode and procedure in such cases made and provided by statute, by reason of errors, omissions and irregularities of the municipal officers of the said city and county, in their official proceedings concerning such work and material furnished." Thereafter the plaintiff presented his demand for the said amount to the board of supervisors, and on the 7th of December, 1891, the board refused to allow or order the same paid, whereupon the plaintiff brought this proceeding in the superior court to obtain a mandate directing the defendants to allow the claim. The defendants filed an answer to the said complaint, in which they set forth certain matters alleged to be the basis of the action of the legislature in passing the act, and pleaded that by virtue thereof the act was in contravention of certain provisions of the constitution. The plaintiff demurred to this answer, but the court overruled his demurrer, and made findings of fact upon the issues presented by the answer, but in its conclusions of law held that the validity of the act must be determined from its face, and could not be made to depend upon matters of fact not appearing thereon.

In *Stevenson v. Colgan*, 91 Cal. 652, 27 Pac. Rep. 1089, we said that "in passing upon the constitutionality of a statute the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice;" and the same principle

was repeated in *Bourn v. Hart*, 93 Cal. 321, 28 Pac. Rep. 951. The court, in the present instance, followed this rule in its conclusions of law; but its previous action, in hearing evidence, and making findings of fact, wherein it attempted to ascertain the "errors, omissions, and irregularities of municipal officers," which in its findings it assumed to be "referred to in the act of the legislature of 1891," was inconsistent therewith. It should have sustained the demurrer to the answer, and determined the plaintiff's right of action without considering the facts therein alleged. The authority of the legislature to direct a municipality to make any payment of its funds rests upon the proposition that these moneys are public moneys acquired under the authority of the state for public purposes; that as the municipality is created only as an auxiliary to the legislature, for governmental purposes, with a jurisdiction confined to a limited portion of the state, it does not cease to be under the control of the legislature; and that the legislature has the same power of disposition over the public moneys in the custody of the municipality that it has over those in the state treasury. In making application of this principle, the legislature, prior to 1879, passed many acts of relief, in which public moneys were appropriated to individuals, whose claims rested entirely upon some moral obligation, which could not in every instance be formulated in convincing or satisfactory terms; and when the constitutional convention met, in that year, it placed a restriction upon such appropriations, by the provision of section 31, art. 4, of the constitution, which declares that the legislature shall not have power "to make any gift, or authorize the making of any gift, of any public money, or thing of value, to any individual, municipal or other corporation whatever." This prohibition is, however, primarily addressed to the legislature; and when an act of that body is brought before the judiciary for review it is not to be assumed that the legislature has intentionally disregarded it, although, if the act is in manifest violation of the foregoing section, it must be declared by the courts to be invalid. The provision, moreover, is not to receive a strict and narrow interpretation, but its spirit, as well as its language, is to be followed, (*People v. Hopkins*, 55 N. Y. 81;) and, in determining whether a statute is in violation thereof, all the provisions of the statute, as well as those matters of which the court can take judicial knowledge, must be considered.

The "gift" which the legislature is prohibited from making is not limited to a mere voluntary transfer of personal property, without consideration, which the Civil Code, § 1146, gives as the definition of a "gift;" but the term, as used in the constitution, includes all appropriations of public money, for which there is no authority or en-

forceable claim, or which rest upon some moral or equitable obligation, which, in the mind of a generous, or even a just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward. The legislature is to be regarded as holding the public moneys in trust for public purposes, and this limitation of the constitution is directed against its disposal of these funds except in accordance with such purposes. All those moral considerations or demands, resting merely upon some equitable consideration or idea of justice which in an individual, acting in his own right, would be upheld, are insufficient as a basis for making an appropriation of public moneys. An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a "gift," within the meaning of that term, as used in this section; and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration. In *Stevenson v. Colgan*, supra, we said: "By these provisions of the constitution there is denied to the legislature the right to make direct appropriations to individuals, from general considerations of charity or gratitude, or because of some supposed moral obligation resting upon the people of the state, and such as a just and generous man, although under no legal liability so to do, might be willing to recognize in his dealings with others." And we also said in *Bourn v. Hart*, supra: "A legislative appropriation made to an individual in payment of a claim for damages on account of personal injuries sustained by him while in its service, and for which the state is not responsible, either upon general principles of law, or by reason of some previous statute creating such liability, is a gift, within the meaning of the constitution." The act under consideration purports to be for the "relief" of the plaintiff, and declares that the appropriation is made for the amount that remains due and unpaid upon certain contracts, for which "he has not been able to obtain compensation according to the mode and procedure in such cases made and provided by statute;" thus, by its own terms, showing that there was no legal obligation in favor of the plaintiff. The act also assigns the "errors, omissions, and irregularities of municipal officers of said city and county in their official proceedings concerning such work and material furnished" as the reason why the plaintiff has not been able to obtain compensation for the work done by him, thus clearly pointing out the cause, as well as the fact, of there being no obligation in his favor.

As we take judicial notice of the statutes under which any improvements of streets in the city and county of San Francisco have been made, we know that each of the contracts under which the plaintiff did any

work or furnished any material for the improvement of those streets contained an express condition that in no case would the city and county of San Francisco be liable for any portion of the expense of the said work or improvement, or for any delinquency of persons or property assessed. It thus appears that, by the terms of the contracts referred to in the act as the basis of the plaintiff's right to any compensation, he had expressly agreed to the exemption of the city and county of San Francisco from any liability thereunder; so that the effect of the statute would be to give him the amount of money therein specified, to which, by his own agreement, he had waived all legal claim. This can be regarded in no other light than as a simple gift. We are aware that in *Creighton v. San Francisco*, 42 Cal. 446, it was held that a similar provision in a contract did not prevent the legislature from directing the municipality to make payment to the contractor; but at that time there was no constitutional prohibition against any disposition whatsoever that the legislature might make of public moneys after they had been brought into the public treasury. It was for the very purpose of preventing such disposition that the provisions of the present constitution were inserted, and consequently the Case of *Creighton* has no authority in construing the present statute.

If the failure of the plaintiff to obtain compensation for the work done by him was by reason of any errors, omissions, and irregularities of the municipal officers, which prevented them from having any jurisdiction to order the work done, or rendered his contract invalid, these were matters which were open to the plaintiff, and could have been ascertained by him before entering into the contract. If, however, they arose subsequent to his entering into a valid contract, the statutes by virtue of which the contract was made gave him the right to have such errors, omissions, and irregularities corrected, upon an appeal to the board of supervisors, and if he failed to seek redress in this mode his loss of compensation arose from his own neglect. In either case the act of the legislature is an attempt to appropriate public moneys for purposes for which there was no legal claim or obligation. The moral claim, which, it is alleged, arose from the fact that the city had enjoyed the advantage of the work, is, as we have seen, insufficient to support the act. In *McBean v. City of San Bernardino*, 96 Cal. 183, 31 Pac. Rep. 49, a sewer had been constructed under a contract with the city of San Bernardino, which contained a clause exempting it from liability, similar to that in the contracts entered into by the plaintiff herein, and after the completion and acceptance of the sewer the city passed a resolution authorizing the payment of a portion of the cost of its construction out

of the funds of the municipality. In an action to recover this amount it was held that inasmuch as, by reason of this exemption, there had never been any liability for the work on the part of the city, the resolution to pay the amount was without any consideration to support it, and that, although the city had received the actual benefit of the work, this did not create even a moral obligation to pay for its cost. One of the reasons assigned for this conclusion was that cities are creatures of law, with powers defined by law, and that persons dealing with them are chargeable with notice, not only of the extent of their power, but also of the mode in which their power may be exercised. The principles declared in that case are controlling in this. The constitution makes the same inhibition on an appropriation of public moneys by the legislature, without any consideration, that exists against a similar appropriation by a municipality. The legislature has no more right to direct a municipality to give away the public moneys in its treasury than had the municipality without such direction. We hold, therefore, that the act in question violates the provisions of the foregoing section of the constitution, and is therefore invalid, and for this reason the judgment is reversed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; PATERSON, J.; DE HAVEN, J.

98 Cal. 642

CLARKE v. BAIRD. (No. 14,934.)

(Supreme Court of California. July 11, 1893.)

JUDGMENT BY DEFAULT—VACATION—INTERVENTION.

A default judgment ordering defendant to "disclose to plaintiff the kind and quality and quantity of the securities held by him through his dealings as broker for W., the daughter of C., deceased, concerning the money appropriated by said W. of the estate of said C., and the investments in which the said money and the proceeds thereof has been placed," was properly vacated to permit W. to file a complaint in intervention, as such judgment was merely interlocutory, and could not be made final without the presence of W. as a party.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Johanna F. Clarke, administratrix of the estate of Margaret Clarke, deceased, against Andrew Baird. There was judgment for plaintiff by default. From an order vacating such judgment, and granting leave to Hannah Wittram to file a complaint in intervention, plaintiff appeals. Affirmed.

Alfred Clarke, for appellant. Chas. F. Hanlon, for respondent.

HAYNES, C. Defendant, Baird, having failed to plead to the complaint, his default

was entered, and thereupon the following judgment or order was made and entered on November 28, 1891: "Now, on the application of the plaintiff, it is ordered that plaintiff have judgment against the defendant, that the defendant disclose to the plaintiff the kind and quality and quantity of the securities held by him through his dealings as a broker for Mrs. Hannah Wittram, the daughter of Mrs. Margaret Clarke, deceased, concerning the money appropriated by said Hannah Wittram of the estate of said Margaret Clarke, deceased, and the investments in which the said money and the proceeds thereof has been placed, and that the defendant account to the plaintiff for the whole and every part thereof, and that plaintiff have judgment for said property and the whole and every part thereof, and for damages, in addition thereto, equal to the value of said property, as required by section 1460 of the Code of Civil Procedure." On December 24, 1891, upon an affidavit filed by the attorney of Hannah Wittram, the court made an order vacating the default of the defendant, Baird, and granting leave to Hannah Wittram to file her complaint in intervention, which complaint, the order recited, was attached thereto, and from this order the plaintiff appeals.

The complaint in the action against Baird is not contained in the record, but the judgment sufficiently discloses its character. The judgment, however, is not a final judgment, but an interlocutory one, ordering an accounting. It did not find that he was indebted to the estate of Mrs. Clarke, but ordered that he disclose the kind, quality, and quantity of securities held by him through his dealings with Mrs. Wittram, "concerning the money appropriated by said Hannah Wittram of the estate of Margaret Clarke, deceased, * * * and that defendant account to the plaintiff for the whole and every part thereof." No final judgment could have been properly entered against the defendant without further proceedings. It disclosed, however, that whatever securities the defendant had in his possession he received from Hannah Wittram, and no final judgment or order for the surrender of such securities, or moneys arising therefrom, to the plaintiff, could properly be made without the presence of Hannah Wittram as a party. What the plaintiff expected to accomplish by the proceeding without making her a party it is difficult to conceive. The order was improvidently made, and was properly vacated upon the interest of Mrs. Wittram being called to the attention of the court.

The objection that an intervention cannot be permitted after final judgment has no application here. Final judgment could not have been had in the action without her presence, and the plaintiff might properly have been ordered to make her a defendant. Besides, the so-called "judgment" was vacated, and the case stood as though no judg-

ment had ever been entered at the time her complaint in intervention was filed. No affidavit of merits was required. Sufficient appeared upon the face of the order vacated to require its vacation, and to show that Mrs. Wittram's intervention was proper. The order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

93 Cal. 644

MALLORY v. THOMAS. (No. 15,041.)

(Supreme Court of California. July 12, 1893.)

TRESPASS—COMPLAINT—SUFFICIENCY.

A complaint in an action for a trespass upon premises occupied by plaintiff, resulting, as alleged, in the destruction of her property and business, and causing her mental and physical distress, which does not aver the value of the property destroyed, and the amount of damage to her premises and business, is bad on demurrer.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by K. S. Mallory against J. H. Thomas. From a judgment for plaintiff, defendant appeals. Reversed.

Fred L. Button, for appellant. J. P. McElroy and J. H. Lucas, for respondent.

HARRISON, J. The plaintiff brought this action to recover damages for an alleged trespass and destruction of certain property, and set forth in her complaint the trespass of the defendant in entering upon her premises, charging that the defendant "tore down the ceiling overhead, a partition wall, the plastering on the front of said building, and caused great damage to plaintiff's goods and business, and rendered said premises unfit for the uses and purposes of plaintiff's business, and thereby broke up and destroyed said business of plaintiff;" and also alleging that the same was done in a threatening and terrorizing manner, so that she suffered great mental and physical distress, and that she was damaged thereby in the sum of \$5,000. The defendant demurred to the complaint, upon the ground of its uncertainty, setting forth the particulars thereof. His demurrer was overruled, and, upon the trial, judgment was rendered in favor of the plaintiff, from which the defendant has appealed.

In many states uncertainty is not a ground of demurrer, the remedy being by motion to make the pleading more certain; but in this state the Code of Civil Procedure (section 430) permits a demurrer upon this ground, and, if such demurrer is improperly overruled, the reversal of a judgment entered upon the complaint must follow. See Reynolds v. Lincoln, 71 Cal. 190,

9 Pac. Rep. 176, and 12 Pac. Rep. 449. In an action for damages resulting from the destruction of property, the pleader should aver the value of the property alleged to have been destroyed, as that is an essential element in determining the amount of his damage; and if, in addition thereto, he has sustained any special damages, the amount of such special damages, as well as the circumstances justifying their recovery, should be alleged, the rule on this point being that only such damages as are the natural consequences of the act which constitutes his right of recovery can be recovered without special averment, and whenever the special damages which the plaintiff seeks to recover do not all flow from the same facts, but depend upon the proof of different circumstances, the grounds for each claim of special damage should be alleged. In the present case the plaintiff should have alleged the value of the property destroyed, the amount of damage done to the premises occupied by her, and the damages sustained by the injury to her business. Each of these elements constituted a distinct portion of the plaintiff's claim, and was capable of exact statement, and the defendant had the right to be informed of the amount of the claim for each, so that he might be prepared with evidence at the trial to meet the claim. He might be willing to concede the amount claimed for each, and limit his defense to the claim for punitive damages. In Grandona v. Lovdal, 70 Cal. 161, 11 Pac. Rep. 623, the plaintiff alleged that the act of the defendant in allowing certain trees to grow near the boundary of his land had caused him damage by lessening the value of the land, and by reason of their shade and the leaves falling therefrom upon his land, and it was held that the complaint was ambiguous and uncertain, because it did not state the amount of damage resulting from either the shade, the falling leaves, or the decrease in the value of the land.

The demurrer to the complaint should have been sustained, and the judgment of the court below is reversed.

We concur: GAROUTTE, J.; PATERSON, J.

89 Cal. 83

NAFTZGER v. GREGG et al. (No. 14,705.)

SAME v. MONTAGUE et al. (No. 14,704.)

(Supreme Court of California. July 21, 1893.)

ACTION ON NOTE — DEFENSE — SUFFICIENCY OF FINDING — EVIDENCE OF BAR — COMPETENCY OF APPEALABLE JUDGMENT.

1. In an action on notes made by defendants, the answer alleged that the notes were given for the deferred payments for land purchased of plaintiff on a contract by which it was agreed that, if defendants failed to comply with the terms thereof, plaintiff would be released from all obligations to convey the land to them, and that plaintiff has not executed to defendants the deed of the land. Held, that the answer constitutes a complete defense to

the action, and the finding of fact that the same is true is sufficient to support a judgment for defendants. Beatty, C. J., dissenting.

2. Since Code Civil Proc. § 1049, provides that an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, an appealable judgment is not admissible in evidence as a bar to a subsequent action. Harrison and Paterson, J.J., dissenting, on the ground that such judgment is competent and admissible on a plea in bar, but does not of itself constitute a bar.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by A. H. Naftzger against Frank W. Gregg, S. S. Patton, and W. F. Montague. Defendants had judgment, and plaintiff appeals. Affirmed.

Action by A. H. Naftzger against W. F. Montague, Frank W. Gregg, and S. S. Patton. Defendants had judgment, and plaintiff appeals. Reversed.

E. B. Stanton and Chapman & Hendrick, for appellant. Goodcell & McIntyre, for respondents.

PER CURIAM. The above-entitled causes, between the same parties, and relating to the same subject-matter, will be considered together, for convenience, if not of necessity. As No. 14,705 was first tried, it will be first stated: It is an action upon two promissory notes, and made by the defendants, each for \$2,500, dated September 8, 1887, one payable one year, and the other two years, after date. It was commenced March 10, 1890. The complaint is in two counts, in the usual form, and is on its face sufficient. The answer of the defendants expressly admits each and every allegation of the complaint, but alleges that there was no consideration for said notes, or either of them, other than a written contract of even date with the notes, whereby the plaintiff agreed to sell and convey to the defendants, and the defendants agreed to buy from plaintiff, a certain lot or parcel of land, and to pay therefor \$7,000,—\$2,000 upon the execution of the contract, \$2,500 in one year, and \$2,500 in two years, from date of contract; the deferred payments being evidenced by the two notes described in the complaint. A copy of the contract is exhibited as a part of the answer, and contains the following: "In the event of a failure to comply with the terms hereof by the said parties of the second part, [defendants,] the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said parties of the second part shall forfeit all right thereto; and the said party of the first part, on receiving such payments at the time and in the manner above mentioned, agrees to execute and deliver to the parties of the second part, or to their assigns, a good and sufficient deed, conveying said land free and clear of all incumbrances made, done, or suffered by the said party of the first part; * * * and that time is of the essence of

this contract." The answer further alleges that the defendants paid \$2,000 at the time the contract was executed, and that "the plaintiff has not executed to the defendants the deed provided for in said contract, or any deed of conveyance of said land, or any part thereof." The court found as facts the execution of the contract; that defendants paid thereon, at the time it was executed, \$2,000; that the notes in suit were given at the same time, as a part of the same transaction; and that "the plaintiff has not executed to the defendants the deed provided for in said contract, or any deed of conveyance of said land, or any part thereof,"—and, as conclusions of law, found "that the plaintiff is not entitled to any relief in this action," and "that the defendants are entitled to judgment against the plaintiff for their costs," and rendered judgment accordingly on July 29, 1890. The plaintiff appealed from this judgment on July 9, 1891, upon the judgment roll, without a bill of exceptions.

No. 14,704 is an action, commenced October 11, 1890, upon the same two promissory notes, to recover the amount alleged to be due thereon, and to enforce the vendor's lien upon the lot described in the contract of sale. The complaint differs from that in the former action (No. 14,705) only in that it sets out the contract of sale, alleges that the notes were made to secure the unpaid purchase money, and "that after the maturity of said promissory notes, and before the commencement of this action, the plaintiff tendered to said defendants a good and sufficient deed, conveying to the defendants the said premises described in the said agreement, free and clear of all incumbrances made, done, or suffered by the plaintiff, * * * and at the same time demanded of said defendants payment of the said promissory notes, but that said defendants then refused, and ever since have refused, to accept the said deed, and then refused, and ever since have refused, to pay the said promissory notes, or any part thereof, and "that at the time of the maturity of said promissory notes the plaintiff was, and ever since has been, and still is, ready, willing, and able to carry out and perform his said agreement on his part, and to deliver to said defendants a good and sufficient deed, conveying said premises to said defendants free and clear of all incumbrances made, done, or suffered by the plaintiff, and he hereby offers to deliver such deed upon payment of said notes." In their answer to this complaint the defendants "admit each and every averment thereof, except that, as to the averment that the plaintiff was and is the owner of the land described in said amended complaint, these defendants are not sufficiently informed to enable them to answer the same, and therefore they deny that the plaintiff was at any of the times mentioned in the complaint, or that he now is, the owner of said land, or able to convey a good title there-

to to defendants." For a further answer they pleaded the former judgment in the above-entitled cause, No. 14,705, as a bar to this action. The plaintiff demurred to each branch of the answer on the ground that it stated no defense. The demurrer was overruled, and the cause was tried by the court. The court found as facts that the former action was between the same parties, and for the same cause, and that it was therein adjudged and determined that the averments of the answer therein were true, that the plaintiff had failed to perform said contract of sale on his part, and that he was not entitled to any relief against the defendants on account of said notes, or the purchase price of said land, and, as a conclusion of law, found that by the judgment in the former action the plaintiff is estopped from maintaining this action, and accordingly rendered final judgment in favor of defendants on July 7, 1891. From this judgment, plaintiff appealed on July 9, 1891, upon the judgment roll, containing a bill of exceptions.

1. On the appeal from the former judgment (No. 14,705) the appellant contends, in substance, that no defense to the action was either pleaded by defendants, or found by the court, and that plaintiff was entitled to judgment upon the pleadings and findings of fact. It is true that the averment in the answer that the plaintiff had not executed to defendants the deed provided for in the contract, and the finding of the court that this averment was true, were entirely immaterial, since the plaintiff was under no obligation to execute the deed until the purchase money was tendered or paid, and could not be put in default without a tender of the purchase money by the defendants. *Englander v. Rogers*, 41 Cal. 420; *Newton v. Hull*, 90 Cal. 487, 27 Pac. Rep. 429. But the setting out of the contract, and the averment that the execution of the contract and the making of the notes were parts of the same transaction, and that the contract was the only consideration for the notes, were material, since it thereby appeared that "the covenants of the vendor and vendee were mutual and dependent, and neither could put the other in default except by tendering a performance on his own part, unless the other party either waived the tender, or by his conduct rendered it unnecessary." *Englander v. Rogers*, supra. And also that the complaint was defective in that it did not set out the contract of sale, nor aver that plaintiff had tendered to defendants a deed of the land. The averment of this new matter in the answer was a complete defense to the prima facie cause of action stated in the complaint, and the finding by the court that this new matter was true supports the judgment. It may be that the plaintiff might have obtained leave to amend his complaint by adding the averment that he had tendered a deed before the commencement of the action, if the fact had

been so. But for some reason, which does not appear, he did not so amend his complaint. There was no averment in the pleading of either party, and consequently no finding, as to whether or not the plaintiff had tendered a deed, yet facts were pleaded by defendants, and found by the court, from which it resulted, as a legal conclusion, that the plaintiff had no cause of action. The plaintiff had failed to set forth that part of the contract which required him to tender a deed as a necessary condition of his right to recover on his notes, and also failed to state that he had performed that condition; and the new matter stated in the answer only partially supplied the deficiency, as it contained nothing in respect to a tender of the deed. It devolved upon the plaintiff to allege and prove that he had tendered a deed; otherwise, it did not appear that the defendants were in default. The authorities, in addition to those above cited, which warrant this conclusion, are numerous, and a large collection of them may be found in 2 Bing. Real Prop. p. 716, c. 12 et seq.

2. On the appeal from the subsequent judgment (No. 14,704) the appellant contends, first, that his demurrer should have been sustained to that part of the answer which denies that plaintiff was the owner of the land he agreed to sell to defendants, or able to convey a good title thereto, and puts the denial on the ground that "these defendants are not sufficiently informed to enable them to answer the same." Section 437, Code Civil Proc., provides: "If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground." It seems obvious that the denial in this case is not in substantial compliance with the Code, since it does not state that defendants have no belief on the subject sufficient to enable them to answer. But the point is of no importance, for the reason that the court made no finding upon the issue attempted to be made by this denial, and placed its decision solely upon the ground that the former judgment is a bar to this action.

But it is claimed that the court below erred in admitting in evidence, against plaintiff's objection, the judgment in the former action, because it had not become final, with reference to the subject-matter thereof, as the time for appeal therein had not expired when the trial of this cause was had. We think this claim should be sustained. Section 1049 of the Code of Civil Procedure provides that an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal is passed, unless the judgment is sooner satisfied. It appears that the judgment in the former action was given and entered July 29, 1890,

and that said action was still pending, within the meaning of the provisions of the foregoing section, when this cause was tried in the court below, which the record shows was commenced on March 12, 1891,—more than four months before the time for appeal had passed. It therefore follows that the court erred in admitting in evidence the judgment roll in the former action, against plaintiff's objection, in bar of plaintiff's right to recover in this action. *Harris v. Barnhart*, (Cal.) 32 Pac. Rep. 589. Let the former judgment (No. 14,705) be affirmed, and the latter judgment (No. 14,704) be reversed, and the cause remanded for a new trial.

HARRISON, J. I concur in the judgment. In my opinion, however, the error of the court below was not in admitting the judgment roll in evidence, but in determining that it constituted a bar to the plaintiff's right of recovery. The evidence offered—the judgment roll—was relevant to the issue presented by the answer, and of a character competent to establish that issue. The objection that it was not sufficient in itself for that purpose went to its weight, and not to its admissibility. It was a judgment that had been rendered between the same parties upon the same cause of action, and by a court of competent jurisdiction; and unless it is to be held that a judgment is not, under any circumstances, admissible in evidence until the time for an appeal therefrom has expired, the court properly received it. Section 1049, Code Civil Proc., does not purport to prescribe a rule of evidence, but merely to determine the condition of an action after judgment has been rendered, and, inferentially, the effect of the judgment; and there are many cases in which a judgment is admissible in evidence at any time after its entry. The court could not anticipate that this was all the evidence to be given upon that issue, and thus exclude it from being considered. It might be shown that there had already been a final determination upon appeal, or that the parties had consented that there should be no appeal. When, however, upon the submission of the case, it appeared to the court that a year had not elapsed since the entry of the judgment, and no other evidence upon that issue had been introduced, the court should have held that it did not constitute a bar, for the reason that under the provisions of section 1049, Id., the action was deemed to be still pending.

PATERSON, J. I concur in the views of Mr. Justice HARRISON.

GAROUTTE, J. I concur.

BEATTY, C. J. I dissent. I think the judgment in No. 14,705 is erroneous, and should be reversed. In the other case, (No. 14,704,) I concur in the judgment of reversal.

(99 Cal. 52)

BERGIN v. HAIGHT et al. (No. 14,993.)
(Supreme Court of California. July 21, 1893.)
**ADMINISTRATOR'S SALE—WHEN SET ASIDE—
FRAUD.**

1. Where a mere volunteer institutes probate proceedings on an estate in which he has no interest, for the ostensible purpose of paying the debts of the estate, but in reality to procure the sale of part of the estate to himself, and, by securing the appointment of his own agent as administrator, controls the proceeding, and accomplishes his purpose, there is such fraud as will entitle an innocent purchaser from heirs of the decedent to have the sale, and the decree confirmatory thereof, set aside.

2. An action to quiet the title of the property, instituted for such a purpose, is not a collateral attack on the decree confirming the sale.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by Thomas I. Bergin against George W. Haight and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Geo. W. Haight and Edward W. R. Taylor, for appellants. Sullivan & Sullivan, for respondent.

PER CURIAM. Action to quiet the alleged title of plaintiff to five undivided twelfth parts of a lot of land situate in the city of San Francisco. The judgment of the trial court was in favor of the plaintiff, and the defendants appeal from the judgment, and from an order denying their motion for a new trial. The cause was tried by the court, and findings were expressly waived. It appears that Francisco Soto, who died intestate in this state in 1856, was seised of the lot in question at the time of his death, and that he left surviving him five sisters and a brother, who were his only heirs at law. In March, 1866, two of these sisters conveyed to plaintiff an undivided half of all their right, title, and interest in said lot, by deed of grant, bargain, and sale, which was duly recorded August 10, 1870. Thereafter, on April 7, 1868, three others of said heirs conveyed to plaintiff an undivided half part of all their right, title, and interest in said lot, by a like deed, which was also recorded on August 10, 1870; and it is admitted that, by virtue of these conveyances, plaintiff was the owner of an undivided five-twelfths of said lot at the time of the commencement of this action, unless he had been divested of his title thereto by an alleged sale of the lot, by order of the probate court, to James Gordon, under whom the defendant Haight claims title to the entire lot. It is alleged in the complaint, however, that the order of sale, and the confirmation thereof to Gordon, under whom defendant claims, were fraudulently obtained, by collusion of the administrator with Gordon and the defendant Haight; that the administrator was

merely the passive and willing instrument of defendant Haight, by which the latter, in fact, administered upon the estate, and, through Gordon, became the purchaser of the property at his own sale thereof.

The principal point made by appellants is that the evidence does not justify the finding of the fraud charged; but, after a careful consideration of the facts and circumstances of the case, we cannot say that they would not justify a finding that the defendant Haight procured the appointment of Sander, and employed the proceedings in probate for the purpose of securing the title in himself; that he, in fact, administered upon the estate, and, through Gordon, became a purchaser at his own sale. It would serve no useful purpose to detail the facts and circumstances upon which we think an implied finding, such as stated above, may be supported. The court below saw and heard the witnesses, and there being, in our judgment, a substantial conflict, upon material testimony, tending to establish or rebut the allegation of fraud, its decision is conclusive upon us. Upon the findings necessarily implied in the decision of the court below, we entertain no doubt as to the right of the plaintiff to the relief herein sought. A mere volunteer, who institutes proceedings in probate upon an estate in which he has no interest, and for the ostensible purpose of paying the debts of such estate, but in fact to procure a sale of a part of the estate to himself, and directs, controls, and manages the proceedings in probate successfully to that end, has no standing in a court of equity. Such a sale is voidable, and will be set aside at the instance of any one injured thereby.

It is claimed by appellants that this is a collateral attack upon the orders of the probate court, and that since the record of the proceedings show that the court had acquired jurisdiction, and that the proceedings were upon their face regular, the order confirming the sale cannot be thus attacked. It is true the court did acquire jurisdiction to administer upon the estate, and to order and confirm the sale of the property; but it does not follow therefrom that this is a collateral attack. The attack is a direct attack upon the sale, on the ground of fraud, and as such is authorized by law. *Van Fleet, Collat. Attack*, pp. 4, 5, 15, and authorities cited. It is not every species of fraud, however, which may be the basis of an action to vacate an order or judgment. To be actionable, as stated by our chief justice in *Pico v. Cohn*, 91 Cal. 129, 25 Pac. Rep. 970, and 27 Pac. Rep. 537, it must be a "fraud extrinsic or collateral to the questions examined and determined in the action. * * * Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit, or where an

attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client." The fraud herein relied upon falls within the principle illustrated by the example stated above, and certainly within the principle underlying many other cases. *Jones v. Hanna*, 81 Cal. 507, 22 Pac. Rep. 883; *Johnson v. Waters*, 111 U. S. 667, 4 Sup. Ct. Rep. 619; *Griffith v. Godey*, 113 U. S. 93, 5 Sup. Ct. Rep. 383; *Mayberry v. McClurg*, 51 Mo. 256; *Hardy v. Broadus*, 35 Tex. 668; *Warner v. Blakeman*, 43* N. Y. 487; *Larue v. Friedman*, 49 Cal. 278; *Caldwell v. Caldwell*, 45 Ohio St. 513, 15 N. E. Rep. 297. The plaintiff had only constructive notice of the administration, and proceedings to sell. Furthermore, there was nothing upon the face of the proceedings to indicate a fraudulent collusion between the administrator and his attorney. There was no opportunity to determine an issue of fraud in the probate court. The administrator was acting as trustee and agent for the owners of the property, whether such owners were heirs or assignees of heirs, and the defendant stood in the same confidential relation. *Ex parte James*, 8 Ves. 343; *O'Dell v. Rogers*, 44 Wis. 136-178; *West v. Waddill*, 33 Ark. 586; *Phillips v. Benson*, 82 Ala. 500, 2 South. Rep. 93; *Hawley v. Cramer*, 4 Cow. 718-733; *Baker v. Humphrey*, 101 U. S. 494.

The judgment and order are affirmed.

HARRISON, J., being disqualified, did not participate in the foregoing decision.

98 Cal. 671

McCOY v. VAN NESS. (No. 15,032.)

(Supreme Court of California. July 14, 1893.)
ACTION ON JUDGMENT—SUFFICIENCY OF EVIDENCE

In an action on a judgment, service in the previous action is sufficiently shown, in the absence of any showing to the contrary, by recitals in the default and the judgment, contained in the judgment roll introduced in evidence, that "defendant was regularly served with process."

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Josephine L. McCoy against Thomas C. Van Ness. From a judgment for plaintiff, defendant appeals. Affirmed.

Horace G. Platt, for appellant. James L. Crittenden, for respondent.

PATERSON, J. One Hardesty recovered a judgment against the defendant on October 28, 1885, for the sum of \$17,548.19. The judgment was assigned by him to one McClung, and by the latter assigned to this plaintiff, who thereafter brought this action to recover the amount due on the judgment.

The only point made by the appellant on this appeal is that the plaintiff failed to show at the trial that the summons in Har-

esty v. Van Ness was served upon the defendant therein. There is no merit in this contention. The judgment roll in that case, which was introduced in evidence, contains the default entered by the clerk, the complaint, the summons, with the return thereon, and the judgment and certificate of the clerk thereto. Both the default and the judgment recite that the defendant therein was "regularly served with process." These recitals are sufficient of themselves, in the absence of any showing to the contrary; but, in addition to this evidence, the affidavit of service states that the summons attached to a copy of the complaint was personally served upon the defendant on the 14th day of August, 1885, and the defendant himself admitted that he had been served with a paper which purported to be a copy of the summons, and a paper which purported to be a copy of the complaint in that action, and that he could not deny that he was served by Mr. Richardson on the day stated in the affidavit of the latter, which is annexed to the judgment roll.

Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

99 Cal. 125

BANK OF BRITISH NORTH AMERICA v. MADISON et al. (No. 14,308.)

(Supreme Court of California. July 25, 1893.)

BANKS AND BANKING—PUBLICATION OF ASSETS AND LIABILITIES—SUFFICIENCY OF STATEMENT.

1. Though St. 1876, p. 729, provides that banking corporations shall publish in January and July of every year statements of their financial condition, yet, in view of the fact that the only penalty provided for failure to so publish is that no corporation can maintain an action "until" such statement has been published, a publication of a statement before the time named in the statute for the publication of the next statement is sufficient.

2. Though the statute provides for the publication of two statements,—one of the capital stock, and the other of the assets and liabilities, of the corporation,—the publication of the two statements as one document is sufficient, where the amount of the capital stock, and the actual condition and value of the assets and liabilities, are set out in the document.

3. Under a provision of the statute that the statement of a foreign corporation shall be verified by the agent or manager of such corporation residing in the state, a verification of the statement of a foreign corporation by its resident agent, that it was true to the best of his knowledge and belief, is not open to the objection that it was not made upon actual knowledge.

4. Under a provision of the statute that the published statement shall contain "the actual condition and value of the assets" of the corporation, a statement showing the amount of cash on hand and at bankers, the amount of cash at call and short notice, the amount of investments, the amount of bills receivable and other securities, and the value of the corporation's premises, is sufficient.

5. Under a provision that the published statement shall contain "the actual condition and value of the liabilities" of the corporation,

a statement showing the amount of capital, the amount of reserve fund, the amount due depositors, the amount of circulation, the amount of bills payable and other liabilities, the amount of rebate, and the amount of undivided net profits, is sufficient.

6. Under a provision that the published statement shall set forth "where" the assets are situated, a statement reciting that part of the assets are in London, England, part in San Francisco, part in New York city, and part in Canada, without giving the amount of assets at the places named, is insufficient.

Department 1. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Action by the Bank of British North America against James Madison and others. From a judgment for plaintiff, defendants appeal. Reversed.

Daniel Titus, for appellants. Smith & Pomeroy, for respondent.

HARRISON, J. This case involves principles similar to those presented in the Bank of British North America v. Alaska Imp. Co., 97 Cal., —, 31 Pac. Rep. 726. The plaintiff seeks herein to recover from the defendants, as stockholders of the Alaska Improvement Company, their proportionate liability of the amount represented by the bills of exchange upon which the former action was brought. The defense thereto is the same as was presented in that action, and the question involved is whether the statements which the plaintiff had filed and published before the commencement of the present action sufficiently conform to the requirements of the act of April 1, 1876, (St. 1876, p. 729,) whose provisions were construed in the former case, and take the present case out of the rules there laid down.

1. The present action was commenced April 8, 1890, and the statement relied upon by the plaintiff was published and filed April 4, 1890, and it is objected that, as the act in question required the statement to be published and filed "in January and July of every year," it must be published and filed in those respective months, in order to relieve the plaintiff from the penalty prescribed by the statute. The statute does not, however, in terms, declare that any penalty shall be enforced against the corporation for a failure to publish and file the statements, or that any consequence shall result from its omission to do these acts within the designated months; and it must therefore be held that the naming of the months in the statute is merely directory. The penalties named in the statute are the liability of the officers for making a false statement, and the prohibition of the corporation from maintaining any action in the courts of this state "until they shall have first duly filed the statements herein provided for, and in all other respects complied with the provisions of this law." The use

of this phrase shows that the prohibition to maintain an action was not intended to be absolute by reason of the failure to do the acts within the designated months, but was intended to exist only "until" they should have been done. See *Byers v. Bourret*, 64 Cal. 73, 28 Pac. Rep. 61. The object of the statute is not that the statement shall be published and filed in any particular months, so much as that the public shall have information of the financial standing of the corporation; and, for the purpose of enforcing this requirement, it declares that the corporation shall not maintain any action until it shall have complied therewith. The statute does not fix the time at which the statements shall be prepared, but as some time must necessarily elapse after their preparation before they can be published, and as they are to be published semiannually, it is reasonable to hold that it is a sufficient compliance with the provisions of the statute if a semiannual statement is published and filed before the time named in the statute for the publication of the next statement.

2. Although the statute provides for the publishing and filing of two statements,—one of the capital stock, and the other of the assets and liabilities, of the corporation,—it does not require that they shall be presented in two distinct documents, nor do the appellants advance any reason in support of their objection that the incorporation of them both in one document is not a sufficient compliance with the statute. No such reason occurs to us, and we hold, therefore, that when the corporation has made proper statements of the amount of its capital actually paid in, and of the actual condition and value of its assets and liabilities, and where said assets are situated, the objection that such statements are incorporated into one document, and published and filed together, is not tenable, especially if they are recorded in each of the books kept for that purpose by the county recorder.

3. The verification of the statements under consideration sufficiently conforms to the requirements of the act. The statute requires that the "sworn statement" shall be verified, in the case of a foreign corporation, "by the agent or manager of the business of such corporation, resident in this state," "before some judge or officer of this state authorized to take affidavits to be used before any court in this state." In the present case the statements are each accompanied by the affidavit of William Lawson, "sworn to" before a notary public, in which he states that he is "the managing agent at San Francisco of the above-named bank, and that said bank has no cashier or secretary at its agency in said place; * * * that the foregoing statement is, to the best of his knowledge and belief, a true and correct statement," in the one case, "of the actual condition and value of the assets and

liabilities of said bank, and of the situation of the said assets on the 31st of December, 1889," and, in the other case, "of the capital actually and bona fide paid in money into the treasury of said bank." The objection that the affidavit is not positive, or made upon the actual knowledge of the affiant, is not tenable. Necessarily, all the transactions of a corporation are not within the actual knowledge of any one individual; and the contents of the statement required by the statute must be obtained from different sources. The legislature did not intend to require an affidavit of a higher degree than could be made on the part of the officer from whom it is demanded, and, when an affidavit is to be made of matters which are presumptively derived through information from others, it is sufficient if the affiant states that it is made to the best of his knowledge and belief.

4. The statement of the amount of capital actually paid in is as follows:

"Statement of the amount of capital of the Bank of British North America (Incorporated by royal charter, 1840) at the close of business hours on the 31st of December, 1889, and April 4, 1890:

Capital subscribed	\$4,866,500 00
Capital actually and bona fide paid in money into the treasury of said bank.....	4,866,500 00
Reserve fund	1,240,957 00
Undivided net profit.....	214,496 12

"The above accounts are made upon the basis of \$4.8665 to the pound sterling."

To this statement is annexed the affidavit of the managing agent of the plaintiff, made April 4, 1890, in which he states "that the foregoing statement is, to the best of his knowledge and belief, a true and correct statement of the capital actually and bona fide paid in money into the treasury of said bank, of the reserve fund and undivided net profits thereof at the close of business hours on the 31st day of December, 1889, and at the date of the verification of this statement."

The statement of the actual condition and value of its assets and liabilities is as follows:

"Statement of the liabilities and assets of the Bank of British North America (Incorporated by royal charter, 1840) at the close of business hours on the 31st of December and April 4, 1890.

"Actual condition and value of said bank's liabilities:

Capital	\$ 4,866,500 00
Reserve fund	1,240,957 00
Due depositors on deposit....	11,004,998 44
Circulation	1,224,452 34
Bills payable and other liabilities	8,419,612 32
Rebate	67,202 52
Undivided net profit	214,496 12

Total \$27,038,218 74

"Actual condition, value, and situation of said said bank's assets:

Cash and specie at bankers and on hand.....	\$ 2,321,978 42
Cash at call and short notice	3,749,518 76
Investments	333,588 52
Bills receivable and other se- curities	20,225,487 78
Bank premises	407,645 26
Total	\$27,038,218 74"

And to this statement is also annexed an affidavit of the manager, made April 4, 1890, that "the same is a true and correct statement of the actual condition and value of the assets and liabilities of said bank, and of the situation of the said assets, at the close of business hours on the 31st of December, 1889, and, to the best of the affiant's knowledge and belief, is a true and correct statement of the actual condition and value of such assets and liabilities, and of the situation of said assets, at the date of the verification of this statement."

The provision of the statute is that the corporation shall publish and file for record a sworn statement "of the amount of capital actually paid into such corporation, or into such banking business, provided that nothing shall be deemed capital actually paid in except money bona fide paid into the treasury of such bank * * *; and a like sworn statement of the actual condition and value of the assets and liabilities." We are of the opinion that the statements under consideration are a substantial, as well as a literal, compliance with these provisions of the act. The statute does not contemplate a detailed schedule, setting forth each asset and liability of the corporation, but its object is to show their condition and value in gross, with such distribution into groups or classes as will enable those for whose benefit the statements are required to ascertain the general condition and financial standing of the corporation as a banking institution. The statement of assets contemplated by the statute is one from which can be ascertained their condition and value, and whether they furnish a sufficient security for the public in dealing with the corporation; and this would include the general character of the securities in which its capital, as well as the moneys deposited with it, are invested; what portion thereof is available for meeting its liabilities, or may be readily converted into money therefor; and what portion is in a more permanent investment, or held as a quasi guaranty for its depositors. On the other hand, the statute contemplates such a statement of its liabilities as will show what portion thereof is immediate, and what portion remote; whether there is such a disparity between the assets and liabilities of the corporation as to render it of doubtful standing, or whether its surplus of available assets is such as to justify the public in regarding it as prosperous, and safe to deal with. These statements are intended to be general in character, and to give results, rather than details. The "condition" of the several assets and

liabilities which is to be set forth therein is not a detailed description, from which the solvency of each asset is to be determined, as that object is reached by requiring their "value" to be stated.

5. The statute requires that the statement shall also show where the assets are situated. The manifest object of this provision is to furnish information to the public within this state, and particularly to those in the locality where the corporation has its place of business, of the security which is afforded to those whom the corporation invites to deal with it as a banking institution; and for this purpose it is essential to know where its assets may be found, as well as their condition and value, in order that those wishing to deal with it may determine whether they are available for the purpose of meeting its liabilities within this state. A banking corporation doing business in California, whose assets are chiefly in a remote part of the world, would not offer as great an inducement for patronage as if its assets were within the state; and, although such fact does not prevent it from doing business here, it has been determined by the legislature that, for the protection and guidance of those who may deal with it, the public shall be informed where the assets of the corporation are situated. The declaration in the statement of the plaintiff herein is that its assets "are situated partly in the city of London, England; partly in the city and county of San Francisco, California; partly in the city of New York, New York; and partly at the other places in Canada mentioned in the affidavit hereto, where the said bank has agencies." And in the affidavit it is stated "that the places in Canada at which the said bank has agencies, and at each of which a certain portion of its assets are situated, are as follows, to wit: London; Brantford; Paris; Hamilton; Toronto; Brandon, Man.; Kingston; Ottawa; Montreal; Quebec; St. John's, N. B.; Fredericton, N. B.; Halifax, N. S.; Victoria, B. C.; Vancouver, B. C.; Winnipeg, Man." This statement fails to comply with this provision of the statute, by reason of the omission to state the amount of the assets which are situated at each of the designated places. A statement giving the amount of the assets, and that they are situated in "Great Britain" or "California," would not be a compliance with the statute, nor would the designation of six or more of the principal cities in both or either of these countries as the places where they are situated be the statement which the law requires, if the amount of the assets in each of the designated places is not also given. The requirement of the statute that the statement shall show where the assets are situated means that it shall not only point out and designate with approximate particularity the place in which they are situated, but also that, if they are situated in more than one place, the amount of the assets in each of

the several places shall be given. A statement which does not show what proportion of the assets are situated within the state of California does not afford the information which it is intended to give, and the citizen of this state who deals with the bank is not informed whether he has any security in such dealing. The state has indicated as its policy that corporations that engage in banking, whether foreign or domestic, shall at stated intervals publish to the world, for the protection of those who may desire to deal with them, certain information concerning their assets and liabilities, and it is incumbent upon every corporation that would engage in such business to make a substantial compliance therewith. The fact that the plaintiff is a foreign corporation, and that it is for that reason more difficult to comply with the statute, does not exempt it from this obligation, for the constitution, art. 12, § 15, declares that "no corporation organized outside the limits of this state shall be allowed to prosecute business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." This requirement of the statute is not unreasonable, nor is it one with which a compliance is impracticable or even difficult. It is quite as easy for the plaintiff to specify the amount of its assets in each place in which it does business, as it is to aggregate them for the purpose of giving their condition and value. It may involve a little more labor, but that results from the magnitude of its business, rather than from its nature. For the error in the court below in holding that this portion of the statement was a sufficient compliance with the statute, its judgment and order are reversed.

We concur: GAROUTTE, J.; PATERSON, J.

98 Cal. 671
EASTERBROOK v. O'BRIEN, Tax Collector, et al. (No. 15,256.)
(Supreme Court of California. July 13, 1893.)

VOID ASSESSMENTS—EQUITABLE RELIEF.

Equity will not give relief against a tax for street improvements levied under a valid act, though the proceedings were void, where plaintiff makes no offer to pay any part of the tax, though his complaint impliedly admits that some part thereof ought in fairness to be paid.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by D. E. Easterbrook against Thomas O'Brien, tax collector of the city and county of San Francisco. Other parties intervened. From a judgment against plaintiff, he appeals. Affirmed.

Haven & Haven, for appellant. Pillsbury, Blanding & Hayne, W. C. Belcher, and Geo. E. Bates, for respondents.

PATERSON, J. This action was brought to enjoin the defendant O'Brien, as tax collector, from selling a certain lot belonging to the plaintiff for taxes levied to pay the principal and interest of the "Dupont Street Bonds," under the act of the legislature providing for the widening of Dupont street, approved March 23, 1876, (St. 1875-76, p. 433.) The complaint shows that the property is situated in the district assessed for the improvement; that the preliminary proceedings prescribed by said act were duly taken; that a report of the commissioners was made to and confirmed by the county court, showing the description and cash value of lands and buildings taken for the improvement, and the damages done the same, together with the amount in which each parcel would be benefited by the improvement, amounting to \$796,837, including \$8,200 benefits to the plaintiff's lot; that the total amount of costs and damages resulting from the improvement was put at \$914,941; that after such confirmation the commissioners issued the bonds, amounting to \$1,000,000. Then follow allegations with respect to the levying of the taxes sought to be enjoined, which, it is claimed, show conclusively that the levy or assessment was wholly unauthorized, illegal, and void, but, nevertheless, sufficient in form to constitute a cloud upon the title of the plaintiff, and to impair the market value of his property. It is claimed by the appellant that the levy was improperly made, because the tax to pay the interest and the tax to pay the principal were united when the amounts for each ought to have been distinguished, and that the assessment was apportioned according to the enhanced values, as fixed by the commissioners, and not upon an annual assessment of the value of the property. In any event, it is claimed the tax collector cannot now sell the property for the delinquent assessment of any year excepting the last. It may be conceded that the levy was not properly made and that the acts complained of are not merely irregularities, but are such as to render the levy illegal and void, (matters which we do not decide,) and yet the plaintiff, in our opinion, is not entitled to any relief in equity. The rule stated by the respondent, and conceded to be correct by the appellant, is that, if the plaintiff ought in equity and good conscience to pay the tax, or any part of it, he must first pay it, or the part of it which in equity and good conscience he ought to pay, before he can ask relief from a court of equity. The allegation of the complaint in that regard is as follows: "That he has been wrongfully and unlawfully charged for more than his just share or proportion of the said annual taxes so imposed upon said land for said Dupont street taxes; and that the land and improvements thereon of plaintiff have been wrongfully and unlawfully charged with more than their legal and fair

proportion of the said annual taxes, by reason of the failure by the duly-constituted authorities of the city and county of San Francisco to assess and levy annually a separate tax upon the said lands described in said act for the payment of the annual interest upon the said bonds, and to assess and levy annually a separate tax upon the said lands and improvements for the payment of five per cent. of said sinking fund. That by the failure by said authorities to assess and levy a separate tax upon the large and valuable improvements situated on the westerly line of Dupont street, or Grant avenue, in said city, there has been imposed and charged upon the lands and improvements of this plaintiff, so located upon the north line of Sutter street, in said city as aforesaid, a much larger proportion of the taxes assessed and levied under the provisions of said act than is lawfully chargeable to said lands and improvements." There is in this allegation an implied admission that some portion of the tax, not stated, is legal and fair, and ought to be paid. Plaintiff must have had in mind some standard of fairness when he made this allegation, and recognized at least a moral obligation to bear a portion of the burden put upon the property included within the district.

Courts of equity do not review the proceedings of officers intrusted with the assessment of the property. If proceedings taken by them are void, no title will pass by a sale of the real estate, and the party claiming to be injured must litigate his rights in an action at law for the possession of the premises. Of course, there are exceptions to the rule,—as where it is shown that the lands are not at all subject to taxation, or that there is no law authorizing any proceedings therefor,—but that is not the case here. The act under which the proceedings were had was declared valid in *Lent v. Tillson*, 72 Cal. 404, 14 Pac. Rep. 71, which was brought to enjoin the tax collector from selling certain real estate for the collection of some of the taxes, the payment of which is resisted in this action. In *Weber v. San Francisco*, 1 Cal. 455, the court said, speaking of an attempt to resist the collection of an assessment for improving a street: "The work has been completed, and after plaintiff has derived all the benefit and profit therefrom * * * he comes into court when he is called upon to pay his portion of the expense, and asks in effect that he may be exempted from the general burden imposed for the common benefit of himself and others, on the ground that there are some irregularities in the mode of making the assessments. I think that should not be permitted. * * * The court below by its judgment held in effect that, as there was no equity on the side of the plaintiff, it would not interfere to prevent a sale, but would leave him to his strict legal right, if

he has any, after the sale of the premises on which the assessment was laid. I think that the decision of the court is correct in this respect." The character of the proceedings therein referred to does not appear, but, whether they were merely irregular or void, we think the conclusion therein reached was correct. So long as the moral obligation to pay any portion of the tax exists, a court of equity will not lend its aid to prevent a cloud upon the title, but will leave the party to his remedy at law. There are cases from other states cited which hold to the contrary, and there are some cases of our own court cited, in which the relief herein prayed for was granted, but in the latter no question was made as to the proper remedy. Judgment affirmed.

We concur: McFARLAND, J.; HARRISON, J.; FITZGERALD, J.

99 Cal. 74

HAYES v. LOS ANGELES COUNTY. (No. 19,103.)

(Supreme Court of California. July 21, 1893.)

TAXATION—SECOND PAYMENT—ACTION TO RECOVER—PARTIES—LIMITATION OF ACTIONS.

1. Where property is erroneously sold for taxes which have already been paid by the owner, and the purchaser again pays the same, it is a payment "more than once," within the meaning of Pol. Code, § 3804, as amended by Act March 19, 1889, providing that "any taxes, per centum and costs paid more than once, or erroneously or illegally collected, may by the order of the board of supervisors be refunded by the county treasurer."

2. The word "may," in said section, means "shall;" and, thus construed, the board having no discretion to allow or reject a claim for taxes actually paid a second time, on a refusal to allow such claim, action therefor lies against the county, without also making the state party defendant.

3. Under Code Civil Proc. § 338, providing that an action for relief on the ground of fraud or mistake does not accrue "until the discovery by the aggrieved party of the facts constituting the fraud or mistake," the action against a county for the amount paid by the purchaser at a tax sale, which had already been paid by the landowner, accrues when the prior payment is discovered, rather than when payment is made by the purchaser.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by William Hayes against the county of Los Angeles. Defendant had judgment on demurrer to the complaint, and plaintiff appeals. Reversed.

Spencer G. Millard, for appellant. James McLachlan, Dist. Atty., Waldo M. York, and B. M. Marble, for respondent.

SEARLS, C. This action was instituted to recover from the county of Los Angeles taxes levied for the fiscal year ending June 30, 1890, and paid upon a delinquent sale of property by the assignors of plaintiff. According to the averments of the complaint,

the officers assessed certain real property in the county of Los Angeles to the owner thereof, and also assessed the same property for the same fiscal year to one Samuel Stratton. The owner paid the tax levied upon the property. The assessment to Stratton was not paid, and after the usual notice the tax collector of defendant, on the 7th day of March, 1890, offered the property for sale, representing that the state and county taxes thereon for the fiscal year ending June 30, 1890, had not been paid, and were still due and unpaid. That A. W. Berry, relying upon the facts so stated by the tax collector, became the purchaser of the property, paying therefor the taxes, per centum, and costs represented to be due on account of the taxes thereon, which amounted, together with the cost of the certificate, to \$35.96. Berry received a tax certificate, which he assigned to plaintiff, and the latter, after notice had been given as provided by law, applied, on the 10th day of September, 1891, to the tax collector, and demanded a tax deed of the purchased premises, which was refused upon the ground that the tax had been paid "prior to the payment shown in the written certificate." Neither plaintiff nor his grantor had any notice that the tax upon the property had been once paid prior to the sale until September 10, 1891. On the 8th day of October, 1891, plaintiff presented to the board of supervisors of the county of Los Angeles a claim for the amount paid by his assignor on account of the double assessment, which the board refused to allow. The complaint contains other causes of action, stating facts similar to those above stated, differing only as to name, date, and amount, which causes of action aggregate the sum of \$325.35, for which judgment is demanded. Defendant interposed a demurrer to the complaint upon the grounds (1) that there is a defect of parties defendant, in that the state of California is not made a defendant; (2) that the complaint does not state facts sufficient to constitute a cause of action; (3) that the demand is barred by section 41 of the act of March 14, 1883, and of March 31, 1891, known as the "County Government Acts."

Section 3804 of the Political Code, prior to 1889, read as follows: "Any taxes, per centum and costs erroneously or illegally collected may by the order of the board of supervisors be refunded by the county treasurer." We are referred to a number of cases,—among them, *Loomis v. County of Los Angeles*, 59 Cal. 456, and *Harper v. Rowe*, 53 Cal. 234,—as tending to sustain respondent's position that no recovery can be had. On the 19th day of March, 1889, section 3804 of the Political Code, above quoted, was amended to read as follows: "Any taxes, per centum and costs paid more than once, or erroneously or illegally collected, may by the order of the board of supervisors be refunded by the county treasurer; and when-

ever any payments shall have been made to the state treasurer by the county treasurer, as provided for by sections three thousand eight hundred and sixty-five and three thousand eight hundred and sixty-six of this Code, and it shall afterwards appear to the satisfaction of the board of supervisors that a portion of the moneys so paid has been paid more than once, or erroneously or illegally collected, said board may refund such portion of said taxes, per centum and costs so paid to the state treasurer to the person entitled to the same out of the general fund in the county treasury, and said board shall thereupon certify to the state controller the amount of such taxes paid more than once, or illegal or erroneous tax, per centum and costs so collected and refunded; and thereupon said controller shall draw his warrant upon the state treasurer in favor of the treasurer of said county for the amount so certified to him, and said treasurer shall pay said warrant as in other cases." It had often occurred, prior to the amendment to the Code above quoted, that, by accident or oversight, property was twice assessed, and the taxes twice collected, yet the obstacles in the way of a recovery of the taxes thus improperly collected were so numerous and perplexing that the remedy for a recovery was scarcely worth pursuing. That the object of the statute was to obviate these difficulties, and provide a means whereby moneys collected by mistake, and to which the county and state have neither a moral nor legal right, is apparent. When the taxes upon property have for a given fiscal year been once paid by the owner, the county has no right or power to sell, or in any manner affect or incumber the land by a sale thereof. The lien of the tax is gone, and as the implied right, which, in the event of a failure to redeem, ripens into a title in the purchaser, has no existence, there is no consideration for the purchase money; and he who has paid it ought, in justice, to be entitled to recover it back. "When the consideration appears to be valuable and sufficient, but turns out to be wholly false, or a mere nullity, or where it may have been actually good, but before any part of the contract has been performed by either party, and before any benefit has been derived from it to the party paying or depositing money for such consideration, the consideration wholly fails, there a promise resting on this consideration is no longer obligatory, and the party paying or depositing money upon it can recover it back." *Pars. Cont.* (7th Ed.) p. 462; *Chapman v. City of Brooklyn*, 40 N. Y. 372; *Corbin v. City of Davenport*, 9 Iowa, 239. In *Fuel Co. v. Tuck*, 53 Cal. 304, it was said: "The authorities appear to be uniform to the effect that, where a sum of money has been paid upon a consideration which has entirely failed, the law implies a promise to refund it." The doctrine of *caveat emptor*, as applied to purchasers at a

tax sale, invoked by counsel for respondent, has no application here. Section 3804 was enacted to do justice in a class of cases where, but for its provisions, the application of the doctrine of caveat emptor would work a hardship to citizens who had paid money which it was inequitable for the county to retain. I am of the opinion that the doctrine of caveat emptor has no proper application to that class of cases in which the attempted sale of real property for taxes is absolutely void by reason of the tax having been previously paid. This view is sustained by a large number of the late authorities, but for present purposes the question is not of moment, the inquiry being directed to plaintiff's right of recovery under the statute.

It is urged by respondent that the Code, by providing that the board of supervisors may by order provide for refunding taxes, etc., paid more than once, made it optional with that body whether to do so or not, and that the board, in this instance, having refused to refund, its action is conclusive upon the plaintiff. Where the public interest or private right requires that the thing should be done, then the word "may" is generally construed to mean the same as "shall." *People v. Supervisors of Livingston Co.*, 68 N. Y. 119. Where the statute directs the doing of a thing for the sake of justice, or the public good, the word "may" is the same as the word "shall." *Rex v. Barlow*, 2 Salk. 609. Where a statute directs a thing to be done for justice's sake, "may" means "shall." *Silvey v. U. S.*, 7 Ct. Cl. 334. Where persons or the public have an interest in having the act done by a public body, "may," in such a statute, means "must." *Phelps v. Hawley*, 52 N. Y. 27; *People v. Supervisors of Otsego Co.*, 51 N. Y. 401. See *Estate of Ballentine*, 45 Cal. 696. In *Supervisors v. U. S.*, 4 Wall. 435, a statute of Illinois provided that the board of supervisors "may, if deemed advisable, levy a special tax," etc. Mr. Justice Swayne sums up the authorities on the question as follows: "The conclusion to be adduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language,—whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless." Applying the rule enunciated in the foregoing cases, and it is apparent that a sound and just rule of construction requires the permissive word "may," in section 3804, *supra*, to be construed as "shall."

There is a further contention by respondent

that the section only applies to taxpayers, as such,—a class to which plaintiff does not belong. Property taxes are levied upon, and become a lien upon, property. If the property is sold, it is to the person who will take the least quantity of the land, and pay the taxes and costs due. Section 3773, Pol. Code. "If the purchaser does not pay the taxes and costs before ten o'clock A. M., of the following day, the property, on the next sale day, before the regular sale, must be re-sold for the taxes and costs." Section 3774, Pol. Code. After receiving the amount of the taxes and costs, the collector must make out, in duplicate, a certificate. Pol. Code, § 3776. The purchaser at a tax sale pays the taxes as effectually as could have been done by the owner without a sale; and if they have been previously paid by the owner of the property, and it is therefore sold for the same tax, and the taxes again paid by the purchaser, it is a payment more than once, within the purview of the statute, for which the purchaser or his assignee may recover from the county, as provided in section 3804. It follows from this conclusion that the complaint demurred to states a cause of action against the defendant, and that the state of California is not a necessary party defendant.

There is no allegation in the complaint that the state has received any portion of the tax in question. To presume it to have done so for the sole purpose of passing upon the constitutionality of that portion of section 3804, Pol. Code, which provides the mode by which taxes of the character in question, when paid to the state, shall be refunded to the county, would require us to go outside the record, in quest of a proposition which may never arise in the case.

The further point is made by the demurrer that plaintiff's cause of action is barred by the provision of section 41 of an act of the legislature of the state of California entitled "An act to establish a uniform system of county and township governments," approved, etc. The section in question requires all claims to be presented to, and filed with, the clerk of the board of supervisors, within one year after the last item in the account or claim accrued. The tax in question was paid by the assignor of plaintiff on the 7th day of March, 1890. Neither plaintiff nor his assignor was aware that the tax had been paid more than once until September 10, 1891, when the tax collector refused to deliver the tax deed. The claim was presented to the board of supervisors October 8, 1891, and rejected October 14, 1891. The fourth subdivision of section 338, Code Civil Proc., provides: "An Action for Relief on the Ground of Fraud or Mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (1) The claim of plaintiff under the statute was inchoate

until September 10, 1891, when the collector furnished him the official evidence that the tax had been previously paid. Prior to that time he possessed no evidence that a deed would not be forthcoming upon demand. It was his demand for a deed, and the refusal by the collector to deliver it, for the cause specified, viz. that the tax had been paid before the sale, that gave him a right to recover from the county. (2) Conceding, however, that we are wrong in the foregoing proposition, plaintiff's cause of action in this case, where the claim was evidently founded in a mistake by the collector, is, under subdivision 4 of section 338, Code Civil Proc., to be deemed as accruing on the 10th day of September, 1891, the date when the mistake, and the facts connected therewith, were first discovered. To hold otherwise would be to hold that the county could, through its collector, for whose acts, within the scope of his powers, it is liable, unlawfully collect taxes from two or more persons upon the same property for the same fiscal year, and then, by withholding the facts for a year, escape liability. This cannot be regarded as within the intention of the lawmaking power. I am of opinion the judgment should be reversed, and the court below directed to overrule the demurrer to the complaint.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court is directed to overrule the demurrer to the complaint.

99 Cal. 146

WETMORE v. CITY OF OAKLAND et al.
(No. 15,412.)

(Supreme Court of California. July 25, 1893.)

MUNICIPAL CORPORATIONS—CONSTRUCTION OF SCHOOLHOUSES—RIGHT TO ISSUE BONDS.

1. Under Act March 19, 1889, authorizing cities to issue bonds for public buildings, and designating the city council as the body to decide on the necessity of calling an election to vote on the subject of issuing bonds, the city of Oakland may issue bonds to build schoolhouses, though its charter vests the government of the school department in a board of education, and authorizes the board to "build schoolhouses," but does not authorize it to contract debts exceeding in any one year the revenue provided for that year.

2. Pol. Code, §§ 1880-1887, providing for the issuance of school-district bonds by the supervisors of a county to build schoolhouses, do not limit the power conferred upon a city by Act March 19, 1889, to issue its own bonds for the same purpose, though section 1576 makes each incorporated city a school district.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by J. L. Wetmore against the city of Oakland and others to determine the validity of city bonds issued for the purpose of building schoolhouses. The bonds were adjudged valid, and plaintiff appeals. Affirmed.

v.33p.no.14—49

Cal.Rep. 32-34 P.—33

Edw. C. Robinson and E. A. Holman, for appellant. James A. Johnson, Davis & Hill, and James W. Goodwin, for respondents.

HARRISON, J. The legislature of this state, at its session in 1889, passed an act approved March 19, 1889, authorizing the incurring of indebtedness for municipal improvements, and issuing bonds therefor by cities, towns, and municipal incorporations, (St. 1889, p. 399,) the first section of which declares that "any city, town, or municipal corporation incorporated under the laws of this state may, as hereafter provided, incur indebtedness to pay the cost of any municipal improvement, or for any purpose whatever requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy." By the next section of the act it is provided that whenever the legislative branch of the municipal corporation shall determine that the public interest or necessity demands the acquisition, construction, or completion of any municipal buildings or other municipal improvements, whose cost will be too great to be paid out of the ordinary annual income and revenue of the municipality, it may call an election for the purpose of determining whether bonds of the municipality shall be issued for such improvement, and if the proposition shall receive the vote of two-thirds of the voters voting at such election such bonds may be issued. September 23, 1891, the council of the city of Oakland passed an ordinance by which it declared that the public interest and necessities of the city of Oakland demanded the acquisition, construction, and completion of certain municipal buildings and improvements in that city for public school purposes, viz. certain designated schoolhouses, and that the cost thereof would be too great to be paid out of the ordinary annual income and revenue of the city; and afterwards passed an ordinance that the question of issuing bonds therefor to the amount of \$400,000 be submitted to the voters of the city at a special election to be held for that purpose. At that election, more than two-thirds of the voters having voted for the issuance of the bonds, suitable ordinances were passed by the council, and bonds of the city to the amount of \$400,000 were issued and sold prior to January 1, 1893, and the proceeds placed in the city treasury. In June, 1893, the appellant having challenged the validity of these proceedings, an agreed case was submitted to the superior court of Alameda county, under the provisions of section 1138, Code Civil Proc., for the purpose of having a determination by that court of the validity of the bonds. The superior court adjudged that they were valid obligations of the city of Oakland, and from its judgment this appeal has been taken.

The proposition presented by the appellant in support of his appeal is that the mu-

nicipality of the "city of Oakland" has no power to issue its bonds for the construction of schoolhouses, for the reason that the management of its schools is vested in a board of education, and that any bonds to be issued for school purposes must be authorized by that body. The city of Oakland is governed by a freeholders' charter, which was approved by the legislature February 14, 1889. St. 1889, p. 513. Under this charter the legislative power of the city is vested in a council of 11 members, and the government of the school department is vested in a board of education consisting of 11 members. The board of education is by the charter vested with authority to "build schoolhouses" upon plans approved by it, but the work of building the schoolhouses is to be carried on through the medium of a board of public works. It is, moreover, expressly declared in the charter (section 131) that the board of education "shall not have power to contract any debts or liabilities in any form whatsoever against the city, exceeding in any year the income and revenue provided for the school fund for such year." By section 149 of the charter it is provided that "whenever the council shall determine that the public interest requires the construction or acquisition or completion of any permanent municipal building * * * the cost of which in addition to the other expenditures of the city will exceed the income and revenue provided for in any one year, they may by ordinance submit a proposition to incur a debt for such purpose, and proceed therein as provided in section 18, of article 11, of the constitution of this state and general law." By this section of the charter the same authority is conferred upon the council to create a bonded indebtedness as is given by the aforesaid act of the legislature, but the act of the legislature prescribes the steps to be taken, and is the "general law" under which it is necessary for the council to proceed in incurring such indebtedness. The provisions of the act of March 19, 1889, are general in their character, and give to every municipal corporation incorporated under the laws of this state the power to create a bonded indebtedness for any of the purposes authorized by the act. The indebtedness is not to be incurred, nor are the bonds to be issued, until after the voters of the municipality have so directed; but, as it is the vote of the electors which determines that they shall be issued, it is immaterial to them what officers of the city carry out this vote. The act itself designates the legislative branch of the municipality as the body to determine in the first instance whether the public interest or necessity demands the construction or completion of the building or improvement, and also designates that body as the agency of the corporation through whose acts the indebtedness is to be created and evidenced. There is no particular mode provided by which the council

shall ascertain this fact, but, in a matter which pertains to the public schools, the fact would naturally be ascertained by direct communication with the board of education, or by a request from that board, and, inasmuch as that board has no power to issue the bonds of the city, it is but natural to assume that it would manifest its wishes to the council. The question, however, is not how the council shall ascertain whether the public interest demands the improvement, but whether it has any power to issue the bonds after it has so determined, irrespective of the mode of ascertaining it. Although the board of education has been intrusted with the management of the schools, and it is the body designated in the charter to build the schoolhouses, there is nothing inconsistent with this provision for the legislature to designate the council as the body to give inception to the indebtedness and issue the bonds therefor. The power to build or improve the schoolhouses which is vested in that board is distinct from the power to borrow money with which to build or improve them. The board of education, as such, is forbidden by the charter from incurring any indebtedness beyond the annual income for school purposes, and as the constitution permits such indebtedness by any municipal corporation only after a vote of the electors therefor, it is competent for the legislature to designate the agent or body of the municipal government which shall act for it in carrying out the will of its electors, and for this purpose the legislative branch of that government would most naturally be selected.

That the education of the youth is properly included within the functions of a municipal government cannot be denied. A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the legislature in making provision for the wants and welfare of the public within the territory for which it is organized, and it is for the legislature to determine the extent to which it will confer upon such corporation any power to aid it in the discharge of the obligation which the constitution has imposed upon itself. The constitution has declared (article 9, § 1) that, "a general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." In furtherance of this duty the legislature has made provision in the Political Code for a system of public schools throughout the state; and in the municipal government act, which was enacted in 1883, providing for the organization of municipal corporations, it has included a school department for the first five of the several classes of municipal corporations therein provided for. In each of the freeholders' charters

that has been approved by it an educational department has been established, and provision made for education, and for the exercise of municipal functions in reference thereto. As schoolhouses are essential aids in the promotion of education, their erection is but incidental to the maintenance of the schools, and falls as completely within the functions of a municipal government as does the erection of a hospital for its indigent poor, or buildings for its fire engines; and the schoolhouses, when so erected, are as fully municipal buildings as are its engine houses and hospital buildings. *Danielly v. Cabaniss*, 52 Ga. 222; *Horton v. Commissioners*, 43 Ala. 598. In *Board v. Fowler*, 19 Cal. 24, the validity of a reservation by the Van Ness ordinance of certain lots for school purposes was involved, and the supreme court said: "The school department of the municipality is only a part of its government. A reservation of property for school purposes is not a disposition of it for the benefit of third persons, but a keeping of it for its own purposes. The resolution amounts only to the setting apart of property of the town for a particular town purpose, and in this respect is not different from a similar act, if such had been done, declaring that the plaza should be reserved as a public garden, or a lot for a jail, or a house for the holding of courts." See, also, *Board v. Martin*, 92 Cal. 209, 28 Pac. Rep. 799.

The provisions of sections 1880-1887 of the Political Code for the issuance by the supervisors of the county of school-district bonds whenever the electors of the district shall vote therefor, to pay for the building of schoolhouses in the district, do not limit or qualify the power conferred by the act of March 19, 1889, upon an incorporated city to issue its own bonds for the same purpose, notwithstanding the provisions of section 1576 of the same Code, making such incorporated city a school district. Each of these acts is a general law upon a subject within legislative power, and, if there is any inconsistency between them, that which is later in date must prevail over the earlier act. There is not, however, any inconsistency between the two acts. The bonds authorized by these sections of the Political Code are different obligations from those issued by the municipal corporation under the act of March 19, 1889. A school district has not, like an incorporated city, any financial officers, nor has it been intrusted with the power of assessment and taxation which is conferred upon an incorporated city, and for these reasons as well as others the legislature would naturally intrust to the supervisors of the county, as being the body having the financial supervision of the school district, the function of issuing and providing for the payment of school district bonds; and as by the constitution bonds cannot in any case be issued except upon

the vote of two-thirds of the qualified electors of the district voting upon the question of their issuance, the agency by which they might be executed would seem immaterial, and there would be little likelihood of an issuance being authorized to be made for the same purpose by each agency. It is, however, unnecessary to determine whether the power to issue bonds conferred by these sections of the Political Code exists in favor of the school district as a corporation, as well as of the incorporated city which constitutes the school district, or whether it has been superseded by the power conferred upon the city, as the bonds in question are those of the municipal corporation, and not of the school district; but, even if it should be conceded that the power to issue bonds for the same purposes rests in the supervisors at the instance of the school district, and also in the city itself, the bonds which are authorized by the Political Code are to be issued in the corporate name of the school district, which by section 1575 of that Code must be "— district of — county," whereas the bonds in question are those of the municipality of the city of Oakland, and their validity is to be determined by the power of the municipal corporation to issue them.

The question presented in *Kennedy v. Miller*, 32 Pac. Rep. 558, was the right of the treasurer of the city of San Diego to demand from the county treasurer the custody of certain public school moneys apportioned to the school district of San Diego, which had been derived from sources outside of the municipality, and not through any agency of the city, viz. the state school fund and taxes levied by the supervisors of the county, and it was held that they were moneys whose custody had been placed by the legislature with the county treasurer. The power of the city to raise money within its own territory for school purposes by tax or otherwise, or to retain the custody or make the disbursement of any moneys which might be raised from taxes levied by its council, did not arise in that case. On the contrary, we said that "the city is a corporation distinct from that of the school district, even though both are designated by the same name, and embrace the same territory. The one derives its authority directly from the legislature through the general law providing for the establishment of schools throughout the state, while the authority of the other is found in the charter under which it is organized;" and it follows that the acts of each corporation are to be measured by the authority under which they are performed, and their validity determined by a comparison with that authority. We hold, therefore, that the city of Oakland had the power, under the provisions of the act of March 19, 1889, to issue the bonds in question, and, as it was conceded at the argument that all the pro-

visions of that act had been complied with, the judgment of the superior court is affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; FITZGERALD, J.; DE HAVEN, J.

98 Cal. 678

MAGEE v. PACIFIC IMP. CO. (No. 14,115.)

(Supreme Court of California. July 14, 1893.)

INNKEEPERS—GUESTS AND BOARDERS—EVIDENCE—CORPORATIONS—ULTRA VIRES.

1. The fact that an hotel has a rule to charge a guest a less rate per diem by the week than by the day, and that, if a guest had been there longer than a week, he got the benefit of the rule, does not show that one who had been at the hotel more than a week was a "boarder," rather than a "guest," it not being shown that he had any notice of the rule, or any knowledge of the charges, or that any arrangement for a permanent stay had been made.

2. The fact that one has made a special arrangement at an hotel for board and lodging by the week is not determinative of the question whether he is a guest or a boarder, but merely evidence on the issue.

3. A corporation, after engaging in the hotel business, and assuming the liability of an innkeeper, cannot repudiate its liability on the ground that its acts were ultra vires.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by James W. Magee against the Pacific Improvement Company. Judgment for defendant. Plaintiff appeals. Reversed.

Blake, Williams & Harrison, for appellant. A. B. Hotchkiss, for respondent.

HARRISON, J. This action was brought to recover from the defendant the value of certain personal property, lost by the burning of the Hotel Del Monte, April 1, 1887. Judgment was rendered in favor of the defendant, and the plaintiff has appealed. It was held in *Fay v. Improvement Co.*, 93 Cal. 253, 26 Pac. Rep. 1099, and 28 Pac. Rep. 943, upon the facts then before the court, that the defendant, as the proprietor and keeper of the Hotel Del Monte, was an innkeeper; and, as the facts herein are almost identical with those presented with that case, the defendant must in the present case be held to have been an innkeeper, and subject to its liabilities. It is, however, contended by the defendant that in the present case the plaintiff was a "boarder" with it, rather than a "guest," and consequently that its liability as an innkeeper does not exist. The finding of the court upon this issue is as follows: "That plaintiff and her assignor, at the time of the destruction of said house by fire, were inmates of said house under special arrangement for board and lodging by the week for a permanent stay, and at the time of the fire had given no intimation to defendant

of any intention to depart from said house, where they had been for about ten days." The appellant contends that this finding is not sustained by the evidence, and we are of the opinion that her contention is correct. The plaintiff testified that there was no special contract made between her and the management of the hotel as to the terms upon which she was received; that she simply went into the office, asked for a room, registered, and was assigned to the room; and, instead of there being any testimony in conflict with this statement, it was corroborated by testimony given on behalf of the defendant by its clerk and manager. The only evidence which it is contended supports the above finding is that it was shown to be a rule of the house to charge a guest a less rate per diem for entertainment by the week than by the day, and that, if a guest remained more than a week, he got the benefit of the rule; that they treated all persons as transient guests until they remained a week, and then they commenced to treat them as boarders, and charged them the weekly rates; and that the plaintiff had been at the hotel about 10 days at the time of the fire. It was not shown, however, that this rule was ever brought to the knowledge or notice of the plaintiff, or that she was ever informed of the rates of charge, the only evidence upon that subject being that she always paid all demands that were made on her for her entertainment; and the defendant's manager testified that nothing was said when they came in about whether they came there by the day or otherwise. There was no evidence whatever that the plaintiff made any arrangement "for a permanent stay," or that there was at any time anything said or done with reference to the time that she would remain at the hotel. Whether the plaintiff was a guest or a boarder with the defendant was an issue in the case upon which the liability of the defendant depended, and upon which the court should have made an express finding. This question was one of fact to be determined by the court upon all the evidence before it. Whether the plaintiff made a special arrangement respecting her stay with the defendant was only evidence to be considered by the court in determining the ultimate fact whether she was a guest or a boarder. Even if the finding of the court that she had made a special arrangement with the defendant for board and lodging by the week had been sustained by the evidence, that fact would not be determinative of the issue whether she was a guest or a boarder, but would be merely evidence to be considered in determining that issue. *Pinkerton v. Woodward*, 33 Cal. 597; *Hancock v. Rand*, 17 Hun, 279, 94 N. Y. 1; *Hall v. Pike*, 100 Mass. 495.

The proposition of the defendant that, because innkeeping is not enumerated as one

of the objects of its incorporation, its acts as an innkeeper are ultra vires, and cannot form the basis of any liability therefor, cannot be maintained. Having engaged in that occupation, and assumed the liability of an innkeeper towards the plaintiff as his guest, and received from her the consideration for such liability, the defendant cannot now repudiate its obligation upon the ground that under its corporate powers it was not authorized to engage in such occupation. The judgment is reversed, and a new trial is ordered.

We concur: McFARLAND, J.; GAROUTTE, J.; DE HAVEN, J.

99 Cal. 143

DREXLER v. McGLYNN et al. (No. 15,086.) (Supreme Court of California. July 25, 1893.)

NEGOTIABLE INSTRUMENTS — NOTICE OF PROTEST — BY AND TO WHOM GIVEN.

1. An executor named in a will, though not yet approved by the court, is a personal representative, within the meaning of Civil Code, § 3145, providing that notice of protest of a note may be given, in case of the death of the person otherwise entitled to notice, to one of his personal representatives.

2. Notice of protest of a note may be given by an agent of the owner, in the agent's name.

3. The fact that notice of protest of a note was sent to the executors of a deceased party to a note, addressed as "administrators," is immaterial, so long as they received it.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by L. P. Drexler against P. J. McGlynn and others, as executors, on a promissory note. A demurrer to the complaint was overruled, and defendants appeal. Affirmed.

Charles F. Hanlon, for appellants. Henry K. Mitchell, for respondent.

PATERSON, J. This is an action against the defendants, as executors of the last will and testament of James M. Donahue, deceased, upon a promissory note indorsed by their testator September 10, 1889. The note became due March 10, 1890. Donahue died on the 3d day of March, 1890, leaving a will in which the defendants were named as executors, and which was filed in the superior court on the 11th day of March, 1890.

It is claimed that the estate is not liable because no proper notice of protest was given, but we think the point is not well taken. The notice was addressed to "Messrs. Peter J. McGlynn and J. F. Burghin, Jr., administrators of the estate of J. M. Donahue, deceased," and it was deposited in the postoffice on the day the note became due. The Civil Code provides that a notice of dishonor may be given, in case of the death of the party otherwise entitled to notice, to one of his personal representa-

tives, or, if there are none, then to any member of his family, and, if there be no family, it must be mailed to his last place of residence. Section 3145. Appellants contend that, inasmuch as the defendants had not been appointed by the court at the time the notice was given, they were not personal representatives, within the meaning of this statute; and cases are cited, holding that notice sent to a person afterwards appointed administrator of an intestate is insufficient. These authorities are not in point. While it is true that the appointment of an executor is only provisional, and requires the approval of the court, for the purpose of administration upon the estate of the testator, it is also true that the law allows a man to appoint his executors, subject to this approval, and treats them as entitled to the office until they renounce it; and unless, for some reason, they are incompetent, the appointment makes them representatives of the estate, "so far as relates to acts in which they are merely passive, such as receiving notice of the dishonor of a note." Shoenberger's Ex'rs v. Savings Inst., 28 Pa. St. 466. It matters not that the person named in the will may never be actually appointed executor by the court. He may renounce the trust. But, as he is the person to whom the testator has confided the administration of his estate, it is regarded as safe to intrust him with the notice. "It is not to be expected that any person can ordinarily be found upon whom this duty [protecting the estate] will rest more strongly than upon one who is named as executor in the will." Goodnow v. Warren, 122 Mass. 82; 3 Rand. Com. Paper, § 1245. The reason for holding that a notice to one named in the will as executor is good, is not applicable to the case of one who happens after the notice is given to be appointed administrator, because the latter is neither honorably, nor in legal duty, bound to do anything for the protection of the estate.

It is claimed, also, that the note was not presented for payment by the holder; that the evidence shows that the note was transferred to the Anglo Californian Bank, which was the holder of the note at the time demand was made. The certificate of the notary, it is true, states that the note was presented and payment was demanded, "at the request of the Anglo Californian Bank, Ltd., holder of the original note," but the plaintiff testified that he had been the owner of the note from the time it was made until the day of the trial, and the fair import of the evidence is that the note was given to the bank simply for collection. The notice may properly be given by an agent, and the agent may give the notice in his own name. 3 Rand. Com. Paper, §§ 1236, 1237; 2 Daniel, Neg. Inst. § 991.

There is nothing in the point that the notice was invalid because it was addressed to the defendants as "administrators." The

notice need not have been addressed to them in their representative character at all. The actual receipt of the notice is the material thing. *Beals v. Peck*, 12 Barb. 245. If the defendants actually received the notice,—and such is the presumption from the fact of mailing, properly addressed and postage prepaid,—the object of the law has been attained.

We think the court properly overruled the demurrer. The allegation as to protest might have been more specific in its statement of facts, but, as against a general demurrer, it is good. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

99 Cal. 137

WOOD v. CURRAN et al. (No. 14,962.)
(Supreme Court of California. July 25, 1893.)

QUIETING TITLE—SHERIFF'S DEED—FORECLOSING LIEN OF STREET ASSESSMENT—SALE BY PROBATE COURT.

Where neither the personal representatives nor the heirs of a decedent are made parties to an action to foreclose the lien of a street assessment upon the land of the estate, the title of one claiming under the judgment of foreclosure is inferior to that of one who, with knowledge of such judgment, enters into possession by virtue of a subsequent deed from the administratrix under a sale had in pursuance of an order of the probate court.

Department 1. Appeal from superior court, city and county of San Francisco; W. T. Wallace, Judge.

Action by J. M. Wood against Michael Curran and others to quiet title. From a judgment for defendants, plaintiff appeals. Affirmed.

J. C. Bates, for appellant. M. C. Hassett, (Jas. F. Tevlin and Thos. E. Curran, of counsel,) for respondents.

PATERSON, J. This is an action to quiet title to a lot of land in the city of San Francisco. John Agnew took possession of the property in 1868, and held the same until April 25, 1871, when he conveyed it to John Hogan, who entered into possession of the land, and held it until his death, which occurred August 6, 1874. Hogan left surviving him the widow, Ellen, and four minor children. Letters of administration were issued to Ellen, August 26, 1874. On October 3, 1884, after due proceedings had, the lot was sold under an order of the probate court to the respondent, who received a deed from the administratrix on October 20th. On the same day the respondent received from Ellen Hogan a quitclaim deed of the property. The appellant claims under a judgment in *Harney v. Corcoran et al.*, foreclosing the lien of a street assessment on the property in controversy. This judgment was entered on June 3, 1879, and the sheriff's deed to appellant is dated December 4, 1883. The proceedings leading up to the street assess-

ment were initiated by resolution of intention, filed March 27, 1876. It is admitted that the respondent had actual notice of the sheriff's deed to appellant. Ellen was a party to the action of *Harney v. Corcoran et al.*, individually, but not as administratrix, and none of the minor heirs were represented. We think, upon the facts stated, the court below properly held the title to be in defendant. Under the act of 1872, upon which the assessment lien was based, the land is not sued or summoned as a party; it is simply described, the owner being the defendant. The action, therefore, to foreclose was not a proceeding strictly in rem. The decree was in personam; the measure of satisfaction, however, being the interest which the defendant had in the land. Of course, the plaintiff did not acquire by his purchase under the decree in that action the interest of the minor children; that interest passed to the defendant herein by the probate sale subsequently made, neither the heirs nor the personal representative of Hogan having been a party to the action. The judgment in *Harney v. Corcoran* against Ellen Hogan did not bind Ellen as administratrix of the estate of John Hogan, deceased. It is settled here that a judgment for or against a party in one right does not affect him when acting in another right. *Association v. Chalmers*, 75 Cal. 332, 17 Pac. Rep. 229; *Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. Rep. 343. The respondent took all the right, title, and interest which Ellen acquired by succession, but he took it subject to the provisions of the probate act for the support of the family of the deceased, and for the payment of the expenses of administration and the debts outstanding against the deceased. Where the widow, after the death of her husband, executed and delivered a quitclaim deed, it was held that this fact constituted no ground for the refusal of the probate court to set apart to her as a homestead a portion of the land conveyed by the deed; that, if an heir conveys his interest in the estate of an ancestor, it will carry only such interest as will remain to him after satisfying the objects of administration. The court there said: "Upon the death of an intestate his property goes by succession to his heirs, subject to administration. The objects of administration are: (1) To support the family for a period; (2) to set apart a homestead to the family; (3) to pay the expenses of administration; (4) to pay the debts of the deceased; (5) to distribute the balance of the estate to those who take it by law." *Estate of Moore*, 57 Cal. 437. So, where the heirs of the deceased executed a mortgage upon property inherited from him, it was held that the purchaser at the foreclosure sale acquired no greater or higher right in the mortgaged premises than the mortgagors held, and that the property in his hands was subject to the orders and proceedings of the probate court as fully in

all respects as if the mortgage had not been foreclosed. *Cook v. De la Guerra*, 24 Cal. 241. That the proceeding for the foreclosure of an assessment under the act of 1872 is not strictly a proceeding in rem, with all the binding force claimed for it by the appellant, is clearly established by the decision in *Wood v. Brady*, 68 Cal. 78, 5 Pac. Rep. 623, and 8 Pac. Rep. 599. The plaintiff had purchased the land at a sale made under a judgment in an action to enforce a street assessment lien which accrued July 10, 1875. Prior to the last-named date the defendant had acquired a street assessment lien upon the lot, and, having recovered judgment, was proceeding to sell the property in satisfaction thereof. The court pointed out the distinction between the power of assessment and the general power of taxation, and held that the foreclosure of a junior street assessment lien did not extinguish prior liens of the same kind, if the holders of such prior liens were not made parties to the foreclosure suit. In that case, as well as in the case at bar, the statute under which the proceedings were had did not purport to attach to the proceedings for collection the effect claimed by the appellant, and, as there said: "There are no considerations of public policy that require that it should be given." It is claimed that, as the defendant had actual notice of the plaintiff's title when he took the deed from Mrs. Hogan, he is estopped from denying the title under which he entered. While Ellen was personally bound by the assessment, decree, and sale, and the defendant, if entering into possession only under her quitclaim deed, would be likewise bound, yet he entered also under the deed of the administratrix of the estate of John Hogan, which vested in him the interest of the estate in the property. Where a party enters into the enjoyment of an estate under two claims, one of which is good and the other is bad, he will be regarded as having entered under the better claim. We have carefully examined the authorities cited by the appellant, and find none of them inconsistent with the views above expressed. The evidence supports the findings of the court, and we see no error in the record.

Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

99 Cal. 134

WATRISS v. REED. (No. 15,064.)

(Supreme Court of California. July 25, 1893.)

PUBLIC LANDS—MEXICAN GRANT—RIGHT OF PURCHASE—CONSTRUCTION OF STATUTE.

1. Act Cong. July 23, 1866, § 7, provides that where one, in good faith, and for a valuable consideration, has purchased lands of Mexican grantees, which lands have been excluded from the final survey of any Mexican grant, and has used, improved, and continued in actual possession thereof, such purchaser may purchase the same, after having such land surveyed un-

der existing laws. *Held*, that the fact that a Mexican grant fixed a definite base line, and that the grant was only a quarter of a league wide, did not affect the grantee with notice that all lands lying more than that distance from the base line did not belong to the grant, so as to deprive him of the right to purchase such lands under said act.

2. The fact that the land in question was never a portion of the grant, and hence could not be excluded from the final survey, did not affect the right to purchase the same under the act.

3. An inclosure was not necessary in order to constitute actual possession under the act.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Action by Martha C. Watriss against E. S. Reed. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

George Pearce, for appellant. Geo. A. Johnson, for respondent.

PATERSON, J. This action was brought to recover possession of a tract of land in Sonoma county. The land is a portion of 640 acres confirmed to Gen. Joseph Hooker, as a part of the Mexican grant known as the "Agua Caliente Rancho." On the final survey 550.36 acres, only, were found to be included within the grant; and the respondent made application to purchase the balance of the 640 acres called for by the decree, under the seventh section of the act of congress of July 23, 1866, popularly known as the "Conness Act," which provides that: "Where persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved and continued in the actual possession of the same according to the lines of the original purchase, and where no adverse right or title (except of the United States) exists, such purchaser may purchase the same after having such land surveyed under existing laws, upon first making proof of the facts required in this section." Respondent's application was granted, and she received a United States patent for the land after a contest with the defendant in the United States land office. The defendant claims under a settlement upon the land in 1879, and a homestead entry of November 12, 1880.

The first point made by the appellant on this appeal is that the respondent was not a purchaser in good faith. In answer to this, it is sufficient to say it clearly appears that Mrs. Watriss paid at least \$7,000 in money, in good faith, acting upon the advice of her attorneys, and that the lands, at the time she purchased, were supposed to have been granted by the Mexican government. At the time of the passage of the act above referred to, she had used and improved the

property, and had continued in the actual possession thereof, and it was for the benefit of persons of this class that congress passed the act. The case is one clearly and fairly within the letter and the spirit of the law. *Bascomb v. Davis*, 56 Cal. 152; *Hosmer v. Wallace*, 97 U. S. 577.

Appellant insists that the grant fixed one definite boundary or base, and that, as the grant was only a quarter of a league wide, all purchasers under the Mexican grantee must have taken with notice that all lands lying more than a quarter of a league east of the base line did not belong to the grant, and that such purchasers cannot, therefore, be regarded as bona fide purchasers, within the meaning of the act of 1866. The character of the grant was considered and determined in *Hays v. Steiger*, 76 Cal. 560, 18 Pac. Rep. 670, and requires no further notice. Plaintiff purchased the land in 1858. Reed made his settlement in 1879, before the final survey of the grant, and the filing of the township plat, and was notified at the time of the respondent's claim, and warned not to trespass thereon. It is claimed by appellant that the land was never excluded from the final survey of the grant, and that the respondent is therefore not entitled to the benefit of the act. The argument seems to be that, as the land never was a part of the grant, it never could have been excluded. But, if the land had in fact been a portion of the grant, she would not have been compelled to rely upon the provisions of the act for title to the land. If congress had intended legal rights alone to control, there was no occasion for the passage of the act. The object of the act was to give to the purchaser from the Mexican grantee the right of purchase from the government. He was assured by the act that if he made his purchase in good faith, took actual possession, and continued the same, and paid a valuable consideration, and the land was believed to be within the grant, he would be treated as a preferred purchaser of the land, and, upon paying for the same, would be entitled to a patent. If respondent's land was not within the lines of the grant, it was supposed to be, and the evidence shows that she honestly believed it to be within such lines, and this entitles her to the protection of the act.

It is claimed, also, that respondent never had actual possession of the premises, and that she has not used, improved, and continued in the actual possession of the same, according to the lines of her original purchase. The evidence shows that respondent used the land for grazing purposes, to which it was best adapted. The land was fenced on two sides. Steiger paid rent to her for grazing his cattle upon the tract, and she has paid taxes upon it since her purchase. All of the neighbors seem to have respected her possession, and no one ever

disputed her right to the same prior to the settlement of Reed. Her claim relates back to the date of the act, although she has been disturbed in her actual possession since the settlement of third parties. Among other facts conceded in the record is the fact that her grantor, Brown, put her in possession of the tract. The deed from Hooker to Brown gives a description of the 640 acres, and one of the witnesses testified that the tract was bounded on the west by Sonoma creek, on the south by land belonging to Camp and Bergin, on the east by government land, and on the north by the Stone tract. To constitute actual possession, it is not necessary that there should be an inclosure, and there can be no doubt, we think, that respondent's land was sufficiently identified. *Steinbach v. Stewart*, 11 Wall. 567, where the grant in question was considered. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(4 Cal. Unrep. 66)

PEOPLE v. MUNROE. (No. 20,973.)¹

(Supreme Court of California. July 25, 1893.)

FORGERY—WHAT SUBJECT OF—ORDER FOR TEACHER'S SALARY—ABSENT WITNESS—EVIDENCE PREVIOUSLY GIVEN—TRIAL—VARIANCE.

1. Since the assignment by a public school teacher of salary not yet earned is void, the false making of such an instrument does not constitute forgery.

2. But if the instrument containing such intended assignment contain likewise a guaranty of payment of the sum assigned, and a provision that, if the sum is not collected by a certain time, it will be paid by the assignee, it is valid in part, and hence is a subject for forgery.

3. Where a witness telegraphed and wrote to the district attorney from another state that, owing to business engagements in that state, he could not be present at the trial, which began about 12 days thereafter, and the return to a subpoena for such witness was that he could not be found within the county, there was a showing of such "due diligence" as justified the reading at the trial of his evidence taken at the preliminary examination before a committing magistrate, under Pen. Code, § 686, providing for the reading of such evidence upon its being satisfactorily shown to the court that the witness "with due diligence cannot be found within the state."

4. On a prosecution for forgery, where the prosecuting witness states that he was present when the complaint was drawn by the district attorney, that they compared the copy therein of the instrument alleged to have been forged with the original, and that such copy was correct, it is proper, if the original is in defendant's possession, and he refuses to produce it after notice so to do, to allow the witness to refresh his memory as to the original by reference to the copy in the complaint.

5. Where a part of an answer is not responsive to the question, and a part is directly so, but the whole is relevant, material, and competent, it is proper to refuse to strike it out as being irrelevant, immaterial, and incompetent, and as being irresponsible to the question.

6. On a prosecution for forgery, a witness testifying as to the forged instrument cannot refresh his memory by reference to the copy

¹ Rehearing granted.

contained in the information, which he does not, of his own knowledge, know to be correct.

7. An order drawn directly on a city, instead of on the auditor thereof, is not void on its face.

8. Where an information for forgery sets out the forged instrument as an order addressed to a city, the fact that it was in reality addressed to the auditor of the city does not constitute a variance.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

George Munroe was convicted of forgery, and appeals. Affirmed.

W. T. Williams and Wm. E. Cox, for appellant. W. H. H. Hart, Atty. Gen., for the People.

HAYNES, C. The defendant was convicted of forgery, and this appeal is from the judgment and from an order denying his motion for a new trial. Appellant's principal contention is that the information does not state facts which constitute a public offense, for the reason that the forged instrument would, if it were genuine, be void upon its face. Said instrument is as follows: "No. 78. Los Angeles, Cal., Feb. 1, 1892. To the city of Los Angeles, Cal.: Please deliver to the State Investment Co., or order, my warrant upon the treasurer of said city for the month of February, 1892; and I hereby authorize the State Investment Co., or order, to receipt for and collect the sum of \$80 due me as teacher; and, for value received, I hereby sell, assign, and set over to the State Investment Co., or order, the sum of \$80, with interest at the rate of ten per cent. per month from March 2, 1892, and I guaranty payment of the above-stated amount on or before March 2, 1892, authorizing the State Investment Co., or order, to collect any warrants drawn in my favor until the amount of this claim and interest are paid in full, and, in case suit is instituted, to collect this claim or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit. [Signed] Helen Henry." The information charges that defendant forged said instrument with intent to defraud one J. W. Jackson, to whom he transferred it by indorsement.

It is well settled in this state and elsewhere that the indictment or information must show that the forged instrument is such that, if genuine, it could be made available in law to work the intended fraud or injury; that, if it is a nullity upon its face, no case is made, unless by averment it can be shown how it could be made to operate injuriously or fraudulently. *People v. Tomlinson*, 35 Cal. 506; *People v. Ferris*, 56 Cal. 445; *Ex parte Finley*, 66 Cal. 262, 5 Pac. Rep. 222. It is also well settled that the unearned salary of a public officer is not assignable, because against public policy,

and that any instrument intended to operate as such assignment is void. *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. Rep. 963; *Bliss v. Lawrence*, 58 N. Y. 442. This principle, however, is not confined to those commonly called "public officers," though we think teachers in the public schools may be properly designated as such. Their employment is a public one, made under the authority of law, and their compensation is paid out of public funds provided by law for that purpose. See Pol. Code, §§ 1696-1704. In *Arbuckle v. Cowtan*, 3 Bos. & P. 328, quoted with approval by the court of appeals of the state of New York in *Bliss v. Lawrence*, supra, it was laid down as a general principle "that all such profits as a man receives in respect to the performance of a public duty are from their very nature exempt from attachment and incapable of assignment." The attorney general, on behalf of the people, does not controvert either of the foregoing propositions, but contends that the instrument in question is something more than an assignment of the unearned salary of a teacher; that it contains a guaranty of the payment of the moneys there mentioned; that Helen Henry had a right to make such guaranty; and that it could be legally enforced. This contention we think is sound, and must be sustained. There is nothing criminal in the assignment of the unearned salary. It is simply void because it is against public policy. The officer whose duty it is to draw the warrants for teachers' salaries was not bound to regard the assignment, or to issue the warrants to the assignee. Notwithstanding the assignment he could, without creating any liability against himself or the city, issue the warrant to the teacher. This would seem to have been a contingency understood or anticipated, and as a protection to the assignee the guaranty was inserted. The test is, could an action have been maintained against Helen Henry for the recovery of the warrant if the instrument had been genuine? The instrument admits that she has received value for the assignment of her warrant for the month of February. The warrant, if earned, would be for the sum of \$80; but interest on that sum at 10 per cent. per month from March 2, 1892, is promised if the money is not then paid, and there is the further express promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in case suit is instituted to collect the claim. There are many cases where money paid upon an illegal contract may be recovered. In contracts which contemplate the performance of some act involving moral turpitude and therefore malum in se, no action can be maintained by either party to the contract. But this is not that case. It is not out of special regard for the officer as

an individual that the assignment is held void, but for the protection of the public by securing to the officer that compensation without which he may be unable to discharge the duties of his office. But he is not prevented from incurring personal obligations, nor from devoting his salary when received to the payment or discharge of such obligations. Credit may be given him or money loaned to him upon the promise to pay out of his salary when received, and a written agreement so to pay is not illegal. The fact that payment was attempted to be secured by an assignment of the warrant, such assignment being void, does not affect the validity of the guaranty or promise to pay the amount. When a salary warrant is issued, it is assignable, and the assignee may collect or receive payment of the warrant; and it will be observed that the guaranty is not that the warrant will be issued to the assignee, but is for the "payment of the above-stated amount." Upon the face of the instrument the transaction appears to be an advancement or loan of \$80, to secure which the borrower assigns her unearned salary for the month of February, authorizing her assignee to receive the warrant and collect the money thereon, but providing that, if the money is not collected on or before March 2d, that she will pay the amount, and, as a further security, authorizes the assignee to collect other warrants drawn in her favor "until the amount of this claim and interest are paid in full." The assignment is void, but the debt and obligation to pay is legal and binding, and therefore the subject of forgery.

A large number of exceptions were taken to rulings of the court upon the admission of evidence, several of which are argued by appellant's counsel.

J. W. Jackson, the prosecuting witness, was not present at the trial, and his testimony taken before the examining magistrate was read in evidence to the jury. It is insisted by appellant that the preliminary evidence offered by the district attorney did not show that Jackson was absent from the state at the time of the trial. This evidence consisted of a telegram from Jackson to the district attorney, dated at Kansas City, Mo., September 30, 1892, in reply to a telegram from the district attorney addressed to him at that place, and two letters, the first postmarked Kansas City, September 22, 1892, and the second postmarked at the same place, October 13, 1892, in each of which he said it was impossible for him to come to California on account of business relations he had formed, and expressed regret that he could not do so. A subpoena for this witness was duly returned by the sheriff of Los Angeles county that the witness could not be found within his county. Upon this evidence the testimony of the

witness Jackson, taken upon the examination of appellant before the committing magistrate, was received. Section 686 of the Penal Code provides that such testimony may be read upon the trial "upon its being satisfactorily shown to the court that he (the witness) is dead or insane, or with due diligence cannot be found within the state." The actual absence of the witness from the state is not required to be shown, but it must appear that he cannot with "due diligence" be found within the state. We think due diligence was shown. During the 10 or 11 days intervening between the date of Jackson's last letter and the time of the trial it was possible for him to have come within the state, but it certainly could not have been necessary for the people to have placed a guard upon every line of travel into the state to enable them to satisfy the court that he could not be found within it.

The instrument alleged to have been forged, a copy of which appears to have been set out in the complaint in the justice's court, was not produced upon the examination. The witness Jackson (whose testimony taken upon the examination before the magistrate was being read to the jury) had stated that he was present when the complaint was drawn by the district attorney, that they compared it, and that the copy in the complaint was correct; whereupon the justice said to the witness: "You may go on and state, refreshing your recollection as you please, the contents of that instrument." Upon the reading of this testimony in the superior court, appellant's counsel objected to the above direction given by the justice to the witness, and the testimony of the witness following, which appears to have been a reading of that portion of the complaint. The superior court overruled the objection, and permitted the testimony in relation to the contents of the paper to be read to the jury. The direction of the justice was too broad, but it does not appear that the witness improperly refreshed his recollection. He was present when the copy was taken from the original; assisted in comparing it. The copy thus made was competent as secondary evidence of the contents of the original, the original, after it was copied, having gotten into the possession of the defendant, and was not produced, though its production was demanded. We think the superior court did not err in overruling appellant's objection.

A part of an answer given by the witness was not responsive to the question, and a part was directly responsive. Appellant moved to strike out the answer on the ground that it was irrelevant, immaterial, and incompetent, and also that it was not responsive to the question. The first objection was properly overruled, as the whole of

the answer was relevant, material, and competent; and the second objection was also properly overruled, as the motion went to the whole answer, and part of it was directly responsive to the question.

Thomas F. Smith, deputy city auditor of the city of Los Angeles, was called for the prosecution, and testified that he saw the Helen Henry order in the office of the city auditor; that Mr. Jackson had it; and that a warrant was drawn in favor of Helen Henry, and delivered to Jackson. Upon cross-examination he testified that "the orders were addressed to the city auditor and city treasurer,—to both." Upon redirect examination the witness said: "I do not remember whether the word 'auditor' after the words 'to the city' was written or printed in. I think it was there. At this point in the re-examination of the witness, the deputy district attorney showed the witness the information containing a copy of the forged instrument, with the request, 'Now look at this.' Defendant's counsel objected that it was not a paper that the witness saw or executed or made, and that it was nothing by which the witness could refresh his recollection; to which the attorney for the people replied: 'It don't make any difference. It is a paper proven to have been an exact copy of the original.' The court overruled the defendant's objection, and permitted the witness to examine the copy contained in the information, and thereupon the witness further testified: 'As I stated, I thought the word 'auditor' was written in there, but I would not be positive. I would not like to swear that it was or was not, but at the same time I thought it was there. These forms are gotten out in that way. I thought it was there because it was customary to put it there.' The mode adopted by the prosecution in the re-examination of this witness was most extraordinary, and the court erred in permitting it. An inspection of the writing set out in the information could not by any possibility refresh his recollection. It might lead him to distrust his memory, or convince him that he was mistaken, but, if so, it could only be because he relied upon the statement of another that "it is a paper proven to have been an exact copy of the original." It was for the jury to say whether the forged instrument was correctly set out in the information, and counsel had no right to assume, for the purpose of affecting the testimony of the witness, that it was proven to be a correct copy. The means which may be used to refresh the recollection of a witness, as embodied in section 2047 of the Code of Civil Procedure, has long been the settled law, and there are no precedents to the contrary. The question remains, however, whether the defendant was prejudiced by this error. If the alleged variance between the instrument as set out in the information and the original was mate-

rial, the error was prejudicial; otherwise, it was not. The defendant, as he had a right to do, assumed two apparently inconsistent positions. He contended that the instrument as set out in the information, being addressed to the city of Los Angeles, and not to the auditor, was for that reason void; and that the original was in fact addressed to the auditor, and therefore was a different instrument from that for the forgery of which he was being tried, or, in other words, that there was a variance between the information and the proof. An immaterial variance must be disregarded. There are two aspects in which the variance in this case must be considered: (1) As to whether the validity of the instrument, if genuine, was affected; and (2) whether, if the forged instrument was addressed to the auditor, as the defendant sought to prove, a conviction or acquittal upon the information in this case could be made available as a bar to another prosecution upon an information in which the instrument should be shown to be addressed to the auditor.

1. As to the validity of the instrument as set out in the information, the defendant requested the court to charge the jury that "an order drawn directly on the city of Los Angeles, and not drawn on the auditor of said city, is void on its face, and could not be enforced." This instruction was refused by the court, and we think correctly. The auditor is but the agent of the city. A corporation can only act by or through its officers, who are its agents. The address to the city was quite sufficient, and fully authorized the auditor to act.

2. We see no ground upon which it could be successfully contended that a conviction under this information would not bar a prosecution upon the instrument in question if it should afterwards appear that it was in fact addressed to the auditor, and a new information should so charge it. Wharton, in his work on Criminal Pleading and Practice, (section 173,) says: "The great rigor of the old English law in this respect was one of the consequences of the barbarous severity of the punishment imposed. A more humane system of punishment was followed by a more rational system of pleading."

The order in question was for the salary of a certain person for the month of February, 1892, to the State Investment Company, indorsed by the defendant to J. W. Jackson, and a warrant was in fact issued thereon to Jackson. It is the order upon which a warrant was issued to Jackson for the salary of Helen Henry for the month of February, 1892, for the sum of \$80, which the defendant has been found guilty of forging. It is not like the case of a counterfeit bank bill, where a letter or a figure may be the only means of distinguishing it from thousands of others of the same denomination purporting to be issued by the same bank. In Peo-

ple v. Hughes, 29 Cal. 258, the defendant was charged with arson, committed to defraud an insurance company. In the indictment the insurance company was named the "Hartford Insurance Company." The name as proved on the trial was the "Hartford Fire Insurance Company." The court said: "It is sufficient to say that, under our practice, this is no ground for the arrest of judgment." Page 262. This remark was made independently of the section of the practice act which also justified the conclusion of the court. In *People v. Phillips*, 70 Cal. 61, 11 Pac. Rep. 493, the information alleged the forgery of a promissory note described as payable "to H. C. Phillips, or order." The note given in evidence did not contain the word "to." Held, the variance was immaterial. See, also, *People v. Tonielli*, 81 Cal. 275, 22 Pac. Rep. 678. As the omission of the words "city auditor" was not essential either to the validity of the instrument or its identification, we must hold, both upon principle and authority, the error under consideration was not prejudicial.

Other rulings upon evidence are assigned for error, most of which are mentioned only by number, and are not discussed. We have, however, examined the whole record, and find no error which would justify a reversal. The exceptions to the instructions to the jury given and refused have been sufficiently covered in the foregoing opinion. We advise that the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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98 Cal. 676

RAMISH v. KIRSCHBRAUN et al. (No. 19,165.)

(Supreme Court of California. July 14, 1893.)

BREACH OF CONTRACT—DELAY IN DELIVERY—
MEASURE OF DAMAGES.

In an action for delay in delivering eggs agreed to be delivered as soon as they should arrive by freight, the measure of damages is the difference between their value at the place of delivery at the time when they were delivered and when they should have been delivered.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by A. Ramish against Kirschbraun & Sons for delay in delivery of a car load of eggs. Judgment for plaintiff. Defendants appeal. Reversed.

Gould & Stanford, for appellants. Del Valle & Munday, for respondent.

PER CURIAM. The facts of this case are fully stated in the opinion of the court found in 90 Cal. 581, 27 Pac. Rep. 433, where the judgment and order of the trial court were reversed, and the cause remanded for a new trial. A new trial was had, judgment again went for plaintiff, and the case is now before us for the second time. Plaintiff, in Los Angeles, purchased from defendants, in Omaha, a car load of eggs, to be delivered in Los Angeles. The eggs arrived in Los Angeles July 8th, but owing, as it is claimed, to the negligence of the defendants, plaintiff was unable to secure possession of them until July 14th. In the mean time the price of eggs dropped, and this action is brought to recover damages upon a failure to deliver on the 8th of July. Upon the question as to the measure of damages, the trial court instructed the jury as follows: "If your verdict be for the plaintiff, you should then, of course, estimate the amount of damages, and in estimating the amount of damages the rule should be the difference between what the eggs cost plaintiff by the terms of the contract and the value of the eggs to him at the time and place when they ought to have been delivered by the terms of the contract. The value to him at that time and place was the market value at that time and place." The foregoing instruction does not state the true rule of damages in a case of this character. The cost price of the eggs is an immaterial element in the case. If the foregoing rule be the correct one, then the value of the eggs at the time they were actually received by plaintiff would be an immaterial element, and evidence addressed to that inquiry not within the issue. But the contrary is the fact, and a determination as to the value upon the 14th of July, the day when the eggs were actually received, is absolutely necessary in order that plaintiff's damage may be properly estimated. It is entirely apparent that the eggs may have been of a greater value on July 14th, when they were actually received than they were upon July 8th, when they should have been received. Upon such an assumption of facts, plaintiff would not have suffered any damage whatever, but, on the contrary, would have been greatly benefited by the delay in delivery; yet, under the instructions of the court, heretofore quoted, he might have been entitled to the amount of damages awarded by the jury. In addition to the reasons already suggested, this court said in the previous decision of the case, (90 Cal. 581, 27 Pac. Rep. 433:) "The evidence should have been confined to the inquiry of what was the market value of the eggs between July 8th and July 14th." The law of the case must be deemed as settled to that effect. For the foregoing reasons let the judgment and order be reversed, and the cause remanded.

99 Cal. 25

BAY VIEW SCHOOL DIST. OF SANTA CRUZ COUNTY v. LINSKOTT, County Superintendent of Public Schools. (No. 15,199.) (Supreme Court of California. July 20, 1893.)
SCHOOL DISTRICTS—DIVISION—EFFECT OF INCORPORATION OF TOWN

1. Under Pol. Code, § 1576, providing that each city or incorporated town, unless subdivided by the legislative authority thereof, shall form a school district, by the incorporation of a portion of a school district as a city or town, all that portion of the district within the exterior boundaries of the city or town is withdrawn from the district.

2. Where a portion of a school district is incorporated as a city or town, the fact that the trustees of the district continue to maintain, as before, for the benefit of the children of their district, a school within the territory included in the city or town, does not entitle such district to a portion of the school fund of the county, in the absence of any school in the portion of the district not included in such newly-incorporated city or town.

Commissioners' decision. In bank.

Application by the Bay View School district, of Santa Cruz county, for a writ of mandate to compel John W. Linscott, county superintendent of public schools, to apportion to plaintiff a part of the county school funds. Writ denied.

Charles B. Younger, for petitioner. Spalsbury & Burke, for respondent.

TEMPLE, C. August, 1865, there were in Santa Cruz county two adjacent school districts, one known as the "Santa Cruz School District," and the other as the "Bay View School District." Since that time, both have maintained their autonomy, electing trustees at the proper times, and have kept up schools within the original boundaries of their respective districts. The Bay View district, the plaintiff here, in 1868, purchased a lot for its schoolhouse, and has since expended \$5,000 in building a schoolhouse upon it. In this house its school has been since maintained, where there has been an average attendance of 100 pupils. At every apportionment of school moneys by the superintendent of said county, up to December 15, 1891, its share has been apportioned to plaintiff, and has been expended by it by orders drawn upon the treasury in the usual mode. At the last-named date the defendant, as superintendent of schools, refused to make any apportionment to plaintiff, and has since refused to recognize plaintiff, or its rights to the public moneys, on the grounds (1) that said Bay View school district has no legal existence; (2) that the persons claiming to act as trustees of said alleged school district are not trustees thereof; and (3) that no public school has been maintained within the exterior boundaries of said alleged Bay View school district, as defined and fixed by the order creating said district, except the public school hereinbefore referred to, which school, since March, 1866, has been maintained in a schoolhouse situate within the

exterior boundaries of the town (now city) of Santa Cruz.

The contention is that the portion of Bay View school district within the exterior boundaries of the city of Santa Cruz has ceased to be a portion of such school district, and therefore no school has been maintained within the district. The question to be determined, therefore, is whether, by the incorporation of the town or city of Santa Cruz, all that portion of the school district within the exterior boundaries of the city has been withdrawn from the district.

It was said by this court in *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. Rep. 1067: "The power to change the boundaries of the district, as well as to define them in the first instance, is of legislative origin, and whether exercised immediately, by the legislature, or mediately, by a board of supervisors,—the local legislature,—is, whenever exercised, a legislative act. It is well settled that the legislature has the power to make such changes, and that in the exercise of this power it may make such provision respecting the property and obligations of the corporation as it may deem equitable or proper, and that its action in this respect is conclusive." The town of Santa Cruz was incorporated by special act of the legislature March 31, 1866, and the exterior boundaries defined so as to include a large portion of Bay View school district, with the lot upon which the trustees of the school district subsequently erected their schoolhouse, and where they have since maintained their school. March 11, 1876, the city of Santa Cruz was incorporated, with the same boundaries as the town of Santa Cruz. At the time of the incorporation of the city, section 1576 of the Political Code read as follows: "Each county, city or incorporated town, unless subdivided by the legislative authority thereof, forms a school district." The legislative authority of Santa Cruz has never subdivided the city into school districts. In 1878 the above section was amended so as to read: "Each county, city, or incorporated town, unless subdivided by the legislative authority thereof, forms a school district; provided the board of supervisors may include more territory than that now included within the boundaries of any incorporated town." March 20, 1891, this section was amended as follows: "Every county, city or incorporated town, unless subdivided by the legislative authority thereof, forms a school district; provided, that whenever a city or town shall be incorporated the board of supervisors may upon petition annex thereto for school purposes only the remainder of the district or districts from which said city or town was organized, or any part thereof; and provided further, that whenever any territory shall be annexed to a city or an incorporated town for school purposes, the board of education or of school trustees of said city or incorporated town

shall have full control for school purposes only of the territory or property so annexed." The board of supervisors of the county of Santa Cruz has not annexed any territory to the city of Santa Cruz for school purposes. Had it done so, the authority to divide such territory with the territory of the city into school districts would have been in the legislative authority of the city or school trustees. In view of these statutes, there can be no doubt but that the city of Santa Cruz constitutes a school district. Certain acts of the city, of the school district, and of the school superintendent are cited, as showing a recognition of the plaintiff as a school district with its original boundaries, and as an estoppel upon defendant. But an act of the legislature, within legislative power, fixing the boundaries of the political subdivisions of the state, cannot be repealed by the officers of such subdivisions, not even by acts of estoppel in pais. After the incorporation of the city the board of supervisors ceased to have any power over the school districts within the city. It must then be taken for granted that the portion of Bay View school district which was included within the exterior boundaries of the city has ceased to constitute a part of that district. The school was therefore not maintained within the district.

A school was, however, maintained by the trustees of the district for the benefit of the children of the district, and there is no complaint that they have not been fully accommodated, or their educational wants fully satisfied, so far as such school could do so. Is this such compliance with the law as will entitle plaintiff to the mandate? It is important to remember that the money has been apportioned and paid out. There is actually no money in the treasury to be apportioned. Perhaps, if insisted upon, this would be sufficient to defeat the application. To issue the mandate now would be of no avail, nor would it compel the respondent to refund the amount on the ground that he has illegally disbursed it. If, in doing so, he has followed the law, he cannot be made to do this no matter how great the hardship upon plaintiff. Sections 1543-1859, Pol. Code, do not expressly provide that such school shall be within the district, but such is clearly the implication. The purpose of establishing school districts is that schools may be brought conveniently near the pupils. This intent could be defeated if the trustees could maintain school out of the district. Section 5, art. 9, of the constitution, provides that: "The legislature shall provide a system of common schools by which a free school shall be kept up and supported in each district. * * *" The provisions made by the legislature will be presumed to be intended to effectuate this, as well as other purposes, and the statutes indicate this. Section 1858, Pol. Code, gives the trustee power to manage school property within the dis-

trict. Section 1581 requires every new district to open a school therein within four months. See, also, section 1662. If a district may, under the law, maintain a school outside of the district, other unpleasant consequences might follow, which it is unnecessary to specify. It is enough that so the law is written.

It is suggested that the Santa Cruz district also antedates the incorporation of the city, and, according to the agreed case, all of it is not included within the city of Santa Cruz. It does not appear that the corporation now known as the "Santa Cruz School District" is the school district created by the statutes above cited, and whose boundaries are coincident with the city boundaries. On the contrary, it appears from the agreed case that such is not the fact. Santa Cruz school district may be in the same condition as Bay View school district, and may not be entitled to any of the school moneys, for the same reason. This may be so, but Santa Cruz school district is not a party to this case. It is not bound by the agreed case here, and no question is raised, or can be, in regard to its rights. It would not help the case of plaintiff to show that money has been improperly apportioned to Santa Cruz school district. I think the order should be denied.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is denied.

(99 Cal. 1)

PEOPLE v. HYNDMAN. (No. 20,966.)
(Supreme Court of California. July 19, 1893.)
HOMICIDE—INDICTMENT—JUSTIFICATION—INSTRUCTIONS.

1. It is not necessary that an indictment for murder state the means with which crime was committed.

2. Under Pen. Code, § 187, defining murder as the unlawful killing of a human being with malice aforethought, it is unnecessary to allege that the killing was deliberate and premeditated.

3. Defendant had a quarrel in a saloon with a woman who had come in with deceased. Deceased interfered, and, while deceased held defendant down on the floor, the woman struck defendant with a hammer, cutting through his ear. Held, that it was error to add to an instruction justifying the killing, if it was done under a reasonable fear by defendant of loss of life or great bodily harm at the hands of deceased and the woman jointly, a condition that deceased and the woman had a preconceived design, and had agreed together, prior to the infliction of the wounds causing deceased's death, to jointly assault defendant.

4. While threats made by defendant between a quarrel and reconciliation in good faith cannot be considered, in the absence of subsequent threats, it is proper to add to an instruction that if defendant had not, in good faith, forgiven deceased, the threats could be considered.

5. Though there had been no reconciliation, the killing might be justifiable, if defendant was assaulted under such circumstances

that he had reasonable grounds to believe, and did believe, that it was necessary to preserve his own life, or prevent great bodily injury.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; John Caldwell, Judge.

William Hyndman was convicted of murder, and appeals. Reversed.

G. L. Waters, for appellant. W. H. H. Hart, Atty. Gen., and Wm. H. Layson, First Dep., for the People.

HAYNES, C. The defendant was convicted of murder in the second degree, and appeals from the judgment, and from an order denying his motion for a new trial. The body of the information is as follows: "William Hyndman is accused by the district attorney for the county of Nevada, state of California, by this information, of the crime of murder, (a felony,) committed as follows: The said William Hyndman, on, to wit, the 8th day of July, 1892, at and in the county of Nevada, and state of California, and prior to the filing of this information, willfully, unlawfully, feloniously, and of his malice aforethought, did kill and murder one William Searle, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California." The defendant demurred to this information and the demurrer was overruled, and defendant also objected to the introduction of any evidence upon the same grounds. Briefly stated, the points urged by appellant are (1) that the information does not allege the means used, nor state facts sufficient to apprise the defendant of the nature of the evidence the people will offer in that regard, or such facts as would enable him to prepare his defense; (2) that the information does not allege that the killing was "deliberate and premeditated."

At common law it was indispensable to a good indictment that the means used to procure death should be stated in all cases where such means were known, and, if unknown, the absence of the allegation must be excused by the statement that the means used were unknown. Under legislation adopted in England in 1851, and afterwards in Canada, an indictment in the form of this information is declared to be good, and this legislation has been incorporated into the statutes of several of the states. While there is no statutory provision in this state expressly declaring such form of indictment or information to be sufficient, it has several times been held that such averments are unnecessary. *People v. Alviso*, 55 Cal. 230; *People v. Hong Ah Duck*, 61 Cal. 388. In *People v. King*, 27 Cal. 510, and *People v. Cronin*, 34 Cal. 192, the question as to changes effected in criminal pleadings by the Code was discussed. In the latter case it was said: "While it may be well to state

the means by which death was caused, we do not consider such a course indispensable." No case is reported in this state where such averments are discouraged, though held unnecessary. To prevent misconception it may be added that in none of the cases so holding was the homicide committed in the perpetration, or attempt to perpetrate, arson or other felonies mentioned in that connection in section 189 of the Penal Code. On the authority of the cases above cited, the first objection made to the information cannot be sustained.

As to the second objection, Pen. Code, § 187, defines murder as follows: "Murder is the unlawful killing of a human being with malice aforethought." In *People v. De La Cour Soto*, 63 Cal. 166, it was held that murder, thus defined, includes both degrees, and that it is sufficient to charge the offense committed in the language of the statute defining it. See, also, *People v. Martin*, 47 Cal. 101.

Other points made by appellant require a statement of the circumstances under which the homicide occurred. The defendant and deceased were working together in a mine a month or two prior to the homicide. The superintendent met defendant in the mine, and the latter, in an excited manner, put his head down, and said Searle (the deceased) had hit him with a drill or hammer. Searle called defendant a liar, and the two "squared off" to fight. The superintendent separated them, and discharged them both, but soon after took Searle back, and put him to work. Defendant was not re-employed. On the evening of the homicide, Searle and the defendant met in the store of one Kohler, who also kept a bar in the same room. The old difficulty was talked over, and they "made up friends," shook hands and drank together, and shortly afterwards another drink was taken, and again they shook hands. Searle made some purchases of some provisions, which were placed in a basket, and he left the store. He was then living with a woman named Lou Kane, who was not his wife, and who was reputed to be a woman of the town. Shortly after Searle left the store, he returned with this woman, and his basket, and took a seat upon a bench. Lou Kane made some purchases, and, while standing at the bar counter, defendant asked her to treat, which she did. According to her testimony, defendant said to her he used to know her at Pioche, to which she replied that she never was there, and that defendant called her a liar, and she then "hailed off, and slapped him in the face;" that the defendant commenced slapping her, whereupon Searle came, and shoved them apart. Other testimony tended to show that it was the woman who gave the "lie," and that defendant seized her by the arms after she had slapped him in the face. When Searle pushed the defendant and the woman apart,

the men grappled each other, and after a short struggle they fell to the floor, the defendant underneath. While in this position the woman struck the defendant at least twice with a hammer, cutting entirely through his ear, so that it had to be stitched up to keep it together. Mr. Kohler testified that defendant called him twice, saying, "Oh, Kohler, Kohler!" that he ran round, and pulled Searle off, "but he was dead then, or as good as dead; he never spoke another word." The fatal wound was inflicted with a pocketknife; one being in the thigh, partly severing the femoral artery, and another penetrating the heart. As to the stage of the struggle at which these wounds were inflicted,—whether before or after the defendant was struck with the hammer,—the evidence is conflicting. The defendant testified positively that he did not take out or use the knife until he was struck with the hammer, and that he believed that it was necessary to use it to preserve his own life, or to prevent great bodily harm. Lou Kane, on the other hand, testified that she did not strike defendant with the hammer until after Searle cried out that he was cut. There was also other evidence upon this point, not necessary to be noticed in this connection. Under this state of the case, the defendant requested the court to instruct the jury that if the woman joined in the assault upon the defendant with a hammer, or other instrument likely to produce death, or to do great bodily harm, "and the defendant had reason to fear, and did fear, that his life was in imminent danger, or that he was in danger of receiving great bodily harm, at the hands of said Kane and William Searle, the deceased, jointly, and that defendant acted under the influence of such fears alone, and to save his own life, or to prevent his receiving great bodily harm, gave the mortal cuts to the deceased, he was justified, and the jury should acquit." This instruction was refused, and the court, of its own motion, gave the following: "If the jury find from the evidence that the deceased, William Searle, at the time of the homicide charged, made an assault upon the person of the defendant, and violently threw him to the floor, and continued his assault in a violent manner, and the jury find further from the evidence that the deceased, Searle, and the witness Mrs. Kane had a preconceived design, and had agreed together, prior to the inflicting of the wounds that caused the death of the deceased, to jointly assault the defendant, and inflict upon him some great bodily injury, and you further find from the evidence that prior to the infliction of such wounds the said Mrs. Kane, in pursuance of such agreement, joined in the assault upon the defendant with a hammer, or some other instrument or thing in her hands likely to produce death, or to do the defendant some great bodily injury, and did strike the de-

fendant on the head with such hammer, instrument, or thing, and the jury find from the evidence that such assault endangered the life of the defendant, or that he was in danger of great bodily harm at the hands of said Kane and deceased jointly, and you further find from the evidence that the defendant had reason for and did fear that his life was in imminent danger, or that he was in danger of receiving great bodily harm at the hands of said Kane and Searle, the deceased, jointly, and that the defendant acted under the influence of such fears alone, and to save his own life, or to prevent his receiving great bodily harm, gave the mortal cuts to the deceased, he was justified, and the jury should acquit. If, however, you believe from the evidence that there was not any preconceived design or agreements between said deceased and said Mrs. Kane to inflict at the time of said homicide, jointly, upon the person of the defendant, a serious bodily injury, and that the assault or injury, if any, were inflicted by the said Kane voluntarily, and without any design or request by the deceased, and if, in such case, at the time of the infliction of such wounds, the defendant had no sufficient reason to apprehend a design on the part of the deceased to take his life, or inflict upon him great bodily injury, then the defendant was not justifiable."

The court erred in refusing to give the instruction asked for, and in giving the instruction above quoted. It certainly could make no difference to the defendant whether the deceased and Mrs. Kane had a preconceived design, and had agreed together to assault the defendant. If he had reason to fear, and did fear, that his life was in danger, or that he was about to receive great bodily injury, he was not obliged to ascertain whether there was in fact such preconceived design, at the risk of converting what would be a justifiable homicide, if such preconceived design and agreement existed, into murder, if it did not exist. The deceased, by being upon defendant, effectually prevented the defendant from protecting himself against the woman. They were in fact co-operating in the assault, and in the infliction of the injuries, upon the defendant. The assault was first made by the woman. The deceased, whether there had been any prior agreement or not, voluntarily joined in the assault. It may be that he had no intention to inflict any great bodily injury upon the defendant, or to put defendant's life in danger, but he was not justified in assaulting him, or joining in the assault made by the woman; but in either case the deceased and the woman, whether there was a preconceived purpose or not, became mutually responsible, each for the acts of the other, unless some dissent or remonstrance or disapproval was in some manner expressed, either by word or act. Of course, we do not intend to pass upon facts which are alone to be found by the

jury. There was, however, evidence tending to prove a state of facts which made the request preferred by defendant's counsel pertinent, and which we necessarily assume in determining whether the court erred in determining it, and in giving the instruction above quoted.

The people, after giving evidence of the reconciliation between the defendant and the deceased, which took place in Kohler's saloon, and of the subsequent homicide, questioned certain witnesses as to threats made by the defendant towards deceased after the difficulty at the mine, and prior to their meeting at the saloon. Evidence of these threats was received, over defendant's objection. In view of this testimony, the defendant requested the court to instruct the jury that if defendant and deceased, in good faith, "made up good friends, and that each forgave the other all past differences and animosities, and no new threats were made by defendant," such former threats could not be considered by the jury as evidence of malice. This instruction was given, with the following qualification: "But if the jury believe from the evidence that the defendant had not, in good faith, forgiven the deceased, and made up good friends, prior to the infliction of the wounds by the defendant, then the jury has the right to consider the past threats of the defendant, if any there were, for the purpose, with the other evidence in the case, of determining the question of malice." We think the evidence of previous threats was properly received, and cannot say that the modification of the instruction by the court was erroneous. There is no class of evidence, however, more likely to be given undue weight and importance by juries, or requiring greater care on the part of the court, to prevent misconception or misapplication. It does not necessarily follow, because a man avows an intention to commit a crime, that such intention really exists. Threats may be uttered in a transient fit of anger, or through bravado, and it requires careful attention to other circumstances to ascertain with reasonable certainty the actual intention of the party making them. One would naturally suppose that a sane man, intending to commit a crime, would not make known his purpose by threatening to perpetrate it, yet such threats have been fulfilled; and therefore, unless under special circumstances, such evidence is competent. If, for example, the time or the manner in which the homicide is committed correspond to the threat, or other circumstances clearly connect them, they are entitled to great weight. But, "such is the indulgence shown human frailty, that when two persons have fought, even on malice, and afterwards, to all appearance, are reconciled, and fight again on fresh quarrel, it will not be presumed that they were moved by the old grudge, unless it appear from all the circumstances of the

fact." *State v. Barnwell*, 80 N. C. 470, citing *Hawk. P. C. c. 31, § 30*; *State v. Jackson*, 2 Jones, (N. C.) 247; *State v. Hill*, 4 Dev. & B. 491. Besides, if there had been no reconciliation, if the defendant was assaulted, and placed under such circumstances that he had good reason to believe, and did believe, that it was necessary to take the life of the deceased to preserve his own, or to prevent the infliction of great bodily injury, the fact of the previous ill will or malice sustained towards the deceased could not take away his right to self-defense, or convert a justifiable homicide into murder. The instruction, as given, does not, when considered with other instructions, exclude these considerations, and in many cases is all that could be necessary to say to the jury in that connection; but, in viewing the peculiar circumstances of this case, we think it advisable that the attention of the jury should be called, in that connection, to the qualifications above suggested.

The instruction given by the court upon the subject of good character is not objectionable.

The further contention of appellant, that the evidence is not sufficient to justify the verdict, need not be noticed, in view of the conclusion to which we have arrived. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

4 Cal. Unrep. 85

PEOPLE ex rel. ATTORNEY GENERAL v. SAN FRANCISCO PUBLIC STOCK EXCHANGE. (No. 14,668.)

(Supreme Court of California. Aug. 11, 1893.)

CORPORATIONS—ANNULMENT OF CHARTER—PLEADING.

The complaint in an action to annul the charter of a corporation, for conducting a business in violation of the laws against lotteries and gambling, should clearly and distinctly allege its illegal acts.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by the people of the state of California, upon the complaint and information of the attorney general, to annul the charter of the San Francisco Public Stock Exchange. Judgment for defendant. Plaintiff appeals. Affirmed.

Atty. Gen. Hart, for appellant. Davis Louderback, for respondent.

HAYNES, C. Appeal from a judgment upon demurrer to the complaint. The complaint alleges the incorporation of defend-

ant, and sets out its articles of incorporation, constitution, and by-laws in full. Its business, as shown by its articles of incorporation, is to buy and sell stocks, bonds, and securities. Except as to one feature, the mode of conducting its business is the same as that of other exchanges with which the public are familiar, so far as appears from its constating instruments, and that is that it permits the use of the phonograph in making orders, offers, and bids. These offers or bids may be spoken into the private phonograph of the person making the bid or offer, or into phonographs kept by the exchange for that purpose in adjacent rooms, and the cylinders containing these bids are placed upon a table in the exchange room, and afterwards placed in the "main phonograph" consecutively, in the order in which they are received, and publicly announced; and the bid, offer, or order is then placed upon the blackboard. The bid, offer, or order must designate the member or broker who is to execute it, and the name of the person making it, unless he directs it to be withheld. The by-laws provide, among other things not material to be noticed, that no fictitious sales or contracts shall be made, and that all stocks and securities must be delivered within 30 minutes after the close of the session. Orders, bids, and offers may also be made orally or in writing, at the option of the party making them. The complaint charges that the mode of conducting business by the defendant is in violation of section 330 of the Penal Code, and in violation of the laws of this state, and of the ordinances of the city of San Francisco, "against conducting of lotteries, gambling, and games of chance, and is therefore illegal, and against public policy." It is conceded by appellant that the articles of incorporation, constitution, and by-laws, upon their face, seem to be legitimate and proper; that there is nothing in the law which inhibits the buying and selling of stocks, bonds, and securities, and that the proper use of the phonograph is not, in itself, objectionable. This being conceded, the complaint must be held insufficient, unless facts are alleged, showing either that defendant is not operating within its constitution and by-laws, or that while its constitution and by-laws may, upon their face, appear to be legal, the business done, though in conformity therewith, demonstrates their illegality. We do not find in the complaint any allegation tending to show either of such facts. While it is alleged that bids and offers are spoken into the phonograph without the hearing of members of the exchange or the public, and that no one knows the prices fixed until the same are announced through the main phonograph, it alleges that the bids and offers are consecutively announced through the main phonograph. No complaint is made of any wrong or injustice in making the announcements consecutively,

nor do we see that any ground of complaint can be based upon the fact that no one can know of the bid or offer until it is announced, as that objection would be equally valid if all bids and offers were made orally. In appellant's brief the argument seems to be confined to the point that respondent's business, as conducted, is a lottery. We see in the complaint no statement of any element of chance, except that which inheres in all speculative business of like character. It is said in appellant's brief that "by a close perusal [of the complaint] it is seen that nothing of substance is either bought or sold." In a complaint seeking to annul the charter of a corporation, or to end its business by a perpetual injunction, the allegations of misuser ought to be so clear and distinct as to be seen without resorting to a close perusal. We can discover no averment of any fact showing that respondent's business is not conducted in conformity to its charter, constitution, and by-laws, or where in it violates any provision of the Penal Code. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

99 Cal. 57

ZELLERBACH v. ALLENBERG et al. (No. 14,313.)

(Supreme Court of California. July 21, 1893.)

DECREE IN EQUITABLE ACTION — RELIEF NOT PRAYED FOR — CONSPIRACY — SECONDARY EVIDENCE OF LETTERS — QUESTIONS NOT RAISED BELOW.

1. In an action to enjoin the sale by defendants of certain stock pledged by plaintiff to defendants, to have judgments recovered by the latter against the former, for money loaned, adjudged paid, and for an accounting, plaintiff alleged that the money loaned to him by defendants was embezzled from him by one of them, who was his clerk, under a conspiracy between all the defendants. Defendants denied the fraud and conspiracy, alleged that the stock was pledged to secure the loans made by them to plaintiff, pleaded as estoppels the judgments recovered by them against plaintiff, and asked for affirmative relief. *Held*, that under Code Civil Proc. § 580, authorizing the court to grant any relief consistent with the case made, and embraced within the issues, though not specifically prayed for, the court had power to decree that plaintiff was indebted to defendants on the judgments in certain sums, that defendants had a lien on the stock for such sums, and to order a sale of the stock by the sheriff to satisfy such indebtedness.

2. In an action to enjoin the sale of certain stock pledged by plaintiff to defendants, and to have certain judgments adjudged satisfied, where the court finds that plaintiff is indebted to defendants in the amount of the judgments, and that the latter have a lien on the pledged stock for the amount of such indebtedness, plaintiff cannot for the first time on appeal object that the judgments are barred by limitations.

3. The payment of cash dividends out of net earnings of a corporation is a question of

policy, and the action of the directors in that regard, if honest and intelligent, will not be lightly overruled.

4. Where plaintiff alleges a conspiracy to defraud him, on the part of defendants, letters written by one defendant to another during the continuance of the alleged conspiracy are admissible.

5. Where a witness shows that letters had been mailed by him to a person in a foreign country, and that the witness had not thereafter seen them; that he received replies in due course of mail; and that he has no copies of the letters,—it is proper to admit secondary evidence thereof.

In bank. Appeal from superior court, city and county of San Francisco; T. K. Wilson, Judge.

Action by Marks Zellerbach against Charles Allenberg and others to restrain a sale of stock pledged by plaintiff to defendants, to have certain judgments adjudged paid and satisfied, and for other relief. From a judgment for defendants, and an order overruling a motion for a new trial, plaintiff appeals. Modified and affirmed.

T. M. Osmont and H. L. Gear, (J. M. Walling, of counsel,) for appellant. Jarboe & Harrison, Jarboe & Jarboe, and Robert H. Countryman, (Naphtaly, Fredericks & Ackerman, of counsel,) for respondents.

PER CURIAM. The facts involved in this case, so far as they need be stated, are as follows: On December 31, 1875, the plaintiff was indebted to the defendant William Goldstein in the sum of \$50,000, for borrowed money, and on that day executed to him his promissory note for the sum named, payable one day after date, with interest at the rate of 1 per cent. per month. On March 20, 1876, plaintiff was indebted to the defendant Charles Allenberg in the sum of \$9,000, and on that day he executed an agreement in writing by which he promised to pay, on or before January 20, 1877, the said sum of \$50,000 to Goldstein, and the said sum of \$9,000 to Allenberg, with interest on the same at the rate of 1 per cent. per month, payable quarterly. At the time of executing this agreement, plaintiff also executed to Allenberg a deed of conveyance of certain real property, situate in the county of Sierra, in this state, to secure payment of the said respective sums of money; and thereafter, in March, 1877, to further secure payment of the said respective sums of money, plaintiff pledged with Allenberg 30,000 shares of the capital stock of the Altoona Quicksilver Mining Company, and on March 7, 1879, for further security, plaintiff pledged with Allenberg 1,000 shares of the capital stock of the Eureka Lake & Yuba Canal Company. Immediately after receiving the said shares of stock in pledge, Allenberg surrendered the certificates therefor to the corporations, and took new certificates in his own name. He was then the attorney in fact of Goldstein, who resided in Germany; and all the transactions, so far as the latter was interested

in them, were managed by him as such attorney. In March, 1877, plaintiff, being then indebted to the defendant, E. L. Goldstein, upon two promissory notes for \$10,000 each, given for borrowed money,—one dated February 26, 1876, and the other June 29, 1876, and both bearing interest at the rate of $1\frac{1}{4}$ per cent. per month,—pledged with said E. L. Goldstein 11,000 shares of the capital stock of the Altoona Quicksilver Mining Company to secure payment of the said notes. On March 22, 1879, the defendants herein severally made personal demand upon the plaintiff that he pay to them the respective amounts for which he was indebted to them, and at the same time served him with written notice that unless he did make such payments they would, on the 5th day of May, 1879, at 12 o'clock noon, at the auction rooms of Middleton & Son, in San Francisco, sell the said shares of stock that had been pledged to them as aforesaid for the said respective amounts of indebtedness. On the said 5th day of May, 1879, plaintiff commenced this action in the late district court of the fourth judicial district in and for the city and county of San Francisco, to obtain an injunction restraining the defendants, and each of them, from selling, or offering for sale, the said shares of stock, or any of them. In his complaint the plaintiff admitted his indebtedness to the defendants, except that he claimed the indebtedness to Allenberg to be \$7,000, instead of \$9,000. The injunction was granted, as prayed for, and it remained in force until it was dissolved by the judgment now appealed from. On February 25, 1880, the defendant E. L. Goldstein commenced an action in the superior court in and for the county of San Francisco, against the plaintiff herein, to recover the amount due upon his said promissory notes. Summons was duly served on the defendant in the action, and, he failing to answer, judgment by default for the sum of \$34,645 was entered against him, and in favor of the plaintiff therein, on November 1, 1881. On January 19, 1881, the defendants Allenberg and William Goldstein commenced an action in the superior court in and for the county of Sierra, against the plaintiff herein, to recover judgment against him for the amount of his said indebtedness to them, and to obtain a decree foreclosing, as a mortgage, the deed of the real property in that county, and directing the sale of the stocks which had been given and pledged to Allenberg, as before stated, to secure payment of such indebtedness. The defendant in the action, Zellerbach, filed his answer to the complaint on August 16, 1881, denying that he was at all indebted to Allenberg, and also denying that he had ever pledged with Allenberg, for the benefit of the plaintiffs in the action, or for any purpose, 30,000 shares, or any number of shares, of the capital stock of the Altoona

Quicksilver Mining Company. Thereafter the case was tried, and on May 17, 1882, findings were filed, and judgment entered therein. The court found that Zellerbach was indebted to Allenberg in the sum of \$15,651, for principal and interest, and to William Goldstein in the sum of \$75,823.15, for principal and interest; that the real property in Sierra county had been conveyed, and the said 30,000 shares and 1,000 shares of stock had been pledged to secure payment of the indebtedness; and that the injunction issued in this action, restraining the sale of the said stock, was still in full force and effect. The judgment was in favor of the plaintiffs, for the amounts found due them, and it directed the sale of the real property, and the application of the proceeds thereof to the payment of the indebtedness, and further provided that, if the proceeds should be insufficient to pay the indebtedness, "application might be made to said court for an order or writ directing the sale of said shares of stock, and the application of the proceeds of said sale to the payment of such deficiency, and that until the further order of said court no process should issue therein for the sale of such stock, or any part thereof." From this judgment an appeal was taken to this court, and in February, 1884, the same was affirmed. *Altenberg v. Zellerbach*, 65 Cal. 26, 2 Pac. Rep. 726. Under the judgment the real property was sold, and the proceeds applied as directed. The whole indebtedness was not paid by the proceeds, but no application was subsequently made to the court for the sale of the said stocks. The Altoona Quicksilver Mining Company was incorporated in July, 1875, with 50,000 shares of capital stock. There were five directors of the company, and, from 1878 up to 1885, defendants E. L. Goldstein and Allenberg were two of such directors. The last election of directors was held September 25, 1880, when the three defendants herein, and two others, were chosen. From that time on, E. L. Goldstein was president, and Allenberg secretary and treasurer, of the company. The Altoona mine was worked profitably up to 1880, but in that year it became necessary, at a large expense, to sink to lower levels; and the work therein was practically suspended, and so continued up to the trial of this action. At the time of suspending work there was quicksilver on hand, the product of the mine, which was subsequently sold by the president, E. L. Goldstein, for sums aggregating, after paying all expenses of working, and indebtedness of the company, the sum of \$22,730.63. This money was received by the president, and held by him up to the time of the trial; no dividend of any part of it having been declared, or credit therefor given to Zellerbach. At the times when the said stocks were transferred to Allenberg in pledge, as before stated, he was the confidential clerk and book-

keeper of Zellerbach. He was also, then and thereafter, the secretary of the Altoona Company, and received for his services as such \$50 per month. On October 1, 1878, a resolution was passed by the directors of the company, allowing him \$2,400 for various services rendered to the company, other than those required of him as its secretary, and this sum was paid to him out of the funds of the company.

On April 23, 1885, after having three times amended his complaint in this action, plaintiff, by leave of the court, filed a new "consolidated and supplemental complaint," on which the trial was had. He alleged therein, among other things, that since the commencement of this action he had discovered that the moneys pretended to have been loaned to him by the defendants were his own moneys, which had been embezzled by Allenberg, his confidential clerk, and advanced to him as money belonging to the Goldsteins, with their knowledge and connivance; that plaintiff was not in fact indebted to the defendants, or either of them, in any sum of money whatever; that plaintiff was the owner of all the shares of stock claimed by defendants to have been given to them in pledge, and that they had no interest in said stocks; that the judgments of November 1, 1881, and May 17, 1882, "are held by said defendants E. L. Goldstein and William Goldstein, respectively, in trust for their codefendant Allenberg; and the said Goldsteins have not, nor has either of them, any beneficial interest whatever therein, and that all their acts and doings in and about the receipt and procurement of said notes, and in the suing thereon, and obtaining said judgments, were and are solely for the benefit of said Allenberg;" that at the time of the execution of said notes, and the recovery of judgments thereon, plaintiff believed that the consideration of the notes had been advanced to him by the payees named, and that the suits thereon were prosecuted, and the judgments recovered, for their benefit alone, and plaintiff did not discover that they were privy to, and participating in, the frauds of the said Allenberg, or were conspiring or conniving with him in covering up and concealing his frauds upon plaintiff, until within the three years last past; "that the defendants, conspiring and confederating together to ruin plaintiff in his business, and to leave him utterly helpless and destitute financially, wrongfully took possession of his valuable properties, and particularly the shares of stock hereinbefore mentioned, * * * and have wrongfully voted this plaintiff's said Altoona stock to elect and re-elect and keep themselves in office as directors of said quicksilver company; that said defendants have, as such directors, wrongfully voted and paid to said defendant Allenberg large and exorbitant sums of money, the property of said company, and which should have been ap-

plied to the payment of dividends on the stock of said company, * * * and particularly that said defendants, as directors of said company, voted to said defendant Allenberg, on the 1st day of October, 1878, the sum of twenty-four hundred dollars, and paid the same to him, under the assumed and false pretense that it was for services rendered the company, other than those of secretary;" that the defendants have willfully managed the Altoona mine so as to depreciate its value, and cause its stock to have no market value, that they might be enabled to purchase the said shares of stock, at such threatened sale, at a merely nominal price; and that unless restrained they will sell and dispose of the same, and the same will be utterly lost to the plaintiff. And the prayer was that the defendants be enjoined from selling or otherwise disposing of the said stock, or any part thereof, and be required to deliver the same to the plaintiff, free and clear of all incumbrances; that the said judgments be adjudged satisfied and paid, or that the amount found due to plaintiff be set off against them; and that an accounting of all the said transactions between plaintiff and defendants be had; and for general relief. The defendants answered the complaint, denying, specifically, all the allegations of fraud and conspiracy; alleged the loan of the various sums of money by themselves to the plaintiff, the pledge of the stock to secure the payment of the said sums, and the nonpayment thereof; and set up, and pleaded as estoppels, the judgments recovered by them against the plaintiff. The answer asked for an affirmative relief. The case was thereafter tried, and the findings upon all the issues were in favor of the defendants. A decree was accordingly entered, adjudging that the plaintiff was indebted to each of the defendants, upon the judgments referred to in the complaint and answer, in certain specified sums of money, and that the defendants, respectively, had a lien, for the payment of such indebtedness, on the said described shares of stock which were pledged to them, and also dissolving the injunction issued at the commencement of the action, and directing that the said shares of stock be sold by the sheriff at public auction, in the manner and upon the notice provided by law for the sale of personal property under execution, and that the net proceeds of the sales be paid to the defendants, so far as necessary to pay the indebtedness due them. From this judgment, and an order denying his motion for a new trial, plaintiff appeals.

1. The appellant contends that the judgment was not authorized—First, because it granted to the defendants, severally, affirmative relief, when no such relief was prayed for by them; second, because the two former judgments, upon which the relief was granted, were barred by the statute of limitations; and, third, because the lien upon

the pledged stock had become extinguished by lapse of time. There was no error in the action of the court complained of. The case was one in equity, and the court was authorized to grant any relief consistent with the case made, and embraced within the issues, although not specifically prayed for. Code Civil Proc. § 580; *Gimmy v. Gimmy*, 22 Cal. 633; *Scott v. Lumber Co.*, 67 Cal. 75, 7 Pac. Rep. 131; *Hurlbutt v. Saw Co.*, 93 Cal. 55, 28 Pac. Rep. 795; *Pom. Rem.* §§ 83, 580. The plaintiff set up the former judgments in his complaint, and brought the whole matter before the court, for its determination as to their validity. No question as to the judgments being barred by the statute of limitations was raised by the pleading, nor, so far as appears, at the trial. The court found: "At the trial of this action, evidence was introduced by the respective parties for the purpose of determining the amounts unpaid upon the several judgments hereinbefore mentioned, and the amounts of the indebtedness of the plaintiff thereon, and an investigation and accounting were had and taken of and concerning the transactions and dealings between the plaintiff and the said defendants, and of the moneys received by the defendants, and each of them, for or on account of the plaintiff; and from such evidence the plaintiff has been shown to be indebted to the defendants, respectively, in the respective amounts hereinbefore stated." This finding is not assailed, and the evidence referred to is not brought up in the transcript. It thus appears that evidence was introduced by both sides for the purpose of determining the matters referred to in the findings, and that no objection was made by either party to the evidence that was offered, or to the accounting that was had. This being so, the appellant cannot raise the objection for the first time in this court, that the indebtedness was barred by the statute. "Common honesty requires a debtor to pay his just debts, if he be able to do so, and the courts, when called upon, always enforce such payments, if they can. The fact that a debt is barred by the statute of limitations in no way releases the debtor from his moral obligation to pay it." *Booth v. Hoskins*, 75 Cal. 276, 17 Pac. Rep. 225. And, even though the debt is barred, the debtor cannot recover property pledged to secure its payment without first paying the debt. *Grant v. Burr*, 54 Cal. 298; *Spect v. Spect*, 88 Cal. 437, 26 Pac. Rep. 203; *Jones, Pledges*, § 582; 18 Amer. & Eng. Enc. Law, p. 734. It follows that, as the indebtedness was not barred, the lien upon the pledged stocks had not become extinguished, and the court was authorized to order them to be sold as it did.

2. The appellant contends that he was entitled to a new trial, because, in the accounting between the parties, he should have been credited with his share of the \$22,-

730.63 surplus assets of the Altoona Quicksilver Mining Company, and with his share of the \$2,400, which, as alleged, was improperly paid to Allenberg. This contention is based upon the theory that the defendants, in the exercise of ordinary care as directors of the company, ought to have declared a dividend of the surplus assets, including the \$2,400, and to have credited appellant's share thereof on his indebtedness; and in support of the contention the rule is invoked that "that which ought to have been done is to be regarded as done in favor of him to whom, and against him from whom performance is due." Civil Code, § 3529. As to the payment of the \$2,400, the court found that the defendants, as directors, had not "voted to or paid the defendant Allenberg any sum of money to which he was not entitled, or which should have been applied to the payment of dividends on the stock of said company," and the only specification of the insufficiency of the evidence to justify the findings is that it appears from the evidence that said E. L. Goldstein and Charles Allenberg, as directors of said company, voted the sum of \$2,400, against the protest of Mr. Zellerbach, out of funds which should have been applied to the dividends of said corporation, and to the credit of said Zellerbach. It appears from the statement that it was shown at the trial "that Allenberg had rendered various services, other than those required of him as secretary, and had received the sum of \$2,400 therefor," and that the payment of this sum was authorized by a resolution passed by the board of directors of the company. The only evidence brought up in the record to show that the allowance and payment were improper is that of Mr. Zellerbach, in which he stated "that in 1879 the trustees of the Altoona Quicksilver Mining Company voted Allenberg a compensation of \$2,400 for services outside of his secretary's work, against which he (Zellerbach) protested as strongly as he could." It was proper, if Allenberg performed extra services, that he be paid a reasonable and just compensation therefor; and that he did perform such services, and received only a reasonable compensation for them, must be assumed, in view of the action of the board. Of course, he could not, as a member of the board, himself take part in passing the resolution to pay him the money, and it does not appear that he, or even E. L. Goldstein, did take any part in passing it. There were five directors, and, in the absence of anything to the contrary, it will be presumed that the resolution was authorized, and was properly passed.

As to the claim that the defendants ought to have declared a dividend, and should be required to account for the money, in this action, as if one had actually been declared, it is enough to say that no such claim was set up in the complaint, or, so far as ap-

pears, made at the trial. But, however this may be, the rule as to declaring dividends is "that the apportionments of the net earnings to the payment of cash dividends * * * is largely one of policy, intrusted to the discretion of the directors, which, when honestly and intelligently exercised, will not be lightly overruled." *Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. Rep. 44. Here the court found, in effect, that the defendants had honestly and intelligently managed the affairs of the Altoona Company, and had not misappropriated any of its moneys, and the evidence was amply sufficient to justify the findings. It appeared that when work in the mine was practically suspended, in 1880, there was still valuable rock in the mine, but that a considerable expenditure of money was necessary before it could be profitably worked. According to Mr. Lytle's testimony, an outlay of \$15,000 was necessary. He said: "It should be worked with a furnace. A good furnace could be put up for \$15,000, that would work ten tons a day, with a return of about 600 pounds of quicksilver per day." Mr. Allenberg testified "that it would require at least \$50,000 to open up the mine at a lower level, and equip it for good work." And the plaintiff, while giving his testimony, was asked if he complained of them for not spending the money in the further development of the mine, and said: "I didn't want them to manage anything. I wanted them to give it up. I wanted to work the mine myself. I didn't want them to do anything but give up the property." Now, inasmuch as the plaintiff, in his complaint, denied that he had pledged his stock to the defendants, and was questioning their right to hold the stock in any capacity, and was attacking every act of theirs with reference to the mine, it would seem to have been simple prudence on their part to suspend any further operations, and to hold these assets in their hands until their rights should be determined, and the litigation ended, for if, as claimed by plaintiff, the stock had not been pledged to them, they would have had no right to pay themselves any dividends out of the assets. Under these circumstances it must be held that the defendants, as directors of the corporation, exercised their discretion honestly and intelligently, in not declaring any dividends, and that they cannot be called upon to account for the money in this action.

3. The appellant further contends that the court erred in admitting in evidence, over his objection, certain letters written by William Goldstein to Allenberg, and also in admitting proof of the contents of certain letters written by Allenberg to Goldstein. It appears that Allenberg was called by the plaintiff as a witness, and was asked if he had any letters from William Goldstein. He answered that he might have, and was

then asked to produce them upon a succeeding day. Upon such succeeding day the witness, still being under examination by the plaintiff, was asked to produce any letters from William Goldstein, which he had, relating to the matters about which he had been testifying; and thereupon he produced a letter dated May 8, 1874, and was asked to read a portion thereof, which he did. The witness thereupon gave to counsel for plaintiff another letter, purporting to have been written by William Goldstein under date of July 31, 1874, and plaintiff's counsel then stated: "I do not wish that letter at present. You can put in any letters you want to, and exhibit them." Subsequently, upon cross-examination of the witness, defendants' counsel offered to read in evidence the letter of July 31st, and plaintiff's counsel objected that it was incompetent, for the reason that it was correspondence between two parties defendant. Defendants' counsel stated that they did not offer the letters as evidence to bind Mr. Zellerbach, but to disprove the allegations of fraud; and thereupon the letter was admitted, and an exception reserved. Defendants' counsel were afterwards permitted, over a like objection and exception, to read other letters written by the said Goldstein to Allenberg and dated, respectively, November 26, 1874, May 14, 1875, July 30, 1875, November, 1875, January 28, 1876, and February 2, 1877. The letter of May 8, 1874, which was produced and read at the request of the plaintiff, was an acknowledgment of the receipt of a letter from Allenberg, containing a quarterly statement of the amount of money standing to the credit of Goldstein on April 1st, and saying it was all right. The letters objected to contained acknowledgments of the receipts of subsequent similar statements, and some of them spoke of the writer's family and financial affairs, and of his investments and losses. It is urged that some of these letters were written after the notes were given for the money claimed to have been misappropriated, and were not a part of the *res gestae*, and therefore not admissible. But it appears that all but two of the letters were written before the notes were given, and the last two were written before the Altoona stock was pledged to secure the notes. It also appears that the transaction complained of commenced prior to 1874, when, as alleged, Allenberg began to abstract and embezzle the plaintiff's money, and it continued until 1879, when he and his co-conspirators advertised, and were about to sell, the plaintiff's stock. It was therefore, according to the plaintiff's theory, a continuing transaction of robbery and fraud from the beginning to the end. Under these circumstances, any communications from one alleged conspirator to the other, made while the conspiracy was in progress, and relat-

ing to its subject-matter, were part of the *res gestae*, and admissible. The court did not err, therefore, in admitting in evidence the letters objected to. Code Civil Proc. § 1850; 1 Greenl. Ev. § 108; Mining Co. v. Park, 14 Blatchf. 412; Beaver v. Taylor, 1 Wall. 642; Lund v. Tyngsborough, 9 Cush. 41; Allen v. Duncan, 11 Pick. 308.

Nor did the court err in admitting evidence of the contents of the letters written by Allenberg to Goldstein. It was shown by the witness that the letters had been mailed by him directed to William Goldstein, at Bremen, in Germany, and that the witness had not seen them since; that in due course of mail he had received replies thereto; and that he had no copies of the letters. Under the provisions of section 1963, subd. 24, Code Civil Proc., there is a presumption that a letter duly directed and mailed was received in the regular course of the mail; and a letter that is beyond the territory of the state is, within the meaning of the statute, "lost," so as to allow secondary proof of its contents. Gordon v. Searing, 8 Cal. 49; Binney v. Russell, 109 Mass. 55; Manning v. Maroney, 87 Ala. 567, 6 South. Rep. 343; Burton v. Driggs, 20 Wall. 134.

It is admitted by respondents that there is in the judgment a clerical error of \$1,000, and that the judgment should be modified so as to correct the mistake. The cause is remanded, with instructions to modify the judgment by striking out "\$21,541.86" and inserting in lieu thereof "\$20,541.86." As so modified, the judgment will stand affirmed. Each party will pay his own costs on appeal. Order denying motion for new trial affirmed.

HARRISON, J., being disqualified, did not participate in the foregoing decision.

98 Cal. 648

PEOPLE v. HAWES. (No. 20,942.)

(Supreme Court of California. July 12, 1893.)

HOMICIDE—EXPERT WITNESS—COMPETENCY—EVIDENCE — HARMLESS ERROR — DYING DECLARATIONS—WHAT CONSTITUTE — DEFENDANT'S DECLARATIONS — INSTRUCTIONS — EXCUSABLE HOMICIDE—BURDEN OF PROOF—RESULTS OF PREVIOUS TRIALS—SELF-DEFENSE.

1. In a murder case, a physician of 17 years' practice testified that he had had such experience as would enable him to say at what distance powder marks would be noticeable on the flesh from the firing of a S. & W. pistol of a certain caliber; that he had seen a great many gunshot wounds, and powder marks and powder burns in connection therewith, and knew, of his own knowledge, the distance between the discharged weapons and the bodies fired on. *Held*, that it was not error to permit such witness to testify, as an expert, as to the distance at which the pistol carried by defendant at the time of the homicide would produce powder marks.

2. In a murder case, it appeared that deceased was shot in the abdomen, when he wore an undershirt, white shirt, coat, and vest; and

no one claimed there were powder marks on deceased's flesh, and all the evidence on the subject tended to show there were none on his vest or shirts. *Held*, that while evidence as to the distance at which the pistol carried by defendant at the time of the homicide would produce powder marks was immaterial, its admission was harmless.

3. In a murder case, a physician testified that he informed deceased that he could not recover, and that deceased used a variety of expressions, such as: "I can't stand this," "It will kill me," "I am going to die." To his brother he said: "I think I am going to die." To another physician he said: "I know enough of anatomy to know I have received my death blow." "I am badly hurt. I am shot in the bowels. I know it is all up." About half an hour thereafter his statement was taken, a few words at a time, while he was gasping for breath. *Held*, that such statement was properly admitted as deceased's dying declarations.

4. Where a witness testified that he saw deceased's vest when it was removed from the body, after it had lain in the grave over five months, and that it was then in the same condition as when he examined and brushed it just after deceased's death, *held*, that it was not error to admit the vest in evidence.

5. It is not error to admit evidence as to what defendant said as to the shooting immediately after it occurred, where the statement was entirely voluntary.

6. Where a murder case has been previously tried three times, and the parties stipulate to use the evidence of one of defendant's witnesses, as given at the last trial, it is not error to exclude a part of the evidence of such witness, as given at the first trial, when offered by defendant to impeach such witness.

7. It is not error for the court to read to the jury Pen. Code, § 1105, which provides that on a trial for murder, the homicide by defendant being proved, "the burden of proving circumstances of mitigation, or that justify or excuse it, devolves on him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justifiable or excusable,"—where there are other instructions in connection therewith which fully and clearly insist on the right of defendant, in every step of the case, to have all reasonable doubts as to his guilt, or as to any fact essential to show guilt, resolved in his favor.

8. An instruction is not erroneous which calls the jury's attention to the importance of having the laws properly executed, and of a careful consideration of the evidence and the law, so that they may reach a result which will be "just to both sides, regardless of what may be the consequences."

9. Where a murder case has been three times previously tried, and on each trial the jury disagreed, it is not error to charge the jury that they must in no sense consider such fact, but render a verdict according to the evidence in the case, and consider no other matters except the evidence and the instructions of the court.

10. Where the court fairly presents to the jury the right of defendant, as a reasonable man, under the circumstances, to act on appearances, it is not error to refuse to give a correct instruction asked by defendant on the same subject.

11. An instruction which is not warranted by the evidence is properly refused.

12. It is not error to refuse an instruction which singles out, and gives prominence to, certain portions of the evidence.

Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Charles W. Hawes was convicted of murder in the second degree, and appeals. Affirmed.

The instructions asked by defendant, and refused, referred to in the opinion, are as follows: "The court instructs you that if, while the defendant had his hands in his overcoat pocket, the deceased made a violent assault upon him, he was justified in defending himself, and it is not necessary that the defendant should show that some danger to him, of loss of life, or danger of some great bodily harm, then about to be done him, actually existed, for actual, real, and imminent danger, to his comprehension, as a reasonable man, is sufficient; and if, in defending himself in his struggle with the deceased, the pistol was discharged there, inflicting a mortal wound, then the defendant is not responsible, and your verdict must be not guilty." "The court further instructs you that it is a rule of law in this state that evidence willfully suppressed would be adverse to the party suppressing it if produced; so, in this case, if you find from the evidence that the prosecution have willfully suppressed portions of the clothing worn by the deceased at the time the fatal shot was fired, or any other fact or circumstance that would tend to throw light upon the case now in consideration, you may presume that if these clothes had been produced, or other facts, if there be any such, shown, they would have shown facts favorable to the defendant, and adverse to the prosecution." "(15) The court further instructs you that in this case the nature and essence of the crime are made by law to depend upon the peculiar state and condition of the defendant's mind at the time, and with reference to the act done. To constitute the crime of murder, with which the defendant is charged, he must have fired the fatal shot with the intention of then and there killing E. W. Wagner, after deliberation, premeditation and aforethought, actuated thereto by his malice. Therefore, you should consider whether his mind was in a condition of self-possession favorable to the formation of a fixed purpose with deliberation and premeditation; and in so doing it is proper that you should take into consideration all the facts shown in evidence, which might throw any light on the defendant's mental condition at the time. Evidence has been introduced tending to show that for a long time prior to the homicide the defendant had been addicted to the excessive use of morphine, and that at that time he had been for a considerable time deprived of the drug. The defendant has also introduced evidence tending to show the effects that such deprivation worked on his mind. In arriving at your verdict, it is necessary to consider whether, under these conditions, (if you find that these conditions existed,) the defendant's mind was in a sufficient state of tranquility to enable him to commit the crime charged, or any lesser crime included in the information."

S. F. Gell, W. A. Kearney, and John J.

Wyatt, for appellant. Wm. H. H. Hart, Atty. Gen., for the People.

PATERSON, J. The defendant was convicted of the crime of murder of the second degree, and was sentenced to serve a term of 50 years in the state prison.

The first point made by counsel for appellant is that the court below erred in allowing Dr. Wright, one of the witnesses on behalf of the prosecution, to testify as an expert with respect to the distance at which the pistol carried by the defendant at the time of the homicide would produce powder marks on the skin. It is claimed that he was not shown to be an expert. The doctor testified that he had been a physician and surgeon for about 17 years, and had had such experience as would enable him to say at what distance powder marks would be noticeable on the flesh from the firing of a pistol of 38-caliber Smith & Wesson; that he had seen a great many gunshot wounds, and powder marks and powder burns in connection therewith, and knew, of his own knowledge, the distance between the discharged weapons and the bodies fired upon. Upon this showing, we cannot say that the court erred in allowing the witness to speak. If the defendant desired to test the knowledge of the witness, and the correctness of his statement as to his ability to give an opinion, he ought to have cross-examined him before he was called upon to express such opinion. We entertain no doubt that the subject was a proper one for expert testimony, and cannot be classed with such matters as were discussed in *People v. Smith*, 93 Cal. 445, 29 Pac. Rep. 64. In *People v. Lemperle*, 94 Cal. 45, 29 Pac. Rep. 709, the witness was not shown to be an expert.

It is claimed that the evidence was immaterial, because the evidence shows, without conflict, that at the time the deceased received the wound he wore an undershirt, a white shirt, and a coat and vest, while the statement of the witness "plainly presupposes that the powder was not interrupted between the muzzle of the pistol and the abdomen of the deceased." In this we agree with counsel. It was certainly a waste of time to prove at what distance the pistol with which the wound was made would cause powder marks upon bare flesh, because the evidence, as stated above, shows that between the pistol and the flesh of the deceased, at the time the shot was fired, there were several thicknesses of cloth. But, as stated by counsel in his brief, "it is too plain a proposition to require argument that any powder escaping from the pistol would have lodged in the vest of the deceased, and that the skin over the abdomen would have been left unmarked," and we are unable to see how the jury could have been misled by the testimony. The jury knew that no one claimed there were powder marks upon the flesh of the deceased,

and all the evidence there is upon the subject tends to show that there were none upon the vest or shirts.

Appellant contends that the court erred in admitting in evidence the dying declaration of the deceased. It is said that no sufficient predicate had been laid for its introduction. Dr. Wright testified that he had a conversation with Wagner, the deceased, and informed him that the wound was fatal; that in speaking of the character of the wound the deceased used a variety of expressions. At one time he said, "I can't stand this." He said to the doctor, "Can I get well?" The doctor said, "No, Mr. Wagner, you can't. You cannot recover." Very shortly after that he said: "I can't stand this. It will kill me. I am going to die,"—and a number of expressions of that import. He said to his brother, just before the statement was made, "Julius, I think I am going to die." About a half an hour before the dying declaration was made, he said to Dr. Smith: "Doctor, I know enough of anatomy to know I have received my death blow." The doctor said he hoped not. Wagner said, "Oh, I am badly hurt. I am shot in the bowels. I know it is all up." His statement was taken, three or four words at a time, while he was gasping for breath. We think this testimony shows that the declaration was made under a sense of impending death, and there is nothing to show a revival, or subsequent hope of recovery.

It is claimed that the court committed error in admitting in evidence the vest taken from Wagner's body after the same had lain in the grave for over five months; but Mr. Moore, the druggist, testified that he saw the vest at the graveyard when it was taken off the body, and it was then in the same condition as when he had examined it and brushed it just after the death of Wagner. The credibility of this witness, and the question whether the appearance of powder marks had been destroyed by lapse of time, and other circumstances, were matters for the jury to determine.

We do not think the court erred in allowing the witness Bradford to testify as to what the defendant said with reference to the shooting immediately after it occurred. The statement by the defendant, that Wagner "did it himself," appears to have been entirely voluntary, and is consistent with the defense set up at the trial.

The court did not err in refusing to allow the witnesses Merritt and Wyatt to state what Davis had told them in Coy's saloon. An attempt was made by the defendant to impeach his own witness, Davis, by evidence produced at the first trial, but, judging from the language of the court, the people and the defendant had stipulated to use only the testimony of Davis as taken at the last trial.

The court read to the jury section 1105

of the Penal Code,¹ and it is claimed that in doing so the court erred. *People v. Bush-ton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, is the basis of this contention. We do not think the contention is sound, because coupled with this instruction were others which fully and clearly insisted upon the right of the defendant to have, in every step of the case, all reasonable doubts as to his guilt, or as to any fact essential to show guilt, resolved in his favor.

We do not find any error in the instruction of the court, admonishing the jury as to their duties. It simply called their attention to the importance to the public of having the laws properly executed, and the importance as well to the defendant of a careful and a dispassionate consideration of the evidence and the law, so that they might reach a result which would be "just to both sides, regardless of what may be the consequences." We see nothing in any portion of the charge which indicates hostility on the part of the court towards the defendant.

It was shown in the course of the trial that the case had been previously tried three times, the jury having disagreed in each instance. The court instructed the jury as follows: "Something has been said about the number of trials there has been in this case. You must in no sense consider that fact. You are sworn to try this case, and a true verdict render, according to the evidence you have heard in the case, and you will consider no other matters in your deliberations except the evidence and the instructions of the court. There is no limit to the number of times a case may be tried. When trials do not result in a verdict a case may be tried until a verdict is obtained." It is said that the jury had as much right to consider the fact that the case had been tried several times without a verdict as any other fact in evidence before them. We cannot assent to this proposition. It did not concern the jury, in determining the guilt or innocence of the defendant, what other juries had thought of the evidence before them. The jury engaged in trying a case have no more right to receive or consider the opinions of other juries than they have the opinions of any other person, and, besides this, the disagreement of former juries may not have been due to a difference of opinion as to the guilt or innocence of the defendant, but to a difference of opinion as to the degree of the crime which he has committed.

The court did not err in refusing to give instructions set forth in the brief. The right of the defendant, as a reasonable man, under the circumstances, to act upon ap-

pearances, was fairly presented to the jury. The instruction asked with respect to the suppression of evidence was entirely unwarranted by the testimony in the case. It was not claimed by any one that the bullet pierced the coat of the deceased. The fifteenth instruction refused was not warranted by the evidence, and was objectionable because it singled out, and gave prominence to, certain portions of the evidence. The charge, as a whole, is full and fair. Other points are made, which, in our opinion, do not require special consideration. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

99 Cal. 162

LOWENBERG v. GREENEBAUM et al.
(No. 14,431.)

(Supreme Court of California. July 31, 1893.)
EXECUTION—PROPERTY SUBJECT TO LEVY—"SEAT"
IN STOCK BOARD.

A "seat" in the San Francisco Stock & Exchange Board, which is a voluntary association, without capital stock or shares, and membership of which can only be secured, under its constitution and by-laws, by a vote of the members, is not subject to levy and sale under execution, and a purchaser at such sale acquires no title to such seat.

Department 2. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by William Lowenberg against Jacob Greenebaum, the San Francisco Stock & Exchange Board, and the Company of Associated Stockbrokers, to quiet the title of plaintiff to a seat in such board, and rights appurtenant thereto; for the appointment of a receiver; and for an injunction, etc. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

John R. Jarboe, W. S. Goodfellow, and Edward R. Taylor, for appellants. Wal. J. Tuska, for respondent.

McFARLAND, J. Judgment went in the court below for plaintiff, and defendants appeal from the judgment, and from an order denying a new trial. In January, 1888, Simon Kullman et al. recovered a money judgment for several thousand dollars against the defendant in the present action, Jacob Greenebaum, and on September 23, 1889, an ordinary writ of execution was issued on said judgment. The sheriff undertook, under said writ, to levy upon and sell, as personal property, the seat of said Greenebaum in an association known as the "San Francisco Stock & Exchange Board." He endeavored to accomplish this in the following manner: He delivered to the president and secretary of said association a copy of the said execution, "together with a notice that all moneys, credits, and effects of the defendant Jacob Greenebaum in the possession or under the

¹Pen. Code, § 1105, provides as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

control of the said San Francisco Stock & Exchange Board, together with the seat, interests, and shares of the defendant Jacob Greenebaum in and to the San Francisco Stock & Exchange Board, were levied upon by virtue of said writ." He then advertised the said seat, interest, etc., for sale, for a period of six days; and on October 16, 1889, he sold the same to William Lowenberg, the plaintiff herein, he being the highest bidder. On the same day the sheriff gave to plaintiff a certificate of sale, which, after reciting the above facts, certifies that the sheriff had sold to plaintiff "all the right, title, and interest of Jacob Greenebaum, one of the defendants, in and to the San Francisco Stock & Exchange Board, and the seat, interest, and shares of the said Jacob Greenebaum in the San Francisco Stock & Exchange Board." On said October 16th the plaintiff herein served notice, directed to said stock board, upon its president, which, after reciting said sale, demanded "to be admitted to the enjoyment and participation of all the rights, privileges, and interests heretofore enjoyed by the said Jacob Greenebaum in your board, and in the property thereof," and that an accounting be had, etc. The board paid no attention to the demand; and said Greenebaum has ever since continued to occupy his seat, with all its rights and privileges, in said board. Afterwards, on March 12, 1890, plaintiff brought this present action against said Greenebaum, making the said stock board, and also a corporation called the "Company of Associated Stockbrokers," parties defendant. The purpose of the action is to have plaintiff's title to said seat, and rights appurtenant thereto, quieted, a receiver appointed, an injunction issued, etc.

Plaintiff rests his title wholly upon said asserted levy and sale by said sheriff under said writ of execution, as aforesaid. But we do not think that by said sheriff's sale the said seat of said Greenebaum in said stock board, or any rights dependent thereon, were conveyed to plaintiff. The said San Francisco Stock & Exchange Board is a voluntary association, without capital stock or shares. The findings, and an agreed statement of facts, set forth very fully its constitution and by-laws, and show very clearly its character and purposes. There are stock boards in other American cities very similar to the one here in question, and they all seem to have been framed upon the same model. It is sufficient to state here a few of the features of the San Francisco Stock & Exchange Board, as follows: It is a voluntary association, consisting of not more than 100 persons. It does not itself do any stock business, but its purpose is to afford facilities for its members doing such business, each individually for himself. Each member has a "seat" in the board, and his seat represents, and is the sole basis of, his rights in said board, and entitles him to a place in the room provided by the association for the

use of its members, to participate in its meetings, and to therein transact his individual business as a stockbroker. Occasionally the board, as an incident to its purpose of providing a place for the meeting of its members, has a surplus of money over its expenses, and sometimes divides said surplus among its members, and the owner of a seat is entitled to his proportion of such surplus when a dividend is declared. No person can become a member of said association, or be entitled to a seat therein, except he be elected by the members of the association according to its constitution and by-laws, under which "ten negative votes shall exclude." Its constitution declares that no member shall have any individual right or title to any of the property or assets of the association until after its dissolution, and the final winding up of its affairs by "its then remaining members." If a member in good standing desires to retire, he cannot dispose of his seat, except to a person whom the association shall elect to become a member; and at no time since the organization of the association has any member been authorized to sell his seat, "upon any terms whatever, except to such person as shall have been personally elected to membership in said association by the remaining members thereof." There are many other features of the association, not necessary to be here specially mentioned. The foregoing gives a clear notion of its general character. The plaintiff was never elected a member, and the association has always refused to recognize him in any way. The defendant Greenebaum remains in possession of the said seat, and is recognized as the lawful occupant thereof by the association. An attempted voluntary sale of the seat by Greenebaum to Lowenberg, the latter not having been elected a member of the board, and the association not having consented to the sale, would not have transferred the title to the seat, or to any of its incidents; and it is difficult to see how a simple sale under execution transferred something which the judgment debtor himself could not have transferred. *Freem. Ex'ns*, § 112, and cases there cited. Moreover, a creditor cannot have property of a debtor applied to the satisfaction of a debt except in the way provided by law; and there is no way provided by law by which such an intangible thing as a seat in the stock board above described—that is, a personal privilege of being and remaining a member of a voluntary association, with the assent of the associates—can be levied upon and sold under execution. Section 688 of the Code of Civil Procedure provides that property may be levied upon under a writ of execution "in like manner as upon writs of attachment;" and section 542 provides what property may be taken on a writ of attachment, and in what manner various kinds of property may be so taken. But there is not in any subdivision of section 542 a method provided for

attaching such a thing as this seat in a stock board. In *Bank v. Robinson*, 57 Cal. 523, this court expressly held that a patent right is not tangible property, which is the subject of seizure and sale on execution; and a seat in the stock board is certainly not more tangible than a patent right, for the latter can at least be sold and transferred by its owner at his own will, while the former cannot. The only case directly in point, cited by counsel on either side, is that of *Pancoast v. Gowen*, 93 Pa. St. 71. There a seat in a stock board similar to the one in question here had been levied upon under execution, and the court say: "A seat in a board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license to buy and sell at the meetings of the board. It certainly could not be levied on and sold under a *fi. fa.* The sheriff's vendee would acquire no title which he could enforce." See, also, *Freem. Ex'ns*, § 110. Whether the respondent, by a creditor's bill in chancery, or by proceedings supplementary to execution under our Code, could reach appellant's right to a seat in the board, is a question not now before us. We merely hold that respondent did not acquire title to that seat, or to its incidents or appurtenances, by virtue of the execution sale hereinbefore mentioned; and under these views it would be useless to inquire into the relations between the San Francisco Stock & Exchange Board and the other appellant, the Company of Associated Stockbrokers. As the respondent has no title to said seat, he has no interest in those relations. The judgment and order appealed from are reversed.

We concur: FITZGERALD, J; DE HAVEN, J.

99 Cal. 157

SULLIVAN et al. v. MOORHEAD. (No. 19,144.)

(Supreme Court of California. July 31, 1893.)

EQUITY—REFORMATION OF DEED—SUFFICIENCY OF EVIDENCE.

Where, in an action to reform a deed on the ground of the mutual mistake of the parties, or the mistake of the grantees and the fraud of the grantor, the evidence is conflicting as to the mistake, a finding that the deed was executed as a result of such mistake will not be disturbed merely because the plaintiffs examined the deed, which conveyed only a part, instead of the whole, of a certain lot, at the time it was executed, and defendant testified that it was his distinct understanding that he was to give only a part of such lot.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by James F. Sullivan and Lucinda A. Sullivan against J. M. Moorhead to reform a deed. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

A. B. Hotchkiss and C. J. Heggerty, for appellant. Wilson & Lamme, for respondents.

HARRISON, J. October 10, 1889, the plaintiffs and defendant entered into an agreement for the exchange of lands, by which the defendant agreed to convey to the plaintiffs certain property in Los Angeles "known as lot ten, (10,) eleven, (11,) twelve, (12,) and thirteen, (13,) in the Pomeroy and Mills subdivision of the Hollenbeck tract, containing about two hundred (200) feet front, and one hundred and ten (110) feet in depth, together with the houses thereon, known as Nos. 706 to 712 New Main street, inclusive." In purported execution of this agreement the defendant, on the 17th day of December, 1889, made a conveyance to the plaintiffs of "lots No. ten, (10,) eleven, (11,) twelve, (12,) and part of thirteen, (13,) in block No. 2 of the Pomeroy and Mills subdivision of the Hollenbeck tract, containing about two hundred (200) feet front, and one hundred and ten (110) feet in depth, together with the houses thereon, known as Nos. 106 to 112 New North Main street, inclusive." The plaintiffs, having ascertained in February, 1890, that the deed of conveyance did not embrace all the land which the defendant had agreed to convey to them, commenced this action to compel the defendant to carry out the terms of his agreement, and for a revision of the instrument of conveyance so that the description therein would conform to the agreement of October 10, 1889. The case was tried by the court without a jury, and findings of fact were made in support of the averments in the plaintiffs' complaint, and judgment rendered in their favor. The defendant moved for a new trial upon the ground that the evidence was insufficient to justify the decision, and that the decision was against law, and for errors of law occurring at the trial. The new trial was denied, and from this order, and also from the judgment, he has appealed.

The main contention of the appellant is that, because at the time the deed was executed the plaintiffs examined the description therein, and were thus aware that it purported to convey only "a part of lot 13," there could have been no mistake on their part, and as the defendant testified at the trial that it was his distinct understanding that he was to give only a part of lot 13, there was no mutual mistake, and consequently no ground for a court of equity to reform the instrument of conveyance. For the purpose of determining, however, whether the instrument expressed the intention of both parties thereto, or whether the description inserted therein was by reason of a mutual mistake, or a fraud on the part of the appellant, the court was not bound to accept the statement of the defendant at the trial, or concluded by the fact that the

plaintiffs had examined the instrument before it was delivered to them. If the court was satisfied from all the evidence, at the trial, that notwithstanding such examination the plaintiffs did not then understand the terms of the instrument, and were not aware that it failed to convey all the land which they were entitled to receive under their agreement, it was authorized to find that it was accepted by them under a mistake in this particular. The transaction between the parties took place at San Francisco, and the plaintiffs had not seen the land until after the execution of the deed. The defendant, in his negotiations with the plaintiffs, represented that the property he was to convey had a frontage of 200 feet, and each of the lots which he agreed to convey had in fact a frontage of 50 feet. The defendant had agreed to convey to the plaintiffs these four lots, and he himself testified at the trial that he said to the plaintiffs, at the time the deed was presented for examination, that the description therein was according to the agreement of October 10, 1889. The testimony of the plaintiff James that he always supposed that the deed gave him 200 feet is uncontradicted, and the fact that he read the deed is not conclusive against his having misunderstood its terms. If the evidence was sufficient to satisfy the court that the deed did not express the intention of the parties, and that the plaintiff had been mistaken in supposing that it did, the fact of his having read the instrument would not prevent the court from finding that it was made under a mistake. *Higgins v. Parsons*, 65 Cal. 280, 3 Pac. Rep. 881. Neither was the court bound to accept as conclusive the statement of the defendant as to his intention, since it was in direct contradiction to his written agreement, and inasmuch as he stated to the plaintiffs, at the time of the transaction, that the instrument was intended to be in execution of that agreement, the court was authorized to find that the mistake was mutual. As he had made an agreement to convey the four lots, it was incumbent upon him to show some subsequent agreement or circumstances by which he was relieved from this obligation; otherwise, the court was at liberty to regard his failure to include the whole of the lots in the conveyance as either a mistake upon his part, or a fraud upon the plaintiffs. Although the rule is that, in order to justify a court in decreeing the reformation of an instrument on the ground of a mistake, the proof of the mistake must be clear, convincing, and satisfactory to the court, yet a mere conflict of testimony as to the mistake does not necessitate a denial of the relief. *Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. Rep. 82; *Wilson v. Moriarty*, 88 Cal. 211, 26 Pac. Rep. 85. And the decision of the trial court upon such conflict of evidence is conclusive upon this court. *Brison v. Brison*, 90 Cal. 334, 27 Pac. Rep. 186. The question of a mistake was the issue between the

parties, and the court found, upon the conflict of evidence before it, that the instrument had been executed as the result of such mistake. We cannot say, from the evidence in the record, that the court was not justified in making such findings. The evidence offered by the defendant, and excluded by the court, was clearly immaterial to any issue in the case. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

4 Cal. Unrep. 74

LIPPERT v. LASAR et al. (No. 14,923.)

(Supreme Court of California. July 31, 1893.)

MECHANICS' LIENS—TIME FOR FILING CLAIM—COMPLETION OF WORK.

A contractor agreed to excavate a cellar, and to erect walls of concrete, and steps to the street, and plaintiff did work thereon for said contractor. The work was accepted by the owner, as complete, July 26th; but in August a carpenter employed by the owner placed a frame in the cellar door, and plaintiff, at the owner's request, filled a small hole outside of the cellar. *Held*, that the lack of this additional work was a "trivial imperfection," within the meaning of Code Civil Proc. § 1187, which provides that such imperfection shall not prevent the filing of the lien claim, and hence the filing of the claim August 29th was not within the statutory time of 30 days from the completion of the work.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by John Lippert against L. Lasar and others. From an order granting a new trial, plaintiff appeals. Affirmed.

D. E. Alexander and E. I. Robinson, for appellant. John T. Humphreys and E. D. Peixotto, for respondents.

VANCLIEF, C. Action to enforce a lien upon a house owned by defendant Lasar, for labor done upon an addition to said house for the defendant Sonneckson, who, as original contractor, constructed said addition. The judgment was in favor of the plaintiff, but the court granted a new trial, and this appeal is from the order granting a new trial.

Whether or not the plaintiff had filed his claim of lien within 30 days after the completion of the additional structure was the principal question at the trial, and is the only question presented on this appeal; it being admitted that the new trial was granted on the ground of insufficiency of the evidence to justify the finding that plaintiff's claim of lien was filed within the time required by section 1187 of the Code of Civil Procedure, namely, within 30 days after the completion of the addition which the original contractor agreed to construct. The claim of lien was filed August 29, 1890, and I think a decided preponderance of the evidence is to the effect that the addition

was completed on July 26, 1890. The addition to the house was a cellar under it. By the original contract, which was in writing, the defendant Sonneckson agreed to make the necessary excavation for the cellar, and to construct walls of concrete seven feet and six inches in height, and steps to the street, for \$365. That all this work was done and accepted by the owner as completed on or before July 26, 1890, there is no controversy; but the evidence shows that the placing of a door frame in the cellar door by a carpenter employed by the owner, and about an hour's work by plaintiff, at request of the owner, in filling a small hole outside of the cellar, were done in August. The court, however, considered the lack of this additional work a trivial imperfection in the improvement, if imperfection it was, in the sense of section 1187 of the Code of Civil Procedure,¹ and not such as would have prevented the filing of plaintiff's lien within 30 days after July 26, 1890; and the evidence contained in the record seems to justify this conclusion. I think the order granting a new trial should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is affirmed.

99 Cal. 50

CLARKE v. WITTRAM et al. (No. 15,147.)
(Supreme Court of California. July 21, 1893.)

APPEAL—WHEN LIES—ORDER APPEALED FROM—
CHARACTER NOT SHOWN BY RECORD.

On appeal from an order setting aside and quashing service of summons, the bill of exceptions showed the entry of a default on defendant's failure to appear, and the entry of the order appealed from two weeks later. There was no judgment roll, and the record did not show that judgment had ever been entered. *Held*, that it did not appear that the order appealed from was "a special order made after final judgment," within the meaning of Code Civil Proc. § 963, allowing an appeal from such an order.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Alfred Clarke against Frederick Wittram and Hannah Wittram. From an order setting aside and quashing service of summons on said Hannah Wittram, plaintiff appeals. Appeal dismissed.

Alfred Clarke, in pro. per. Dunne & McPike, for respondents.

¹Code Civil Proc. § 1187, as amended in 1887, provides that any person, other than the original contractor, claiming a mechanic's lien, must file his claim within 30 days after the completion of the building or improvement, and that any trivial imperfection in the work shall not be deemed such a lack of completion as to prevent the filing of the lien claim.

TEMPLE, C. This is an appeal from an order setting aside, and quashing, service of summons. The record includes a bill of exceptions, which contains proof of the service of summons upon the defendant, and shows that default was entered upon the failure of defendant to appear and answer; also notice of motion to set aside and quash the service of summons, given two days after entry of the default, and an order granting the motion entered two weeks later. No judgment roll is contained in the record, and no pleading. The character of the suit does not appear, and we do not know whether the relief sought was of such a nature that upon default judgment might have been entered by the clerk without action on the part of the court, or not. The record does not show that judgment has ever been entered. Motion is made to dismiss the appeal on the ground that the order is not appealable. Appellant contends that the order is a special order made after judgment,¹ but, as we have seen, that nowhere appears. There is nothing in the nature of the order to indicate it. Ordinarily, such motions precede the entry of judgment; and, further, it is natural to suppose, if judgment had been entered, an order vacating it would have been included in the relief asked. Appellant, in his notice of appeal, describes the order as made after judgment, and insists upon this as showing that the order he has appealed from is such an order. But a party cannot make evidence for himself in that mode. If such fact existed, it should have been stated in the bill of exceptions. I think the motion should be granted.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the motion to dismiss the appeal is granted.

4 Cal. Unrep. 65

CLARKE v. WITTRAM. (No. 15,091.)
(Supreme Court of California. July 21, 1893.)

REVIEW ON APPEAL—DISCRETION OF TRIAL COURT
—SETTING ASIDE DEFAULT.

An order setting aside a default, and permitting a defendant to plead after the time allowed by law has elapsed, will not be set aside, unless the court abused its discretion.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Alfred Clarke against Hannah Wittram and others. From an order setting aside a default, and permitting said Hannah Wittram to plead, plaintiff appeals. Affirmed.

¹Code Civil Proc. § 963, allows an appeal from "any special order made after final judgment."

Alfred Clarke, in pro per. Dunne & McPike, for respondent.

PER CURIAM. This appeal is from an order setting aside a default, and permitting one of the defendants to plead, after the time allowed by law had elapsed. We have examined the transcript, and find no abuse of discretion on the part of the trial court.

Order affirmed.

99 Cal. 214

EDWARDS v. HELTINGS et al. (No. 15,100.)

(Supreme Court of California. Aug. 10, 1893.)

JUDGMENT—ACTION ON—PLEADING.

A complaint, in an action purporting to be on a judgment, by alleging that at a certain time a certain court, in an action therein pending between plaintiff and defendant, adjudged that defendant should pay to plaintiff a certain amount, does not plead a judgment.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by T. C. Edwards against W. B. Hellings and others. Judgment for plaintiff. Defendants appeal. Reversed.

Henry I. Kowalsky and T. J. Crowley, for appellants. H. C. Firebaugh, for respondent.

McFARLAND, J. This purports to be an action upon a judgment. The complaint was demurred to upon the ground that it does not state facts sufficient to constitute a cause of action, and also as ambiguous, uncertain, etc. The demurrer was overruled, and, defendants refusing to answer, judgment was entered for plaintiff. W. B. Hellings, one of the defendants, appeals.

The general demurrer should have been sustained, for the complaint does not state facts sufficient to constitute a cause of action upon a judgment. The only averment in the complaint about a judgment is as follows: "That on the 21st of June, 1879, at this city and county, in the late fifteenth judicial district court in and for this city and county and state, in an action therein pending between this plaintiff and the above-named defendants, said court adjudged that the defendants should pay to plaintiff one thousand and eight hundred and seventy-three and 85-100 dollars," together with interest, etc. This court has been quite liberal in condoning defective and vulnerable pleadings, but the frontiers of liberality in this respect have not yet been pushed far enough to take in everything. In the case at bar, if we waive the point whether the words, "late fifteenth judicial district court," designate any court which we can recognize, still the complaint fails to plead any judgment constituting the present alleged cause of action. In this state there are several well-known methods of pleading a judgment; and, if the pleader desires simplicity, he need only follow sec-

tion 456, Code Civil Proc., and aver that the judgment was "duly given." In the late case of *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. Rep. 854, it was held that the words, "recovered a judgment," were sufficient; and, although the decision in that case was quite liberal, still it appeared there from the averment that there was a judgment. But we cannot imagine how the most accomplished pleader could manage to plead a judgment without using the word "judgment," and there is no apparent reason why he should try to do it. In the complaint in the case at bar there is no averment of any judgment; the only allegation touching that matter being that in an action, the nature of which is not stated, the court, at some stage of the action not specified, "adjudged" that the defendants therein "should pay" to the plaintiff a certain sum of money. Now, a judgment is "the final determination of the rights of the parties," and a complaint upon a judgment must show that the thing sued on was such a final determination. Such final determination is averred by the use of the word "judgment;" but the word "adjudged," while sometimes used together with "considered," "ordered," "determined," "decreed," etc., as one of the operative words of a final judgment, is also applicable to interlocutory orders and adjudications of a court. It is synonymous with "decided," "determined," etc. If, in a case tried without a jury, the judge should make his written findings, which would be his decision, it would be proper to say that he thereby "adjudged" so and so, but his findings would not be a judgment. In this case, therefore, there is no averment of a judgment, and consequently no averment of a cause of action. Judgment reversed.

We concur: **FITZGERALD, J.; DE HAVEN, J.**

98 Cal. 681

Ex parte HONG SHIN. (No. 20,998.)

(Supreme Court of California. July 15, 1893.)

CITY ORDINANCES—VALIDITY—REGULATION OF OPIUM TRAFFIC—PRIOR STATE LEGISLATION—EFFECT.

1. Act April 16, 1880, makes it unlawful to retail opium without labeling the bottle or package with the name of the drug and the word "Poison," and without ascertaining that the person receiving the same is aware of its poisonous character, and that it is to be used for a legitimate purpose, and a record is required to be kept of these facts. Act March 11, 1891, provides substantially the same, and, in addition, that this shall not apply to physicians' prescriptions, nor to the sale of a single package containing no more than a dose. *Held*, that a city ordinance providing that no one should sell opium except upon the written prescription or order of a physician who is a regular graduate in medicine, and requiring the seller to label the bottle, and to keep a record of the name, age, and residence of the person receiving the drug, and of the physician prescribing it, was not void, as being in conflict with the acts of the legislature.

2. Where the same act violates a state law and a city ordinance, the person charged therewith may be tried for both offenses without any violation of the constitutional provision that no one shall be twice put in jeopardy for the same offense.

Department 1. Petition by Hong Shin for a writ of habeas corpus. Writ denied.

Lyman I. Morony, for petitioner. A. O. Collin and Davis Louderback, for respondent.

PATERSON, J. The petitioner was convicted in the police court of the city and county of San Francisco of selling opium without a physician's prescription, under order No. 2085 of the board of supervisors, approved July 18, 1889. Section 1 of the ordinance provides that "it shall be unlawful for any apothecary * * * or any person whatever to sell * * * to any person in the city and county of San Francisco any opium, * * * except upon written prescription or written order of a practicing physician, as provided in this order, and except upon the day of the date of said prescription or order." Section 2 of the order provides that every person selling opium, etc., must keep a book, and record therein the sale, the name, age, sex, color of the person receiving the poison, the name and quantity thereof, as well as the name of the physician and the name and residence of the patient, and that there shall be attached to the bottle or parcel containing the article the name thereof, together with the name of the physician, the name of the druggist or other person who sells the article, and his place of business. Section 3 provides that the prescription or order must be dated and signed by a physician, who must be a graduate in medicine with a diploma from a regularly constituted medical institution, and must contain the name and residence of the patient and the residence or office of the physician. Section 9 makes it a misdemeanor to violate any provision of the order, punishable by fine, not exceeding \$500, or by imprisonment, not exceeding six months, or by both such fine and imprisonment. An act to regulate the sale of certain poisonous substances, approved April 16, 1880, provided that it shall be unlawful for any person to retail certain poisons, including opium, without labeling the bottle or other package with the common name of the article, together with the word "Poison," and the name and place of business of the seller. The act makes it unlawful for any person to retail any of the poisons named unless upon due inquiry it is found that the person receiving the same is aware of its poisonous character, and that it is to be used for a legitimate purpose. The act also requires a record to be kept stating substantially the facts required by the order above named, and, in addition thereto, requires the seller to ascertain whether the name and address given by the person receiving the poison are the

true name and address, and for that purpose to insist upon the person being identified. Any violation of this act is made a misdemeanor, and is punishable as such. St. 1880, p. 102. An act to regulate the practice of pharmacy and sale of poisons in the state of California, approved March 11, 1891, contains substantially the same provisions as those found in the act last above referred to, and, in addition thereto, provides that said provisions "shall not apply to the dispensing of poisons when prescribed by practitioners of medicine, nor to the sale of poisons if a single bottle or package does not contain more than an ordinary dose." The act provides that any person failing to comply with the requirements aforesaid shall be guilty of a misdemeanor, and, upon conviction, shall be liable to a fine not exceeding \$50. St. 1891, p. 89.

It will be seen from the provision above referred to that the state and municipality have both legislated upon the same subject. The state has endeavored to regulate the sale of certain poisons by requiring the seller to make certain inquiries and keep a record of certain facts, but it is not provided that opium cannot be sold except upon prescription of a physician furnished by the purchaser. In this respect the order of the board of supervisors goes beyond the requirements of the statute, and the question is whether or not the board have the right so to legislate upon the subject. There is no doubt that municipal by-laws may stand if not inconsistent with state laws, and that the by-law is not necessarily void simply because the legislature has regulated the same subject by law; but it must be in harmony with the general laws of the state and with the provisions of the municipal charter. "Whenever they come in conflict with either, the by-law must give way." Cooley, Const. Lim. (6th Ed.) p. 239. Our constitution provides that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Article 11, § 11. It is claimed by the petitioner that, inasmuch as the legislature has regulated the sale of certain poisons, including opium, by the acts above referred to, it is not within the power of the board of supervisors of the city and county of San Francisco to make another regulation, or to prohibit the sale of opium; that an ordinance is in conflict with the general laws when it makes another and different regulation for the sale of an article of commerce than that provided by a statute of the state. The soundness of this contention we cannot admit. There may be different regulations without a conflict. The Revised Statutes of the state of New York provide that no keeper of an inn, tavern, or of any alehouse, or porterhouse, or grocery, nor any other persons authorized to retail strong or spirituous liquors,

shall, on Sunday, sell or dispose of any ale, porter, strong or spirituous liquors, excepting to lodgers in such inns or taverns, or to persons actually traveling, in the cases allowed by law." The ordinance of the city of Brooklyn provided that no person should sell or dispose of any ale, porter, strong or spirituous liquors in said city on Sunday. It was claimed that the common council had exceeded the power conferred upon it in passing this ordinance, because the charter of the city authorized the city council to make only such ordinances, rules, police regulations, and by-laws as are not contrary to the laws of that state. The supreme court said: "The Revised Statutes simply prohibited the sale of spirituous liquors on Sundays to any but lodgers and lawful travelers. It might possibly have been competent for the common council under their general power to make the police regulations to extend the prohibition so as to make it total on that day. At any rate, there would not have been a direct conflict. But the Revised Statutes, in this particular, are not simply prohibitory; they are also expressly permissive. They authorize the vendition on Sunday to certain lodgers and travelers. It needs no reasoning to show that two provisions, the one permitting and the other prohibiting the same act, are in direct conflict with each other." *Wood v. City of Brooklyn*, 14 Barb. 426. So, in the action at bar, the legislature has simply prohibited the sale of opium and certain other poisons unless a certain record is kept. It has not directly authorized the sale of opium without the prescription of a physician; it has not legislated upon that subject at all, except in providing that, where a physician's prescription is presented, no other record need be kept. The city has gone further than the statute, and provided that no opium shall be sold without a prescription. While the regulation is different from that of the state, there is no conflict, and therefore it is not in violation of the provision of the constitution quoted above. There are the very best of reasons why cities should be authorized to impose penalties in addition to those inflicted by the laws of the state. "Particular acts may be far more injurious, while the temptation to commit them may be much greater, in a crowded city than in the state generally. They consequently require more severe measures for prevention. State laws are, of course, for the general good, and cannot always answer the peculiar wants of particular localities." *Wood v. City of Brooklyn*, supra. See, also, *City of Burlington v. Kellar*, 18 Iowa, 66; *In re Sic*, 73 Cal. 151, 14 Pac. Rep. 405; *Ex parte Cheney*, 90 Cal. 620, 27 Pac. Rep. 436. The offenses being different, there is no violation of the constitutional inhibition against putting one twice in jeopardy for the same offense. *McInerney v. City of Denver*, (Colo. Sup.) 29 Pac. Rep. 518.

It is claimed by the petitioner that the board of supervisors of the city and county of San Francisco, by order No. 1615, has provided for the legitimate sale of smoking opium, as said order provides for licenses for the sale of such opium graduated according to the amount of sales; that order No. 2085 was not intended to cover smoking opium; that the two orders can be read together, so as to give force to both without doing violence to the language of either, and the latter should not, therefore, be held to have repealed the former by implication; and, again, that if order 2085 does repeal order 1615, then it, in effect, prohibits the sale of smoking opium, because before a sale can be lawfully made there must be presented the written prescription of a physician that "smoking opium is not a medicine, and no respectable physician will give a prescription for it." The language of order No. 2085 covers all kinds of opium, and "any extract of opium or production thereof, * * * or any preparation or compound of which any of those substances, extracts, or products is an element or ingredient." There is no question, therefore, that all orders in conflict therewith are repealed. Conceding that the board of supervisors does not possess the power to prohibit the sale of smoking opium, the last point made by the petitioner is not sound. The court cannot say, as a matter of law or fact, that no respectable physician would give a prescription for smoking opium. The petitioner is remanded to the custody of the chief of police.

We concur: GAROUTTE, J.; HARRISON, J.

(99 Cal. 104)

COX v. DELMAS. (No. 14,409.)

(Supreme Court of California. July 21, 1893.)

**ATTORNEY AND CLIENT—CONTRACTS—RESCISSION
—DEMAND—PLEADING.**

1. Where one sues for money received by defendant as attorney for plaintiff, and defendant, in his answer, denies having so received it, and claims that he received it in his own right, and that plaintiff had no interest in it, it is not necessary that the complaint should allege a demand, as a demand would have been useless.

2. The complaint in an action by a client against his attorney for money received in payment of the judgment obtained by plaintiff in an action conducted by defendant for him alleged the purchase of an interest in the claim on which the judgment was founded, from R., by defendant, for plaintiff; that thereafter defendant handed plaintiff a paper which recited that defendant was the owner of such interest, and entitled to collect it; and that, without any prior agreement, like that contained in the paper, plaintiff signed it, on the advice of defendant. *Held*, that the complaint did not state a contract between plaintiff and defendant, or, at least, not one requiring a rescission.

3. The paper referred to in the complaint recited that whereas defendant had, by sale and assignment, become invested with, and then held, the rights and interest of R. in the claim, it was covenanted and agreed by the parties that defendant was the owner thereof. It further recited that plaintiff "sells and assigns" such interest to defendant. *Held*, that these latter words did not change the character of the instrument, which was not a contract requiring rescission, but merely an admission of a condition caused by prior acts.

In bank. Appeal from superior court, city and county of San Francisco; J. McM. Shafter, Judge.

Action by Jerome B. Cox against D. M. Delmas. Judgment for plaintiff. Defendant appeals. Affirmed.

Garber, Boalt & Bishop, (Wm. F. Herrin and H. L. Gear, of counsel.) for appellant. Galpin & Zeigler, for respondent.

PER CURIAM. This is an action to recover a certain sum of money alleged to

have been collected by defendant, as attorney at law of plaintiff. The case was tried with a jury, and judgment was rendered for plaintiff for a little less than the amount sued for; and defendant appeals from the judgment, and from an order denying a new trial.

The main features of the case are these: Prior to May, 1888, respondent had been engaged continuously, for several years in litigating, as plaintiff, in the courts of this state, the suit of Cox v. McLaughlin, which suit had been brought to recover a large amount alleged to be due from McLaughlin to Cox for work done and materials furnished for the construction of a certain railroad. In 1883 appellant herein was employed by respondent as one of his attorneys at law in conducting said suit, and was to receive, as compensation for his services as such attorney, 10 per cent. of the amount of the judgment that should be recovered against McLaughlin. He continued to be respondent's attorney in said suit until it was concluded and settled, in 1888. Prior to said employment of appellant by respondent, the latter had recovered a judgment in the trial court against McLaughlin, which was afterwards reversed in the appellate court; and some creditors of respondent, to the extent of three or four thousand dollars, had levied an execution upon said judgment and upon said cause of action, and the same had been sold to Michael Reese, since deceased, for about the amount of the claims of said creditors. Afterwards, respondent had assigned to said Reese \$25,000 of his said claim against McLaughlin, for the purpose, as averred by respondent, of securing Reese for the money advanced for his said purchase of said judgment and right of action. One Cobb had also been formerly in the employ of respondent as attorney in said suit, and was to receive 10 per cent. of the judgment, and Cobb had assigned his claim to said Reese as security for a certain promissory note. These claims, founded upon said two assignments, were in February, 1884, assets in the hands of the executors of said Reese, then deceased. Early in February, 1884, respondent began negotiating with Joseph Rosenberg, one of the executors of the Reese estate, for the purchase of said \$25,000 claims. That estate was then nearly settled, and the executors were desirous of closing it up, and Rosenberg agreed to sell said claims to respondent at private sale for \$1,500, or thereabouts. Thereupon, respondent informed appellant of the existence of said claims, and that he (respondent) had an opportunity to purchase them for about \$1,500. As to what then occurred touching the purchase of said claims, respondent and appellant disagree in their pleadings and testimony. Respondent says that he asked appellant's advice in the premises; that appellant offered to purchase said claims for respondent; that

respondent assented thereto; that he brought about a meeting between appellant and Rosenberg in order to have the details of the purchase arranged; that thereupon appellant advanced the money, and purchased the claims for respondent; and that, at appellant's instance and request, the purchase was made in the name of his clerk, Franklin T. Bull. On the other hand, appellant denies that he advanced money to buy said Reese claims for respondent, and maintains that he bought said claims on his own account and as his own business speculation, and that respondent has no interest whatever therein. It appears that when Rosenberg reported the sale to the probate court the attorney of the heirs of McLaughlin, then deceased, made a higher bid for said claims, and appellant was compelled to raise his bid, so that he finally paid for said claims about \$2,425; and that amount was paid by him on February 11, 1884, and an assignment of the claims was made by the executors to said Bull. On the 12th of February, respondent signed a certain written instrument, a copy of which, marked "Exhibit A," is attached to the answer, which appellant handed to him, already prepared, with a request that he sign it. Respondent avers and testifies that appellant informed him that it was necessary for him to sign this instrument in order to make the sale of said claims legal; that he feared that if the sale was not legal the claims might be resold and fall into the hands of the McLaughlin estate, which would greatly embarrass him; and that, relying on the advice and good faith of appellant, he executed it without communicating with other counsel, and without receiving any consideration therefor. Appellant, however, contends that respondent well knew the contents of said instrument, and executed it for the purpose which its language imports. (With respect to said instrument, it is sufficient to say, at this time, that in terms it acknowledges that appellant owns said Reese claims, and is entitled to recover the amount of the same out of any judgment that might be recovered by respondent in the said case of Cox v. McLaughlin.) In the case of Cox v. McLaughlin, judgment was rendered for plaintiff October 21, 1886, for \$98,228.80, with legal interest from June, 1886; but on appeal this court, on May 1, 1888, affirmed the judgment, with the modification that interest should be allowed only from the date of the judgment in the lower court,—October 21, 1886, 18 Pac. Rep. 100. This made a great reduction of the amount of the judgment, and respondent was desirous of filing a petition for a rehearing, but, upon the advice of appellant, the intention of applying for a rehearing was abandoned. On May 21, 1888, the judgment, which then amounted, in round numbers, to \$110,000, was paid in the office of appellant. Of this amount, respondent received, in round numbers, \$63,000, and appellant

retained \$47,000. This amount retained by appellant included his own fee of 10 per cent. of the judgment, and also the \$25,000 and the Cobb fee of 10 per cent., which had been assigned to Reese as aforesaid. By the judgment of the superior court, appellant was allowed his fee of 10 per cent., and the amount which he had expended for the purchase of the Reese claims, with interest thereon until date of settlement, and judgment was rendered for plaintiff for the balance of said \$47,000.

The case seems to have been fairly tried upon its merits, and the jury, by its special verdict, found all the material issues of fact against appellant, and in favor of respondent. They found, with respect to the Reese claims, that respondent commenced negotiations with Rosenberg for their purchase; that appellant agreed to advance for respondent the necessary money to effect the purchase, and to buy them for respondent; and that the purchase was made in the name of Bull, at appellant's suggestion. They also found that appellant had not established the fact that the transaction was fair, and that no advantage had been taken of respondent. They also found that, at the time of the payment of the judgment in the case of Cox v. McLaughlin, the money in contest in the case at bar was paid to appellant, as attorney for respondent. Appellant contends for a reversal of the judgment upon grounds, most of which, whether tenable or not, may be fairly called technical. The force of the very able briefs of his counsel is directed mainly to the point that the judgment should be reversed because the complaint does not state facts sufficient to constitute a cause of action, and that its defects are such as could not be cured by the verdict, or by anything that appeared at the trial. The main points made against the general sufficiency of the complaint are that it contains no averment of a demand made upon appellant for the money in contest before the commencement of the action, and that it shows a contract between the parties, by which appellant was to have said money, and does not show a rescission of that contract.

There is a great deal of learning, and a great conflict of authorities, on the subject of the necessity of a demand before suit. It is clear that when a demand is an integral part of the cause of action, as when the duty to pay, or to deliver property, or to do some act, does not arise until after demand, then, as a general rule, a demand must be averred, but that when the time had come for doing the act, and it was the duty of the defendant to do it unconditionally, then no demand, other than the suit itself, is necessary. Of course, the difficulty lies in applying the rule to particular cases; but the reason of the rule requiring a demand is that it would be unjust and inequitable to subject a defendant to litigation without first notifying him of plaintiff's claim, so that

he might have an opportunity of compliance with it without the annoyance and expense of a suit. There are authorities which hold that it is the duty of an attorney at law to pay money collected for a client as soon as he receives it, and that want of previous demand is no defense to an action brought by the client for such money, and there are others which hold that it is a defense only as to the matter of costs. But it is unnecessary to pursue the subject further, because it is well settled that previous demand is not required, when, as in the case at bar, it fully appears that it would have been unavailing, when it would not have changed the rights and relations of the parties, and would have been a mere useless and idle ceremony. This rule was well expressed in the opinion of this court in *Parrott v. Byers*, 40 Cal. 622, where the court say: "It is a familiar rule that, when the relations between the parties are such that a demand and a refusal is a condition precedent to the right of the plaintiff to maintain the action, a denial in the answer of the relation on which the action is founded will dispense with the necessity of an averment in the complaint of a previous demand and refusal;" and "the law does not require a useless act to be performed, and when it is plain, from the answer, that, if a demand had been made, it would have been refused, it does not lie in the mouth of the defendant to object that no demand was made." In the case at bar the appellant, in his answer, denied that he received the money herein sued for as attorney for respondent, and alleged that he received it in his own right, and as his own property, and that respondent had no interest therein. Moreover, it was proved at the trial, without objection, that respondent had demanded said money of appellant before the suit was commenced, and that appellant had promptly and absolutely denied that respondent had any right whatever therein. Under these circumstances, the position that the judgment should be reversed for the failure of the complaint to contain an averment of a previous demand cannot be maintained.

It is strenuously contended by appellant that the complaint is fatally defective because it shows a contract between the parties, by which appellant was to have the money sued for, and contains no averment of a rescission of such contract, and that, if respondent had any rights in the premises, his remedy was a bill in equity to rescind the contract. We do not think that this position is tenable. The complaint does not give, in *haec verba*, the document Exhibit A, a copy of which is in the answer. The complaint, after averring the sale of said Reese claims, and their purchase by appellant for respondent, as aforesaid, merely states that "after said sale, and within a few days," appellant handed to respondent "a paper," and requested him to sign it, saying that it was

necessary, in order to make said sale legal, and that, having no fear that appellant "would not deal fairly with him in regard to the purchase of said claims," and relying on his advice and good faith, he "executed said paper at once, without communicating with other counsel, and without receiving any consideration therefor." And, as to the character of said "paper," it is merely stated that it contained a stipulation that appellant was the owner of said Reese claims, and entitled to collect, receive, and receipt for the same. It is further averred that, prior to the production of said paper, there had been no agreement between appellant and respondent, "the same as or similar to what was therein stated." Therefore, what the paper states on this subject is merely that respondent, without consideration, made a certain written declaration, acknowledgment, or admission that a certain condition of things existed. But such averments do not state any contract at all, and certainly not a contract of such dignity as to require rescission.

The foregoing are the main assaults made upon the complaint. The others do not require special notice. We think it clear that the complaint states facts sufficient to constitute a cause of action. But if we go beyond the complaint, and consider Exhibit A independently of any mere question of pleading, we do not think that it comes within the class of contracts which must be formally rescinded in order to avoid their force or effect. The rule which makes technical rescission necessary applies to a contract by which the party seeking to ignore it has received something of value, or obtained some advantage; and in such a case he is not allowed to retain the thing received, or the advantage obtained, and at the same time ignore the rights of the other party. He must give notice of rescission, and return, or offer to return, what he has received under the contract, and thus restore each party to his original status. But, in the case at bar, Exhibit A is not such a contract. In fact, it cannot properly be called a contract at all. It is not "an agreement to do or not to do a certain thing," and was founded upon no consideration. It was signed, according to the complaint, several days after the conclusion of the purchase of the Reese claims, and the jury found that it was signed the next day after such purchase. The exact time is immaterial, because the instrument itself shows that it was signed after said purchase. It recites that, "whereas, said party of the second part [appellant] has, by regular sale, assignment, and transfer, become invested with, and now holds, all the rights and interest which said Michael Reese held, as hereinbefore stated." The instrument then declares that it is covenanted and agreed by the parties that appellant is the owner of said claims. It is nothing more than a written admission of

the existence of a condition caused by prior acts. It has all the formalities of a contract, but has no contract in it. If respondent had simply written upon a paper, "I acknowledge that appellant bought the Reese claims for himself," such paper would have had as much legal value as Exhibit A. Of course, in either form, the paper would be admissible in evidence for what it was worth, as an admission of a party, but there was no more necessity to rescind it than there would be to rescind a receipt. There was nothing for respondent to rescind. It is true that, in one part of Exhibit A, respondent is made to say that he "sells, assigns, and makes over" a certain part of the Reese claims; but those words do not change the character of the instrument, for he had nothing to assign. The paper itself set out that Reese was the legal owner of said claims; and appellant says that he fully examined into their validity before the purchase, and satisfied himself that they were good, and that the title to them was in the Reese estate. Therefore, after he had obtained an assignment of the claims from their owners, the Reese executors, the words "sells, assigns, and makes over," in Exhibit A, had no significance.

As to the legal merits of the case, we see no reason to disturb the judgment. The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity,—uberrima fides. If, on his own account, he has any transaction with his client about the subject of the litigation, he must, with respect to such transaction, be able to give, and must give, to his client, "all that reasonable advice against himself that he would have given him against a third person." *Gibson v. Jeyes*, 6 Ves. 278. This is a very hard thing to do, and there are authorities which hold that all such transactions are against public policy, and absolutely void. See *Weeks*, Attys. at Law, § 268 et seq., and cases there cited. We do not think that the current of authorities goes quite that far, but the utmost view that can be taken of the subject, favorable to appellant's contention, is this: that the attorney must show affirmatively that he gave full and proper advice in the premises, acted with entire fairness throughout the transaction, and took no advantage of his client. The latest expression of this rule is to be found in *Felton v. Le Breton*, 92 Cal. 469, 28 Pac. Rep. 490, where this court, through Mr. Justice Harrison, speaking of this subject, says: "In any attempt by the attorney to enforce an agreement on the part of the client, growing out of such transaction, the burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was fully advised." See, also, cases cited in opinion in *Felton v. Le Breton*. In the case at bar the appellant, no doubt, considers that the transaction

here involved was entirely proper, and one which he had a perfect right to enter into, but the findings of the jury were against him, and we cannot say that the verdict had no support in substantial evidence. The case of *McDowell v. Milroy*, 69 Ill. 498, was a stronger case in favor of the attorney than the case at bar, for in that case it was admitted that the attorney had bought for himself; but the court says (we quote from the syllabus, which is a correct statement of the decision) that "when the relation of client and attorney actually exists, and the attorney, at the instance of his client, purchases a note which is secured by mortgage on the land of the client, at a considerable discount, the latter will be entitled to the benefit of the purchase, although the attorney may have bought for himself."

We do not think that the court erred in fixing the amount of the judgment according to the special verdict. "When a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." Code Civil Proc. § 625. Neither do we think that the special findings are contradictory, or that appellant was prejudiced by any absence of findings. There are no other points necessary to be noticed. This case has been ably and exhaustively argued by counsel on both sides, and it would be impossible, in an opinion of reasonable length, to discuss all the positions taken, or to notice the leading authorities cited. After a full consideration of the whole case, we see no sufficient reason for disturbing the judgment. The judgment and order appealed from are affirmed.

FITZGERALD, J., and DE HAVEN, J., did not participate in the foregoing decision.

WIEBOLD et ux. v. RAUER et al. (No. 14, 926.)

(Supreme Court of California. Aug. 11, 1893.)

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Henry Wiebold and Mary D. Wiebold, his wife, against J. J. Rauer, John F. Burris, and others, to cancel a certain mortgage executed by Burris to Rauer, consolidated with an action by J. J. Rauer against Henry Wiebold, Mary D. Wiebold, and John F. Burris, to foreclose such mortgage. From a decree canceling and annulling the mortgage, and from an order denying his motion for a new trial, Rauer appeals. Affirmed.

G. H. Perry, (Naphthaly, Friedenrich & Ackerman, of counsel,) for appellant. W. C. Kennedy, for respondents.

PER CURIAM. This is a consolidated action to cancel a certain agreement, and have declared satisfied a certain mortgage. The

court rendered judgment for plaintiff, and the defendant J. J. Rauer appeals from the judgment and from an order denying a new trial.

There are numerous assignments of error in the record, but the main point presented in the briefs of appellant is that the evidence does not justify the findings; the only other point being that the findings do not support the judgment. We think, however, that the evidence is clearly sufficient to justify the findings that defendant Burris committed the fraud charged, and that appellant was a party to said fraud; and it would serve no useful purpose to review the evidence here. It is also clear that the findings are full enough, and amply support the judgment. Judgment and order affirmed.

(99 Cal. 290)

CITY OF MONTEREY v. MALARIN et al.
(No. 15,006.)

(Supreme Court of California. Aug. 15, 1893.)

HIGHWAYS—OBSTRUCTION—JUDGMENT—WHEN
SUPPORTED BY FINDINGS.

In an action to abate an alleged obstruction of a street the court found that defendant was the owner and had been in possession of the land claimed as a street for more than 20 years; that prior to such ownership and possession it had been used continuously for more than 20 years as a street, but was not so used after that time. *Held* that, in the absence of a further finding that the owner ever intended to dedicate such land for a public street, or acquiesced in or had knowledge of such use, a judgment for defendant was supported by the findings; Pol. Code, § 2619, which provided that "all roads used as such for a period of more than five years are highways," having been enacted after such user ceased, and repealed before the action was brought.

Department 2. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by the city of Monterey against Maria Malarin and others to abate a nuisance caused by the obstruction of a highway, and to enjoin defendants from maintaining the same. There was a judgment for defendants, and plaintiff appealed on the judgment roll. Affirmed.

W. A. Kearney, for appellant. S. F. Geil and W. M. R. Parker, for respondents.

FITZGERALD, J. This is an action by the city of Monterey, a municipal corporation, to abate an alleged public nuisance caused by the obstruction of an alleged public highway of that city, and to enjoin the defendants from further maintaining the same. The complaint, in substance, alleges that plaintiff is the owner and entitled to the possession and control of the land therein described, and that the same is a public street within its corporate limits; that defendants have erected and maintained upon said street certain buildings and fences which obstruct the street and are a nuisance. These allegations are specifically denied by the answer. Defendants had judgment, and

plaintiff appeals upon the judgment roll alone.

The court, in its decision, found: "(2) That plaintiff was not at the time of the commencement of this action, nor at any time before or since, the owner, or entitled to the possession or control, of the strip of land described in plaintiff's complaint, or any part thereof. (3) That the defendant Maria Malarin is the owner in fee simple of the tract of land described in the complaint, and that the other defendants herein occupy and possess said tract as the tenants of said defendant Maria Malarin. (4) That the defendant Maria Malarin and her grantors have been in the actual, open, notorious, exclusive, continuous, and adverse possession of all of the land described in the complaint herein as owners, and have exercised acts of ownership over the same, since 1870, and have during all that time builded, kept, and maintained valuable buildings and improvements on the same. (5) That such buildings and improvements have, during all the time since the year 1870, been by said defendant Maria Malarin erected and maintained in such a manner as to entirely obstruct and prevent any use of the land described in the complaint, or any part thereof, as a public street or highway. (6) That that portion of the land set out in the complaint described as follows, to wit, [description omitted,] was open and uninclosed, and was a convenient way of travel for the public from Alvarado to Tyler street, and it was traveled and used continuously and uninterruptedly by the public as and for a public highway or street in said city of Monterey for more than twenty years immediately prior to the year 1870, and the same was known as 'Spence' or 'Pence' street, but since the year 1870 no part of the said land has been traveled over or used in any respect by the public as a street or otherwise; that neither the board of supervisors of Monterey county nor the city authorities of Monterey city have ever accepted the said land as a street or road or highway. (7) That no part of the land described in the plaintiff's complaint is a public street known or called 'Spence Street,' or any other street, or any part of a public street, within the corporate limits of the city of Monterey or elsewhere; and that the buildings, houses, sheds, and fences erected and maintained upon said premises are not an obstruction or an encroachment on any public street, and do not constitute a nuisance in any public street or highway. (8) That prior to the year 1835 the pueblo of Monterey was the owner in the fee of the lands and premises described in the complaint herein; that in said year said pueblo, by its legally constituted authorities, conveyed its title to Jose Maria Herrera as a pueblo lot; that since said conveyance the defendant Maria Malarin has by mesne conveyances from said Jose Maria Herrera ac-

quired and now holds the whole of the title so conveyed from said pueblo for said tract of land."

It is claimed by appellant that the findings do not support the judgment. This claim is urged upon the ground that the use of the strip of land described in the complaint by the public as found by the court in its sixth finding was such as to constitute it a public street, within the meaning of section 2619 of the Political Code; that said section is in the nature of a statute of limitations, therefore a finding by the court of knowledge by the owner of such user was not material or necessary. The section referred to provided that "all roads used as such for a period of more than five years are highways." This section was enacted subsequent to 1870, and was repealed by the act approved February 28, 1883. Nor was there any such general or local law upon the subject applicable to or concerning public highways in Monterey county prior to 1870. The intention of the owner was therefore absolutely essential in order to constitute a dedication to the public use of the strip of land in question, and the acceptance and user thereof by the public for this purpose are indispensable to the validity of the dedication, but such acceptance may be shown by mere user, without any formal action in relation thereto by the municipal authorities. As there is no finding by the court that the owner ever intended or offered to dedicate to the public the strip of land referred to for a public street, or ever acquiesced in or assented to the use thereof for such purpose, or ever had any knowledge of such use by the public, or that the municipal authorities ever performed any act or recognized or asserted any right whatever thereto, it follows that the judgment appealed from should be affirmed, and it is so ordered.

We concur: DE HAVEN, J.; McFARLAND, J.

99 Cal. 216

In re BLINN.

ADAMS v. BRADLEY. (No. 15,126.)

(Supreme Court of California. Aug. 11, 1893.)

EXECUTORS AND ADMINISTRATORS—REMOVAL.

Hitt. Gen. Laws, §§ 5794, 5795, provide that when one of several executors or administrators shall die, become lunatic, or otherwise incapable of executing the trust, or his letters shall have been revoked according to law, the other shall proceed and complete the trust, and if all be so disabled the probate court shall issue new letters. Section 5979 empowers the probate judge, on learning of certain grounds for removal,—inter alia, incompetency to act,—to suspend the executor or administrator, and cite him to show cause why his letters should not be revoked. Held that, where a sole administratrix has been adjudged insane by the county court, she has become "incapable," and not merely "incompetent to act," and the record of said court being sufficient evidence of her insanity, in the absence of proof that she has since recovered, the probate court may

grant new letters without citation to her to show cause.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Proceedings by W. J. Adams, guardian, to sell the interest of Helen B. Blinn, an insane person. H. W. Bradley, Jr., made a bid for the property, on certain conditions as to title. The guardian accepted the bid, and reported it for confirmation. From the judgment confirming the sale, Bradley appeals. Affirmed.

Jarboe & Jarboe and R. H. Countryman, for appellant. Selden S. & Geo. T. Wright, for respondent.

HAYNES, C. The court below granted an order for the sale of the interest of Helen B. Blinn, an insane person, in certain real estate. Appellant, Bradley, made a bid in writing therefor of the sum of \$24,750, "subject to confirmation by said court: provided that the title to said lot is perfect and merchantable, and is free from all liens and incumbrances of every kind and character. * * * If the title is not perfect as of record, or said property is incumbered, and the incumbrances are not removed after five days' notice thereof, then said deposit is to be immediately returned. The undersigned to have five days after the receipt of complete abstract of title of the said lot in which to examine the same." Respondent accepted the bid, with the said conditions attached, reported the sale to the court, and asked for confirmation. Appellant filed objections to the confirmation, which objections were submitted to the court upon an agreed statement of facts, whereupon the court made an order confirming the sale to appellant, and directing a conveyance, from which order this appeal is taken. The facts appear in the bill of exceptions, and, somewhat condensed, are as follows:

In 1872, Samuel P. Blinn died intestate, leaving said Helen P. Blinn, his widow, and three minor children. The widow was duly appointed administratrix, was qualified, and letters of administration were regularly issued to her. Shortly thereafter, and before she had made any progress in the settlement of the estate, she was adjudged insane by the county court of the city and county of San Francisco, and sent to the state asylum for the insane. Thereupon, William H. Patterson was appointed her guardian, but the records in that proceeding do not show that he ever qualified as such. George B. Bradford was duly appointed and qualified as the guardian of the children. Shortly after Mrs. Blinn had been adjudged insane, Patterson, as her guardian, and Bradford, as the guardian of the children, petitioned the probate court for the appointment of Bradford as administrator of the estate of Samuel P. Blinn, alleging the usual jurisdictional facts, and that Mrs.

Blinn had been adjudged insane by the county court, and was then confined in the state insane asylum; that Patterson had been duly appointed and qualified as her guardian; and praying that a day be fixed for the hearing, and that the clerk give notice thereof by posting. Upon this petition, Bradford was appointed, thereafter qualified, gave notice to creditors, and administered the estate. The order for his appointment recited that it was upon the petition of Bradford, as guardian of the children, but did not refer to Patterson as the guardian of Mrs. Blinn; that the applicant, Bradford, appeared in person and by his attorney, W. H. Patterson; found that the clerk had posted notices as required by law; that Mrs. Blinn was insane, and had been so adjudged, and revoked her appointment. The record is silent as to whether any citation or notice of these proceedings were served upon Mrs. Blinn, and, aside from the averment in the petition that Patterson had been appointed and qualified as her guardian, is also silent as to the fact that she had a guardian. The insanity of Mrs. Blinn was at that time of short duration. After she was restored to sanity, she applied to the court for an allowance for her support, recognized Bradford as the administrator, consented to the allowance of his commissions, and participated in the final settlement and distribution of the estate. Her present incompetency occurred subsequently. Upon these facts, appellant contends that the probate court had no jurisdiction to revoke the letters granted to Mrs. Blinn; that she had never been suspended or removed from her office as administratrix; that the appointment of Bradford is void; that the estate of Samuel P. Blinn has never been administered; and that, hence, the title to the property is not such as he is bound to accept, under the conditions of his bid. It is conceded by respondent that the record does not affirmatively show either that Mr. Patterson ever qualified as the guardian of Mrs. Blinn, or that any citation was issued or served upon her to show cause why her letters of administration should not be revoked; but respondent contends that even if the proceedings for the appointment of Mr. Bradford as administrator were defective, by the acquiescence of Mrs. Blinn in the appointment after she was restored to sanity, and her participation in the final settlement and distribution of the estate, she is now estopped from questioning the validity thereof; the proceeding for the sale of the real estate here in question being a proceeding by her through her guardian, and for her benefit.

We think that the court had jurisdiction, and that the appointment of Mr. Bradford was regular. The proceedings resulting in the appointment of Mr. Bradford were had before the Code of Civil Procedure was enacted. Sections 5794 and 5795 of Hittell's General Laws (corresponding to sections

1425 and 1426 of the Code of Civil Procedure) are as follows: "5794. In case any one of several executors or administrators, to whom letters shall have been granted, shall die, become lunatic, be convicted of an infamous offense, or otherwise become incapable of executing the trust, or in case the letters testamentary, or of administration, shall be revoked, or annulled, according to law, with respect to any one executor or administrator, the remaining executor or administrator shall proceed and complete the execution of the will or administration. 5795. If all such executors or administrators shall die, or become incapable, or the authority of all of them shall be revoked, according to law, the probate court shall issue letters of administration with the will annexed, or otherwise, to the widow or next of kin, or others, in the same manner as is directed in relation to original letters of administration. The administrator so appointed shall give bond in the like penalty, with like sureties and conditions as hereinafter required of administrators, and shall have the like power and authority." These sections, it will be seen, do not prescribe the grounds upon which the authority of an administrator may be revoked, nor the mode in which the revocation may be accomplished. The twelfth chapter of the act, sections 5979 to 5984, (2 Hitt. Gen. Laws,) does that. Section 5979 is as follows: "Whenever the probate judge has reason to believe from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed, or is about to commit, a fraud upon the estate, or has been incompetent to act, or has permanently removed from the state, or who has wrongfully neglected the estate, or has long neglected to perform any act as such executor, or administrator, it shall be his duty, by an order entered upon the minutes of the court, to suspend the powers of such executor, or administrator, until the matter can be investigated." The sections following provide for the appointment of a special administrator during such suspension, if deemed necessary, and require the suspended administrator to be cited to appear and show cause why his letters should not be revoked. When considered together, these provisions do not seem difficult of construction. The power or jurisdiction of the court to appoint a new administrator may be exercised upon the happening of the death, insanity, or conviction of an infamous offense of the former administrator, or upon the revocation of his power and authority by the court. The insanity of Mrs. Blinn at the time of Bradford's appointment is not questioned, but only the proceedings resulting in his appointment. In case of the death, insanity, or conviction of the

former administrator, such death, insanity, or conviction must be judicially ascertained by the probate court before a new appointment can be made, but such fact may properly be ascertained by the court in a proceeding under a petition for the appointment of a new administrator. In case of the death of the former administrator the fact is properly presented to the court in a petition for the appointment of a new administrator, and upon the hearing the fact may be established by witnesses. In case of the conviction of the former administrator of an infamous offense, the fact may be presented in the same manner, and proved upon the hearing by the production of the record of his conviction. No citation to the convict is necessary, as it is the fact of the conviction, when shown to the court by proper allegation and evidence, which authorizes the court to make the new appointment. The convict is not a necessary party to the proceeding. He has had his day in court, and is conclusively bound by the record. No one would contend for a moment that it is necessary in the probate proceeding for the appointment of a new administrator to again charge him with the offense, and try him upon that charge before a jury, and have a verdict of guilty in the probate court. So, in the case of insanity, not only the insane person, but all who deal with him, are bound by the record of the court of competent jurisdiction adjudging him insane, unless they can show that after the adjudication, and before the transaction in question, he had been restored to sanity. No such restoration is claimed in this case. Hence the proper mode of presenting the fact of Mrs. Blinn's insanity was pursued. It was properly alleged in a petition for the appointment of Mr. Bradford as administrator, and the record of the county court adjudging her insane was competent and sufficient proof of the fact, and that was the only fact to be ascertained to authorize the court to proceed to the appointment of a new administrator. Upon the question of her sanity, Mrs. Blinn had had her day in court. She was bound by that adjudication. If she had not been adjudged insane prior to the proceeding for Mr. Bradford's appointment, it would have been necessary to have brought her regularly before the court as a party to the proceeding, since she must have been presumed to be sane, and entitled to a hearing upon that question.

Appellant contends, however, that the statute required that she should be cited; that the word "incapable," used in sections 5794 and 5795, and the word "incompetent," used in section 5799, are synonymous; that under the latter section the person "incompetent to act" must be cited to show cause before his authority can be revoked. The legislature has classified death, insanity, and conviction of an infamous offense under the

designation "Incapable," and other matters affecting the integrity or qualification for the discharge of the duties of an administrator as "incompetency." The embezzler, the thief, the man who hesitates at no fraudulent scheme to despoil an estate, or who is so careless and indifferent as to habitually and grossly neglect his duties, may have capacity to properly discharge all the duties of an administrator, but the man who is dead or insane or civiliter mortuus is "incapable." Whether the word "incompetent" was wisely chosen or not, the context leaves no room to doubt the sense in which it was used, and that it was used to designate a different class from those characterized as "incapable." Nor is this view inconsistent with *Schroeder v. Superior Court*, 70 Cal. 344, 11 Pac. Rep. 651, cited by appellant. There it was held that the provision of the Code of Civil Procedure, that, by the marriage of an administratrix, "her authority is extinguished," is the equivalent of, "she ceases to be competent." In such case the mental and physical capacity of the administratrix is not affected by the marriage, but the statute extinguishes her authority. It is true the court there held that she "may be proceeded against for suspension and removal under section 1436, Code Civil Proc., and the sections immediately following;" but the closing sentence of the opinion shows that the proceeding "for suspension and removal" is referred to as a convenient and orderly one for ascertaining the fact of the marriage where doubt existed. If we clearly distinguish between the direct legal effect of the death, insanity, marriage, or conviction of crime upon the authority of the administrator, and the finding of these facts as necessary to the exercise of the jurisdiction of the court to appoint a successor, all difficulty is removed. Appellant also cites *Estate of Moore*, 68 Cal. 281, 9 Pac. Rep. 164. In that case, Thomas W. Moore, the administrator, was adjudged insane by a competent court, and sent to an asylum. About a year later he was discharged from the asylum, and under a direct proceeding under section 1766, Code Civil Proc., he was found and adjudged to be of sound mind. Afterwards, the widow of intestate filed her petition in the probate court, alleging, among other things, that Thomas W. Moore had been adjudged insane, and since that time no order had been made, appointing any one as administrator, and asking that she be appointed. It was held that an entire or absolute vacancy was not created when respondent, Thomas W. Moore, was sent to the asylum; that he became incapable of executing the trust for the time being, and if, during that time, she had applied for letters, they would doubtless have been granted, but having been restored to sanity, and recognized by the court and others as such administrator, the application came too late. It is not

necessary to determine, in the case at bar, whether insanity creates an absolute vacancy, or, if it does, whether it occurs prior to the judicial ascertainment of the fact by the probate court, for it is not questioned here that Mrs. Blinn was insane at the time Mr. Bradford was appointed, while the Case of Moore expresses the opinion that, if Mrs. Moore's application had been made while the insanity of the former administrator continued, letters would have been granted to her. There is therefore no conflict between that case and the opinions we have expressed in this. The probate court, having found that Mrs. Blinn was insane, and had been so adjudged by the county court, had jurisdiction to appoint Mr. Bradford, and no citation to Mrs. Blinn was necessary. She was entitled, as heir, to notice of the hearing, but that was given by posting the usual notice. The conclusion we have reached makes it unnecessary to consider the effect of her subsequent acquiescence in the appointment and proceedings of Mr. Bradford as administrator, and also renders immaterial the question whether Mr. Patterson in fact qualified as her guardian. The judgment or order confirming said sale to appellant, from which this appeal is taken, should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment or order confirming said sale to appellant is hereby affirmed.

99 Cal. 286

PEOPLE v. BEEVERS. (No. 20,975.)

(Supreme Court of California. Aug. 15, 1893.)

BIGAMY—VALIDITY OF MARRIAGE.

1. Under Civil Code, § 82, declaring that the marriage of one below the age of consent can only be annulled by that party, and that, if he or she freely cohabit with the other after attaining the age of consent, the marriage is valid, one who has married a girl below the age of consent cannot, after remarrying, plead that fact to the charge of bigamy.

2. A marriage by consent, followed by "a mutual assumption of marital rights, duties, or obligations," as described in Civil Code, § 55, is as sufficient a basis for a prosecution for bigamy as one by consent, "followed by a solemnization."

3. In a prosecution for bigamy, on a defense that the first marriage was illegal, the judgment roll of a suit for divorce by the first wife against the accused, granted by the court, and pending on appeal in the supreme court, is incompetent evidence, and, if admitted, prejudicial.

Department 1. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

Prosecution of John A. Beevers for bigamy. Verdict of guilty, and judgment thereon. New trial denied. Defendant appeals. Reversed, and remanded for new trial.

Frank H. Short, for appellant. Atty. Gen. Hart, William H. Layson, First Dep. Atty. Gen., W. D. Tupper, and H. H. Welsh, for the People.

GAROUTTE, J. Appellant, Beevers, was convicted of bigamy, and now prosecutes an appeal to this court from the judgment and order denying his motion for a new trial. It is insisted that the evidence is insufficient to justify the verdict. Beevers, being of the age of 20 years, and Lou Jacobs, being of the age of 14 years, desirous of marrying, eloped from Hollister, San Benito county, and went to the town of Monterey for the purpose of being married upon the high seas, this course being adopted with a view to escape the difficulties to marriage presented by the girl's tender years. Upon their arrival at Monterey, the sea was boisterous, no boat could be procured, and the plan was abandoned. It was thereupon orally agreed between them that they should live together as husband and wife, and that, upon their return to the home of their parents, both should state the fact to be that they were married upon the sea. Thereafter they returned to Hollister, and to all their friends declared the fact in accordance with their previous agreement, and further stated that the certificate of marriage had been lost. These statements were repeated upon all occasions for many months, and it was only a short time prior to the inception of this prosecution that the true facts were disclosed to the public. Immediately upon their return to Hollister they lived together as husband and wife, represented themselves as such at all times, were known to the neighborhood as married people, and conducted themselves as married people usually do. Their affairs were conducted upon these lines for nearly four years, during which time a child was born to them, but, differences having arisen, a separation ensued, and subsequently Beevers married one Clara Bates, and his prosecution and conviction upon a charge of bigamy were the result.

It is claimed that the foregoing evidence is insufficient to prove such a marriage between these parties as to form the basis for a charge of bigamy, and, as one of the grounds for such claim, it is insisted that the girl was but 14 years of age at the time the agreement of marriage was entered into, and, consequently, was incapable of giving consent thereto, the statute fixing the capacity of females for consent at the age of 15 years. Appellant's contention cannot be sustained. Section 82 of the Civil Code declares that the marriage can only be annulled by the party who did not possess the capacity to consent, and expressly recognizes the validity of the marriage if, after attaining the age of consent, such party freely cohabits with the other as husband or wife. In *Shaffer v. State*, 20 Ohio, 1, it is held

that marriage by a person under the age of consent, if followed by cohabitation after arriving at the proper age, is sufficient to support a prosecution for bigamy. In other states it is held that such marriage, unless subsequently disaffirmed by positive action, is sufficient to support the charge. *Walls v. State*, 32 Ark. 565; *Beggs v. State*, 55 Ala. 108; *Cooley v. State*, Id. 162. In the present case these parties lived together as husband and wife almost three years after the girl arrived at the age of consent, and a full ratification of their prior acts and agreement was the result. We have been cited to no law, and know of none, that would entitle a guilty husband to escape a charge of bigamy upon such a pretext.

It is insisted that a marriage sufficient upon which to base a charge of bigamy must be a regular, solemnized, and authenticated marriage, as provided by the statute, but with this contention we cannot agree. Section 281 of the Penal Code declares that "every person, having a husband or wife living, who marries any other person, * * * is guilty of bigamy." In this case the second marriage is conceded, and defendant's guilt is dependent upon the fact as to whether or not Lou Jacobs was his wife at the time he contracted the second marriage. Section 55 of the Civil Code declares: "Marriage is a personal relation, arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." It will thus be seen that consent to marry, followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations, constitutes marriage. The meaning of the phrase "mutual assumption of marital rights, duties, or obligations" was exhaustively discussed in the case of *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. Rep. 26, 131. It was again under consideration in *Kilburn v. Kilburn*, 89 Cal. 46, 26 Pac. Rep. 636; and its legal signification is there clearly and succinctly declared. In the present case there was no solemnization, but there was consent, followed by a mutual assumption of marital rights, duties, and obligations; and, under our statute, those elements conjoined result in a marriage as binding in morals and in law as though it was solemnized by priest or judge. In the one case we have consent, followed by solemnization; in the other, consent, followed by the mutual assumption of marital rights, duties, or obligations. The crime of bigamy is committed when a person marries who has another husband or wife living at the time. The mere form of the first marriage is entirely immaterial. The vital inquiry is, is such a person a husband or wife? The solution of that question being in the affirmative, one element of the crime is proven, and the in-

quiry passes to the second marriage. The policy of the law recognizing and authorizing this form of marriage is not for the court to support or condemn. It is known to all that it is becoming a common practice with the people, entirely too common; but, if bigamy, adultery, and kindred crimes cannot be founded upon such marriages, inducements are offered to the lawless which cannot fail to be seized upon, and which will undoubtedly end in most pernicious results. There is no authority, to our knowledge, opposed to the foregoing views upon this question. The differences among the courts have arisen alone as to the amount and character of evidence necessary to prove the marriage. It is conceded everywhere that an actual marriage must be proven to support the charge of bigamy, a great number of the cases holding that cohabitation and repute, standing alone, are not sufficient to prove the marriage. This was the common law, and was based upon the principle that the presumption of innocence of crime overcame the presumption of marriage following cohabitation and repute. Many cases hold that the admissions of marriage by a defendant, coupled with cohabitation and repute, are sufficient to sustain a finding of actual marriage. *State v. Hughes*, 35 Kan. 626, 12 Pac. Rep. 28; *State v. Britton*, 4 McCord, 256; *Oneale v. Com.*, 17 Grat. 583; *Williams v. State*, 44 Ala. 24; *Scoggins v. State*, 32 Ark. 205; *State v. Gonce*, 79 Mo. 600. Section 1106 of the Penal Code, which prescribes the character of evidence that may be introduced upon the charge of bigamy to prove marriage, is directly in line with the principles declared in the foregoing cases, although it is not necessary to invoke the provisions of that section in the present case, for here the facts disclose an actual marriage in accordance with section 55 of our statute. The sufficiency of the evidence in this case to support a conviction for bigamy as to the first marriage is fully indorsed in *Hayes v. People*, 25 N. Y. 390, and *State v. Bittick*, 103 Mo. 183, 15 S. W. Rep. 325. In *Case v. Case*, 17 Cal. 598, following the law, it was held that repute and cohabitation were not sufficient to prove marriage, the defendant in that case being charged with adultery. No statute authorizing marriage in the manner prescribed by section 55 of the Code was upon the books when the question was decided by the court in that case. Neither do the exigencies of this case require us to enter into a discussion as to the true result to be deduced by reason of the presumption of innocence coming in conflict with the presumption of marriage, arising from general repute and cohabitation, viewed in the light of section 55 of the statute; but it may be stated that, if the principle of estoppel is ever recognized in criminal law, the application of it to a defendant under such circumstances, in the interests of the wronged spouse, the un-

fortunate offspring, and good morals, would prove a most wholesome rule.

The court committed error in admitting in evidence the judgment roll in the civil action of Lou Beevers vs. John A. Beevers. The action was brought against defendant for divorce, and a default was taken. At the time the judgment roll was offered in evidence the case was upon appeal to this court, and it follows necessarily that the findings of fact and other recitals therein contained were inadmissible as evidence upon any question involved in this prosecution. *Woodbury v. Bowman*, 13 Cal. 635; *Murray v. Green*, 64 Cal. 369, 23 Pac. Rep. 118. The adjudication of the superior court that these parties were husband and wife, and a decree being entered dissolving the bonds of matrimony, were matters which probably had great weight with the jury. The question as to the marriage was the contested issue, and this evidence pointed directly to that element of the case. Coming from a source so grave, it must have prejudiced defendant's rights. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; PATERSON, J.

4 Cal. Unrep. 87

PEOPLE v. FAGAN. (No. 20,938.)

(Supreme Court of California. Aug. 15, 1893.)

CRIMINAL LAW—CONDUCT OF TRIAL—VIEW BY JURY.

On a prosecution for the larceny of cattle, it is error for the court, jury, counsel, and officers of the court to go to a neighboring corral to examine the brands on certain cattle, when such examination is not conducted as a part of the regular trial,—neither the cattle nor the brands being offered in evidence, nor defendant given an opportunity to object,—since Pen. Code, § 1119, authorizing the court to order the jury to be conducted to the place in which the offense was committed, or other material fact occurred, does not apply to such case.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Frost Fagan was convicted of the larceny of cattle, and appeals. Reversed.

James H. Budd, L. J. Maddux, and Robt. Farrell, for appellant. Atty. Gen. Hart and L. W. Fulkerth, Dist. Atty., (T. A. Coldwell, of counsel,) for the People.

TEMPLE, C. The defendant was indicted jointly with his father, whose appeal was recently disposed of here, (*People v. Fagan*, 33 Pac. Rep. 60,) and William Ducker. They had separate trials, and the cases, as presented in the record, differ widely. By this record it appears that one F. Weyer had about 200 head of cattle on the Booth ranch, in the county of Stanislaus, 22 miles west of Modesto. On the 2d day of October, 1891, 21 head were missing. Nothing was known

as to the mode or cause of the disappearance, but on the 8th or 9th of the same month seven animals were found by William Grummett on the Howard ranch. Grummett had charge of Howard's stock, and had some belonging to himself. At the suggestion of Howard, he put the strays in with his own. On the 13th four more animals appeared, and were taken by Grummett. Howard, on the 16th of the month, having heard of Weyer's loss, notified Purvis, sheriff of the county, of the presence of the cattle. On the next day, Purvis and McGinnis, a deputy constable who was looking for the cattle, and had offered a reward for their recovery and the apprehension of the thief, supposing them to have been stolen, went to Howard's ranch, and examined them. The animals had been freshly marked, and the brands altered. The marks were a crop off one ear, and an underslope of the other. Weyer's brand consisted of a mark resembling a capital L, when turned one way, and, inverted, resembled the figure 7. The cattle were thus branded. It had been changed by connecting the horizontal line with the perpendicular mark at each end, making it a square. Thus altered, both marks and brand bore a close resemblance to the marks and brand used by the defendant. The sheriff told Grummett to keep the cattle until some one called for them, and then immediately notify him. These cattle were subsequently identified as a portion of the 21 head which had been lost by Weyer. Defendant lived with his parents at Modesto. His father had recently taken up some land in the coast range, about nine miles from Howard's, intending, as he said, to homestead it. His father had a small cabin there, and had gone there about the 1st of October. Defendant's witnesses testified to facts which, if true, proved that defendant was at home on the night of the 2d of October, and also on the 3d and 4th of that month. Defendant had cattle of his own, and, according to his testimony, on the 14th of October drove some 15 head into the coast range near his father's cabin, and remained there at his father's place until his arrest, on the 20th. On the 18th, Grummett visited the Fagan cabin, and told defendant about the 11 head which were at Howard's, describing their marks and brands, when, according to Grummett's testimony, defendant said they were some cattle he had recently purchased and re-marked, and said he would take them away. Defendant, on the stand, denied having said that he had recently bought or marked any cattle, and said he knew nothing of the cattle lost by Weyer. He had neither taken nor marked any of them. He said, however, he had lost some of his cattle, and was looking for them. He testified that 10 head of his were never found. The 11 head were taken from Howard's place on the 19th of October, about noon, while Grummett was at dinner. During the afternoon, Grummett missed them,

and found that a gate which had been locked had been lifted from its hinges; that there were cattle tracks through the gate, and also those of a horse. He telegraphed to Purvis, who came over that evening, bringing McGinnis with him. They, with Grummett, followed the tracks to a canyon leading into the coast range, called "Ingram Canyon." Three ravines, not far apart, lead into the mountains. Washington canyon is the more northerly, then Curran canyon, and then Ingram. High ridges divide them from each other. They terminate near together at a mountain called "Oso," near which Grummett and his brother had a place. About 4 o'clock in the morning of the 20th they reached the Fagan cabin, where they found the 11 head in a corral within a few feet of the cabin. In the cabin they found the defendant and his father, in bed, while William and Ed. Ducker were lying by the cabin on the outside. When asked by the sheriff if the cattle were his, defendant replied that they were not; that they were strays, and he did not know how they got into the corral. Charles Fagan said that he and Will Ducker put them into the corral, and that Frost knew nothing of it. At the trial, Ducker testified that defendant was cooking supper when the cattle appeared there, not driven by any one, and muddled their spring, whereupon Charles Fagan and he put them into the corral. The defendant also said that he had about 30 head of cattle in the range, and some of the posse made search, and found 2 head near Mt. Oso, which were marked and branded in the same mode as the 11 head. Afterwards, November 21st, 3 more were found near Mt. Oso, 3½ miles from the Grummett cabin. They were marked and branded similarly to the 11 head. They were taken to Modesto, and placed in Mr. Young's corral, and on the trial were identified as Weyer's cattle, and as having been missed on the 2d of October; but they were not part of the 11 head, with the larceny of which, it was assumed at the trial, defendant was charged.

The court required the prosecution to say whether they prosecuted the defendant for a larceny committed by the taking from the Howard place on the 19th, or from the Booth ranch on the 2d. The district attorney said he claimed that the taking was from the Booth ranch on the 2d. If, therefore, it can be said that the defendant was found in possession of the cattle at all, it was not until 18 days after the taking; and it was only from the circumstances recited that it could be inferred that even then defendant had any possession or control of them, by himself, or jointly with his codefendants. And the evidence was conflicting as to the existence of every one of these circumstances, except the fact that the cattle were found in his father's corral while he and three others were at the cabin. It is impossible to make out from the statement

in what respect the defense claimed that the marks and brands upon the cattle alleged to have been stolen differed from the defendant's marks and brands. But a great deal of evidence was put in upon the subject upon both sides, much of which consisted in illustrations upon the blackboard, or the examination of sensible objects, the force of which we cannot appreciate. To enable the jury to compare these marks and brands, there was exhibited to them, against the objections of the defense, a hide alleged to have been taken from an animal claimed by the defendant. It was not the hide of an animal alleged to have been stolen, but was exhibited merely to prove what the defendant's marks and brands were. I think the evidence insufficient to show that the hide was from a steer belonging to the defendant, or that it had not been tampered with, but I pass to what I deem a still plainer error.

After examining the earmarks upon the hide, the court, with the jury, clerk, sheriff, and counsel went to Young's corral to examine the three head which had been found, November 21st, near the Grummett place, in the coast range, of course, for the purpose, in part, of comparing the marks with those upon the hide. These three animals the defendant was not charged in the information with stealing, nor was it shown, by direct evidence, at least, that he had ever seen them, or that he knew anything about them. This action of the court was against the objection of the defendant. This course is not authorized by section 1119 of the Penal Code. The cattle and the marks were not offered in evidence, so as to afford the defense an opportunity to object, nor had they the opportunity to call the attention of the jury to variances between the marks and those of the defendant. Upon this point, see *People v. Fitzpatrick*, 80 Cal. 539, 22 Pac. Rep. 215.

When the defendant was on the stand, the following occurred: "Question. What is there about this hide? Answer. This hide? Q. Yes, sir. A. Well, I don't know whether it is the same bullock or not. Sam Miller sold a bullock that belonged to me. Mr. Fulkerth: We shall object to that, that it is immaterial what there is about that hide. They can dispute the conversation, if they want to. The Court: That is your hide. Mr. Ferral: What is there to this hide that has been offered in evidence? So he may have the right to explain any connection he has with it. The Court: I think that it is too general a question. I will sustain the objection. (The defense reserved an exception.)" I take it that the remark of the judge, "That is your hide," was merely intended to tell the witness that it was the hide offered in evidence. The question, with the explanation, which must be taken as a part of it, was not too general. It could hardly be made more specific without being

objectionable. The objection made and sustained was that it was immaterial, as the defendant could only deny the conversation in which the defendant was reported to have said that the marks on the animal killed were his. The defense, having taken an exception, pressed the matter no further. What explanation could have been given, we do not know; but many possible ones may be imagined, which would have destroyed the entire value of the evidence, if believed by the jury. That the evidence was most material is evident. The identity of the marks and brands recently made on the cattle with the marks and brand of defendant was the most important fact testified to for the people, and the exhibition of the hide and the marks and brands on the cattle in Young's corral was the most forceful evidence of the fact. For this reason the judgment and order must be reversed.

The exceptions to the instructions are mainly the same as those made in the recent case of *People v. Fagan*. In that case the court deemed it unnecessary to consider and determine these questions. It is not more necessary to do so in this case.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

99 Cal. 259

SHIVELY v. SEMI-TROPIC LAND & WATER CO. (No. 19,141.)

(Supreme Court of California. Aug. 15, 1893.)

SALE OF LAND—RESCISSION—RECOVERY OF PAYMENTS—PLEADING—ASSIGNMENT OF CLAIM.

1. When a contract for the sale of land is rescinded by the parties, the vendee has a right to recover back payments made, though the contract provided that on default in payment the vendee shall forfeit all rights and payments already made.

2. A complaint in an action against the vendor to recover payments made alleged that defendant sold the land to other parties, who took possession and made lasting improvements thereon, and that by reason of such sales the defendant had rescinded his contract of sale to plaintiff's assignor. Held, that these facts did not show a rescission or abandonment of the contract, as defendant had not necessarily thereby placed it out of his power to comply with the terms of the contract.

3. The failure of the complaint to show a rescission of the contract by defendant was cured by the admission of the answer that defendant had rescinded it.

4. An assignment to plaintiff by the vendee of all interest in moneys paid by him under the contract was not a violation of the provision of the contract prohibiting its assignment.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Henry L. Shively against the Semi-Tropic Land & Water Company, a corporation, for money had and received.

Judgment for plaintiff. Defendant appeals. Affirmed.

Willis, Cole & Craig and H. A. Barclay, for appellant. Henry Bleecker and Geo. I. Cochran, for respondent.

GAROUTTE, J. On the 10th day of October, 1887, Lewis Shively purchased a tract of land from the defendant under a written contract for the sum of \$4,004. \$1,334.66 was paid in cash; the balance was to be paid in three installments, the last payment being due on the 10th of October, 1889, and the deferred payments, if not paid when due, were to bear interest at the rate of 12 per cent. per annum until paid. The first payment was the only one made by Shively, and nothing further was done by either party to the contract until the defendant, on the 8th day of April, 1890, and after all the payments had been due, wrote a letter to Shively, notifying him to pay up, or return the contract, or the defendant would foreclose. Subsequently, the balance of the money not being paid, defendant sold the land to other parties. Prior to the bringing of this suit said Lewis Shively assigned to the plaintiff all his right, title, and interest in the claim and contract in question, and to all sums of money paid by him under said contract. This action was commenced in October, 1891, and is in the nature of an action for money had and received, to recover back the first payment made by Lewis Shively under the contract. Judgment went for plaintiff, and this appeal is taken from the judgment and order denying the motion for a new trial.

Respondent rests his case upon the claim that appellant, having sold the land to other parties, thereby rescinded the contract, and rendered itself liable for a return of the money already paid. Appellant insists that Shively's failure to pay the deferred payments when due or when demanded was such a default upon his part as to relieve appellant of any further obligation towards him. Appellant states in his answer that by reason of respondent's default as to the nonpayment of the installments due it treated the contract of sale as rescinded, and thereupon sold the land to other parties. While in a subsequent portion of the answer there is a denial of the allegation that defendant rescinded the contract by reason of such sale, yet the pleading, taken in connection with the balance of the record, indicates that a rescission by defendant was fully admitted. This is conclusively shown by an answer to an interrogatory of the court, wherein counsel for appellant said: "We treated the contract as rescinded, and after about a year and a half sold the land to other parties. That is alleged and admitted in the pleadings." The general principle involved in this case, as disclosed by the pleadings and facts stated, has been directly passed upon by this court in a num-

ber of recent decisions, and the law upon the question must be deemed settled beyond dispute. These cases hold that, when a contract of sale and purchase of land is abandoned or rescinded by the parties, the vendee, though in default, may recover back installments paid of the purchase money, less the actual damage to the vendor occasioned by his breach of contract. *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. Rep. 749; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. Rep. 774; *Bradford v. Parkhurst*, 96 Cal. 102, 30 Pac. Rep. 1106. The contracts of sale forming the basis of litigation in the foregoing cases contained a forfeiture clause quite similar to the one here under consideration, and that provision has never been upheld. The assignment to plaintiff of the cause of action evidenced by this litigation was no violation of those provisions of the contract prohibiting its assignment. This is not an action arising under the contract, but an action for money had and received. See *Joyce v. Shafer*, (Cal.; decision filed February 17, 1893,) 32 Pac. Rep. 320.

It is insisted that the general demurrer to the complaint should have been sustained. The complaint alleged that the defendant sold the land to other parties, who took possession as owners thereof, and made large and lasting improvements thereon, and that by reason of such sales the defendant had rescinded said agreement. These facts are all that is alleged as to the rescission by defendant, and we think them wholly insufficient to support a cause of action based upon rescission. Rescission or abandonment of the contract by defendant gives plaintiff his cause of action, but a transfer of the land to third parties of itself does not constitute such abandonment or rescission. It does not necessarily follow from such transfer that defendant has placed it out of his power to comply with the terms of the contract. Such transfer creates no breach of the contract. Non constat but plaintiff's rights were expressly reserved by its terms. Defendant as yet has not defaulted, and might not suffer default when the balance of the purchase price was tendered, and a deed demanded; and the plaintiff is not entitled to recover the money paid until he shows the default of the defendant. This question was directly presented in *Joyce v. Shafer*, supra, and it was there held that a conveyance by the vendor was not a breach of the contract, and a demurrer was sustained to the complaint for that reason. We are entirely satisfied with the principle laid down in that case. If this question were to be tested by the sufficiency of the complaint alone, a reversal of the cause would be the result; but defendant's answer, as already shown, sets out the failure of plaintiff to pay the amounts due, and states that for that reason it treated the contract as rescinded, and sold the land to other parties.

Such allegation supplies all that the complaint omits, and gives plaintiff a good cause of action. When defendant treated the contract as rescinded, and sold the land to other parties, it became liable for the amount of money received from plaintiff, less the actual damage suffered by reason of plaintiff's breach of the contract. That a defective complaint may be cured by admissions of the answer is well settled. Mr. Pomeroy, in his work upon Remedies & Remedial Rights, (section 579,) says: "When the plaintiff has failed to state material facts, so that no cause of action is set forth, but these very facts are supplied by the averments of the answer, the omission is immaterial, and the defect is cured."

We find no other matters demanding our attention. For the foregoing reasons let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

4 Cal. Unrep. 103

REITER v. ROTHSCHILD. (No. 15,045.)

(Supreme Court of California. Aug. 16, 1893.)

ACTION AGAINST EXECUTOR—MONEY PAID TO TESTATOR AS SECURITY—EVIDENCE.

1. Plaintiff leased property of R., and gave him \$500 as security for the lease, he agreeing to pay it back on the expiration of the lease. R. died before the expiration of the lease, and H., who was appointed his executrix, filed an inventory, which recited: "Moneys belonging to said deceased which has come to the hands of the executrix * * * \$500, held as security for lease from" plaintiff. H. died after the termination of the lease. *Held*, that it was not necessary to present a claim for the \$500 against the estate of R., but that an action might be maintained therefor against the estate of H.

2. In view of the sworn statement of H., the finding of the court that she had in her possession the money deposited by plaintiff is supported by the evidence, though her executor testified that he made such statement, and that as a matter of fact it was not true, but was made because they felt she was morally liable for the money.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Catherine Reiter against Joseph Rothschild, executor of Hannah Rothschild, deceased, to recover money deposited by plaintiff with H. Rothschild, whose executrix was Hannah Rothschild. Judgment for plaintiff. Defendant appeals. Affirmed.

Jos. Rothschild, for appellant. Wm. G. Cousins and Wm. B. Sharp, for respondent.

TEMPLE, C. Appeal from judgment and order denying new trial. From the findings and undisputed evidence it appears that on December 29, 1886, Henry Rothschild by indenture leased to the plaintiff the premises known as No. 835 on Sacramento street, San Francisco, for the term of three years and five months, beginning January 19, 1887, at

a monthly rental of \$125. On the same day the parties to the lease executed another instrument in writing, wherein it is recited as follows: "And whereas, as security for the prompt payment of the rent therein reserved and agreed to be paid by the said party of the second part to the party of the first part, at the times and on the conditions therein mentioned, and to and for the faithful compliance on her part with and performance of all the terms, covenants, promises, and agreements mentioned and set forth in the said lease, which said lease is here referred to and made a part of this agreement, the said party of the second part has paid to, deposited, and left with H. Rothschild the sum of five hundred dollars (\$500) in gold coin, to be kept, used and employed by him only for the uses and purposes herein stated: Now, this agreement witnesseth that if the said party of the second part shall [well] and truly pay all rents and perform and execute all the promises, covenants, and conditions of the said lease, as therein contained on her part, then, and in that event, at the expiration and completion of the term of said lease, the said H. Rothschild hereby agrees to pay back the said sum of five hundred dollars (\$500) to the said party of the second part." It was further stated that, in case the tenant did not perform her covenants, Rothschild was authorized to retain the \$500 as liquidated damages. On the same day Mrs. Reiter delivered the money to Rothschild, receiving the following receipt: "Received, San Francisco, December 19, 1886, of and from Catherine Reiter, the sum of five hundred dollars, to be kept, used, and employed by me according to and upon the terms and conditions of the foregoing agreement, and in pursuance thereof. H. Rothschild. Witness: E. O. Hisgen." Mrs. Reiter entered into possession under the lease, occupied the premises for the full term, and upon its termination, June 19, 1890, quietly surrendered the premises to the representatives of H. Rothschild. It is agreed that she paid her rent when due, and did in all respects perform all the agreements, promises, conditions, and covenants on her part in the lease. Before the expiration of the term, however, to wit, May 4, 1889, Henry Rothschild died testate, and on May 24th of the same year his widow, Hannah Rothschild, was appointed executrix of his will. The usual notice to creditors was published by her prior to June 24, 1889. June 10, 1889, Hannah Rothschild, as executrix of the will of Henry Rothschild, returned and filed an inventory of said estate, verified by her oath, as required by law, in which the following appears: "Moneys belonging to said deceased which have come to the hands of the executrix as follows: Cash, \$1,307.50; \$500, held as security for lease from Catherine Reiter, paid December 29, 1886, \$500.00." The verification states that the foregoing inventory contains a true statement of all

the estate of said deceased which has come to her knowledge and possession, and particularly of all moneys belonging to said deceased. No claim of any kind was ever presented by plaintiff, or for her, against the estate of Henry Rothschild, deceased.

After the expiration of the term of the lease, to wit, October 26, 1889, Hannah Rothschild died intestate. November 18, 1889, Joseph Rothschild was appointed administrator with the will annexed of the estate of Henry Rothschild, and March 10, 1890, the administration of said estate was closed, and the administrator discharged. November 18, 1889, Joseph Rothschild was also appointed executor of the will of Hannah Rothschild, deceased, and duly qualified, and is still such executor. September 16, 1890, the plaintiff presented her claim against the estate of Hannah Rothschild in due form to the executor, by whom it was rejected September 29, 1890. This suit was brought to have judgment establishing her claim against that estate. Defendant denies that he received or has the money sued for. If Hannah Rothschild, therefore, received the \$500 deposited with Henry Rothschild by plaintiff, she must have converted it to her own use. As a witness the defendant says that he thinks plaintiff ought to have the money, but he says, as a lawyer and as executor, he thinks he should not pay it unless she establishes a legal claim to it. She ought to have presented the claim to the estate of Henry Rothschild, and, not having done so, he cannot pay it. This suggests the question raised on this appeal.

1. It is first suggested that it is averred in the complaint that the money was received by Hannah Rothschild as executrix, and it is claimed what she held as executrix must belong to the estate. The complaint also avers that Hannah Rothschild held the money for the use of the plaintiff. This is a very comprehensive allegation. It would be supported by any evidence which proves that she had money which, in equity and good conscience, she ought to pay to plaintiff. It was not necessary to aver that she received the money as executrix, yet in this case it was literally true, and the allegation does no harm. The leasehold estate had not terminated when Henry Rothschild died. Of course, there still remained something to be done by plaintiff, for the performance of which the money was held as security. In the absence of a showing we must presume that the premises and the lease still belonged to the estate, and Hannah Rothschild, executrix, would be entitled to retain the money until Mrs. Reiter had fully performed her covenants. When that was done, as it was, while Mrs. Rothschild was executrix, the estate had no further interest in it, and Mrs. Rothschild was then a mere bailee of the money for Mrs. Reiter, and an action might have been maintained against her for it

without demand. *Quimby v. Lyon*, 63 Cal. 394. If this be so, it is evident that it was not necessary to present the claim against the estate of Henry Rothschild, even if plaintiff might have elected to do so. See, on this subject, *Gunter v. James*, 9 Cal. 658; *Lathrop v. Bampton*, 31 Cal. 24; *Roach v. Caraffa*, 85 Cal. 437, 25 Pac. Rep. 22; *Rowland v. Madden*, 72 Cal. 17, 12 Pac. Rep. 226, 870; *Von Schmidt v. Bourn*, 50 Cal. 616.

2. It is claimed by the appellant that there was no evidence to sustain the finding of the court that Hannah Rothschild had in her possession the money deposited by plaintiff. In view of the sworn statement of Hannah Rothschild, quoted above, it is difficult to comprehend this contention; but the point seems to be that defendant was himself the only one having personal knowledge of the matter, and he was a witness at the trial. He testified, among other things, that he had personally attended to the business for Henry and Hannah Rothschild, who were his parents. He drew the lease and the agreement, received the money from Mrs. Reiter for his father, and handed it to his father. He testified that Henry Rothschild put the money with his own, did not keep it separate, and that Mrs. Rothschild did not receive the \$500, or any portion of it, either as an individual or as executrix. He says: "She never included it in the inventory, and it never appeared there, because she never received it." He prepared the inventory himself, as the attorney of Mrs. Rothschild, and further testified in regard to the statement contained in it: "Question. And yet you let her sign that? Answer. Yes, sir; upon my advice that she should charge herself with the money, although she never got a dollar of it. I took the position that she was morally, if not legally, liable for this money, although she never got the money. It was upon the further theory that she was the sole devisee under the will, and I told her if she never received that money, although I knew she had not, she should pay it if she took it out of her own pocket, and so advised her." For an explanation this is certainly not a success. If true, it shows that Mrs. Rothschild did intend to make herself personally liable for the money. But the statement was made under oath, and no reason can be imagined for swearing to such a statement, unless she had the money, and denied that, or at least doubted, whether it belonged to the estate. It is not necessary nor is it usual to state the debts in the inventory, and certainly the defendant, as an attorney, could not doubt that Mrs. Reiter had both a moral and a legal claim against the estate of Henry Rothschild for the money, and that it was unnecessary for her protection to state anything about it in the inventory. And then the statement, made from a conscientious desire to secure to plaintiff money justly due her, might result in her injury, if it can now be shown to be false;

for, if the statement were true, plaintiff had no occasion to present her claim against the estate of Henry Rothschild. It is, after all, only a question as to whether there was a substantial conflict in the evidence. I think the finding in accordance with the evidence, and advise an affirmance of the judgment and order.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

99 Cal. 223

GAMBLE v. TRIPP et al. (No. 15,083.)

(Supreme Court of California. Aug. 11, 1893.)

APPEAL — EXCEPTIONS — INSUFFICIENCY OF EVIDENCE — CONTRACT OF SALE — RESCISSION FOR FRAUD — LACHES.

1. Specifications in the bill of exceptions "that the court erred in finding that the allegations of the plaintiff's complaint were true, and all the denials and allegations of the defendant's answer were untrue, inasmuch as the testimony does not show such a state of facts," and "that the findings are not borne out by the testimony, fraud and misrepresentation in law having been proven by the defendant," are insufficient, under Code Civil Proc. § 648, requiring an exception on the ground of the insufficiency of the evidence to specify the particulars in which it is insufficient.

2. A rescission of a sale, on the ground of fraud, $4\frac{1}{2}$ months after the fraud was discovered, is not, in the absence of excuse for the delay, the prompt action required by Civil Code, § 1691, to justify a rescission.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by James Gamble against Dwight K. Tripp and the Western Savings & Trust Company. From a judgment for plaintiff, defendant Tripp appeals. Affirmed.

Galpin & Zeigler, for appellant. W. H. L. Barnes, for respondent.

BELCHER, C. On the 29th day of July, 1875, the defendant Dwight K. Tripp executed and delivered to the plaintiff his promissory note for \$5,885, payable 60 days after date, with interest at the rate of 1 per cent. per month from maturity until paid. The consideration for the note was the sale by the payee to the maker of 2,140 shares of the capital stock of the Western Savings & Trust Company, a corporation organized under the laws of this state, and doing a banking business in the city and county of San Francisco; and, to secure payment of the note, the certificates of the stock were left with the said company in pledge for the plaintiff. On the 15th of February, 1876, the plaintiff commenced this action to recover the amount due on the note, and to obtain a decree directing the sale of the said stock and the application of the proceeds of the sale to the payment of the judgment. On

the 29th of the same month, the defendant Tripp filed his answer to the complaint, alleging that, to induce him to purchase the said stock, and for the purpose of defrauding him, the plaintiff made to him certain representations and statements as to condition and affairs of the said company, which were false, fraudulent, and untrue, and known by the plaintiff to be so at the time they were made, and that, relying upon such representations and statements, he was induced to purchase the said stock, and, in payment thereof, to execute the said note; and also alleging "that, as soon as he became fully informed of the condition and situation of the said Western Savings & Trust Company, and of the false and untruthful and fraudulent statements of the said plaintiff, he notified him thereof, and offered to surrender and deliver to him the said 2,140 shares of stock, and demanded the return of said note given therefor, revoking and rescinding his said agreement;" and the prayer was "that the contract existing between defendant and plaintiff sued upon be rescinded, and that the said plaintiff be ordered to surrender said note to this defendant, and that the said codefendant, Western Savings & Trust Company, be directed to surrender and deliver to said plaintiff the said 2,140 shares of stock," and for general relief. The case was tried in December, 1891, and the court, among other things, found "that all the allegations and averments of the plaintiff's complaint are true, and all the denials and allegations of the defendant's answer are untrue; that the plaintiff did not at or before the making and delivery to him by defendant of said promissory note, or ever, make to the defendant any representations or statements which were false, fraudulent, or untrue, or made for the purpose of defrauding the defendant, or that the defendant was induced to or did rely upon such alleged false and fraudulent representations or statements in respect to said Western Savings & Trust Company, or any or either of them; that the defendant, after the commencement of this action, and not before, offered to rescind said transaction, and to return to plaintiff said 2,140 shares of said capital stock of said company, and demanded the return to him of said promissory note;" and, as a conclusion of law, that the plaintiff was entitled to judgment as prayed for in his complaint. Judgment was accordingly entered in favor of the plaintiff for the amount due on the note for principal and interest, aggregating \$17,404.05, and for costs of suit, and also directing a sale of the stock, and the application of the proceeds to the payment of the amount found due. From this judgment the defendant appealed, and has brought the case here on a bill of exceptions.

1. The appellant contends that the findings were not justified by the evidence, and hence that the judgment should be reversed.

The only specifications found in the bill of exceptions as to the insufficiency of the evidence to justify the findings are as follows: "That the court erred in finding that the allegations of the plaintiff's complaint were true, and all the denials and allegations of the defendant's answer were untrue, inasmuch as the testimony does not disclose such a state of facts;" "that the findings are not borne out by the testimony, fraud and misrepresentation in law having been proven by the defendant and his witnesses." These specifications are clearly insufficient to meet the requirements of section 648 of the Code of Civil Procedure,¹ and the findings cannot therefore be reversed on this ground. If it were otherwise, however, the same result would necessarily follow. The evidence was conflicting in many respects, but that introduced by the plaintiff was amply sufficient to justify the findings.

2. The appellant further contends that the stock, when transferred to him, was of no value, and hence that there was no consideration for the note, and he had a right to rescind the transaction without returning the certificates. In support of this position, counsel cite *Gifford v. Carvill*, 29 Cal. 589. The case cited was an action upon two promissory notes given for a part of the purchase money for shares of stock in a mining company, and the defense was that the defendant was induced to purchase by the false and fraudulent representations of the plaintiff as to the value of the mines owned by the company issuing the stock. The court, speaking of the rescission of contracts, said: "When the article is absolutely valueless for any purpose, it is not necessary to return it. This is on the ground that an article absolutely without any value is not the subject of a contract; that it cannot afford any consideration for a promise, and the contract is nudum pactum—absolutely void, ab initio—for the want of a consideration to support it. But it is not enough that it shall be without value to the defendant. If it is or may be of any value to either party, or if the detention would produce any loss or injury to the other party, the contract must be rescinded, and the property returned within a reasonable time after the discovery of the fraud." In this case there was no averment in the answer, or proof at the trial, that the stock sold by plaintiff to defendant was of no value at the time of the sale. On the contrary, it appears to have had a market and a supposed real value at that time. This being so, the defendant could only rescind his contract by doing so promptly upon discovering the facts which entitled him to rescind, and by restoring or offering to restore to the

¹ Code Civil Proc. § 648, requires an exception to a verdict or decision, on the ground of the insufficiency of the evidence to justify it, to specify the particulars in which the evidence is alleged to be insufficient.

plaintiff everything of value which he had received under the contract. Civil Code, § 1691. The defendant testified: "I believed when I bought the stock that the bank was sound, and doing a legitimate banking business, as I was induced to believe from plaintiff's representations to me, and I accepted the position as director of the company or bank. In the course of a short time, and before my note became due, I discovered the true condition of the bank, and that the representations made by the plaintiff were false and untrue." The note became due on the 27th of September, and the discovery was therefore before that time. The court found, in effect, that the defendant made no offer to rescind until after the commencement of the action, and this finding is not assailed. More than 4½ months then elapsed between the time of defendant's alleged discovery and his offer to rescind. This, in the absence of some excuse shown for the delay, was certainly not the prompt action required by the Code, and therefore cannot be availed of. We advise that the judgment be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

99 Cal. 204

DOWLING v. COMERFORD et al. (No. 14,957.)

(Supreme Court of California. Aug. 10, 1893.)

SERVICE OF PROCESS—AMENDMENT OF COMPLAINT—EFFECT—PRESUMPTIONS ON APPEAL.

1. Code Civil Proc. § 432, providing that if the complaint be amended a copy of the amendments or amended complaint must be served on the defendants affected thereby, applies to amendments made after the parties have been brought into court; and if the amendment is made before service on defendants the summons may issue as in other cases, and require defendants to appear and answer "the complaint filed" without referring to the amendment.

2. On appeal from a judgment which recites due service, and shows nothing inconsistent therewith, it will be presumed that the court authorized the issuance of summons on the amended complaint on which judgment was given.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by J. J. Dowling against Moses Comerford and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Sullivan & Sullivan, for appellants. Parker & Eells, for respondent.

TEMPLE, C. This action was brought to foreclose a street assessment, and the appeal is taken by Moses and Ann Comerford, against whom judgment was entered upon default, from the judgment upon the judgment roll. April 10, 1890, an amended

complaint was filed, and an amended summons issued. The amended summons required defendants to appear and answer "the complaint filed therein, or judgment by default will be entered against you according to the prayer of the complaint;" and they were notified "that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief therein demanded." It also contained a full and correct statement of the relief demanded in the complaint.

It is contended that summons must be issued "on" the original complaint, and, if the complaint be amended, a copy of the amendment must be served on all defendants affected thereby. Sections 405, 416, 432, Code Civil Proc., are relied upon to support this proposition. 405 provides simply that an action is commenced by filing a complaint; 416, that summons may be served by delivering to defendant a copy of the summons and a copy of the complaint, except in certain specified cases; and 432, that if the complaint be amended the court may require it to be filed as amended, and that a copy of the amendments or amended complaint must be served on the defendants affected thereby. This last requirement is evidently the chief reliance for this contention. It, however, has reference to amendments made after the parties have been brought into court, and it does not follow that, if amendments had been made before all the parties had been served, the summons might not, nevertheless, be served as in other cases. New parties might be brought in, and in such case I see no reason why summons might not be served on the new defendants in the same mode as would have sufficed had they been made parties originally. Section 432 was not designed for such a case, and does not require a mode of service differing from other cases. The summons refers to the complaint on file, and not in terms to the amended complaint. I think this the proper mode, even when the complaint has been amended, although it would have been sufficient had the reference been in terms to the amended complaint. In neither case would there have been anything misleading. When an amended pleading is filed, which entirely takes the place of the former one, it becomes the complaint, answer, or demurrer, as the case may be, and such a reference is not at all uncertain or ambiguous. It does not appear that there was any order allowing the complaint or summons to be amended, and authorizing the service of the amended complaint instead of the original; but the appeal is upon the judgment roll alone, and the respondent could not furnish such order if it existed. Its existence will therefore be presumed in support of the judgment, which recites due service, and shows nothing inconsistent with the fact that such

order was duly made. *Sichler v. Look*, 93 Cal. 606, 29 Pac. Rep. 220. I recommend that the judgment be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

4 Cal. Unrep. 108

HUNT v. SWYNEY, (SHARP, Intervener.)
(No. 14, 958.)

(Supreme Court of California. Aug. 16, 1893.)

EVIDENCE—RELEVANCY—RESULTING TRUST.

1. S.'s clerk, Y., took an assignment of mortgage from him, foreclosed it, and took the property in his own name. S. having died, Y. contended, as against his widow, that he had bought the mortgage, and foreclosed it for himself. The widow asserted that she had bought it from her husband, and had it assigned to Y. for foreclosure. On direct examination, Mrs. S. was asked whether at the time in question Y. was her agent for collecting rents. Y.'s accounts were then put in evidence, showing large credits for rents collected for her, and charges for the notary's fee on the assignment of the mortgage, for taxes on the same, and expenses of foreclosure and sale. *Held*, that the question was proper as an introduction of the accounts.

2. Where a witness responsively answers a question in the affirmative, and then proceeds to state other irresponsive matters, a motion to strike out the whole answer is rightly denied.

3. Y., who had been the clerk of S., deceased, and Mrs. S.'s rent collector, took an assignment of mortgage from S., foreclosed it, and took title to the land in his own name. Mrs. S. thereafter claimed the land as having bought the mortgage from her husband, and had it assigned to Y. to foreclose. Y. maintained that he had bought and foreclosed the mortgage for himself. The record of the foreclosure case showed that Y., cross-examined, had admitted his agency for Mrs. S. in the matter, and that the price of the mortgage was applied on a debt due from S. to his wife. *Held*, that the court was justified in finding him a trustee, who could have no possession adverse to Mrs. S.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by John Hunt, executor of the will of George F. Sharp, deceased, against Thomas N. Swyney, to establish a trust in favor of testator's estate in certain lots held by said Swyney. Honora Sharp, testator's widow, intervenes, claiming the trust for herself. Judgment for intervener. Defendant appeals.

Eugene N. Deuprey, for appellant. Arthur Rodgers and Matt I. Sullivan, for respondent.

HAYNES, C. Appeal by defendant, Swyney, from a judgment in favor of the intervener, Honora Sharp, and from an order denying his motion for a new trial. An action was commenced October 17, 1887, by plaintiff, as the executor of the will of George F.

Sharp, deceased, against the defendant Swyney et al., to compel said Swyney to convey to plaintiff a certain lot in the city of San Francisco, and to recover the value of the use thereof, alleging that said Swyney held the title in trust for the estate of his testator. Honora Sharp, the widow of said George F. Sharp, filed her complaint in intervention August 17, 1888, alleging the same facts, except that Swyney held the property in trust for her, and that she, and not the estate, was the owner, and entitled to a conveyance and to recover the rents and profits. On December 21, 1880, Alfred Rising and wife executed to George F. Sharp their note for \$3,500 for money loaned, and a mortgage upon the lot in question to secure the same. On December 10, 1881, Sharp assigned the note and mortgage to defendant, Swyney, who foreclosed the mortgage, and upon a sale under the decree, in July, 1882, bid the amount of the judgment, and became the purchaser of the lot in controversy. Swyney assigned the certificate of purchase to one Pennie, to whom the sheriff executed a deed, but Pennie afterwards conveyed the lot to defendant, Swyney. George F. Sharp died in October, 1882. For three years last before Sharp's death Swyney was his law clerk, and during the same time was the agent of Mrs. Sharp in collecting the rents of her separate property. Plaintiff claimed that the note and mortgage were assigned to Swyney in trust, for collection for the benefit of Mr. Sharp. Defendant, Swyney, claimed that he purchased and paid for the note and mortgage and foreclosed it for his own benefit, and the intervener, Mrs. Sharp, claimed that the consideration of the note and mortgage was her separate money, which her husband had invested for her, taking the note and mortgage in his own name; that the assignment to Swyney was without consideration and in trust, for foreclosure, collection, and purchase for her exclusive benefit. Swyney's answer put in issue the material averments of the intervener's complaint, and pleaded the statute of limitations.

The findings fully sustain the contention of the intervener, but it is contended by appellant that in several material matters they are not justified by the evidence. So far as the findings are adverse to defendant's claim that he purchased the note and mortgage, and was the owner of them in his own right, and not in trust for the use and benefit of any person other than himself, the evidence, while conflicting, could lead to no other reasonable conclusion than that reached by the court. The particulars in which the testimony of the intervener is least satisfactory, and which are largely commented upon by appellant, are those which relate to the question whether the trust was for the benefit of herself or her husband; but the trust having been found on sufficient evidence, that is a question

which does not materially concern the appellant, though the findings in that respect are sufficiently supported. Appellant also specifies several particulars in which he contends the court erred during the trial.

The judgment roll in the case of *Swyney v. Rising et al.* was properly received. The copy of the note set out in the complaint omitted the words, "at the same rate," but the complaint was amended in that respect by leave of the court. Upon direct examination Mrs. Sharp was asked: "During the year 1881, from December 1st down to and including the month of October, 1882, was Mr. Swyney, the defendant in this action, your agent in collecting rents for you?" Objection was made that it was immaterial, irrelevant, and incompetent, and not pertinent to any of the issues. The objection was overruled, upon the ground that it was introductory. The specifications do not show that any motion was afterwards made to strike out, while the record does show that defendant's accounts were put in evidence, showing not only that large amounts of rents were collected by the defendant for her, thus tending to show that she had moneys of her own, but also showing, among other things, that in his accounts to her of rents collected he charged her for the notary's fee for acknowledging the assignment of the Rising mortgage to himself, and for recording it, for paying the taxes on the mortgage, and for all the expenses of foreclosure of that mortgage, including a witness fee to himself and the expenses of sale. In view of this evidence the preliminary question leading to its introduction was entirely proper. The witness, in answer to a question, said, "Yes, sir;" and proceeded to state other matters not responsive to the question, the material parts of which appear in other portions of her testimony, and which, so far as material, were harmless. The motion by appellant was to strike out the whole of the answer as not responsive. The motion was properly denied. A part was responsive, and therefore all the answer could not be stricken out.

Two other errors of law are stated in the specifications, being rulings upon the admission of testimony, and marked "D" and "E." I can see no valid objection that appellant could urge to either. Both questions were pertinent to the controversy between Mrs. Sharp and the estate, and, if erroneous upon any ground, it is not perceived how they could prejudice the appellant. These exceptions are stated in appellant's brief, but no comments of any character are made.

The remaining points relate to the findings, and have been disposed of, except that relating to the plea of the statute of limitations. Upon that issue the court found that the intervener did not discover that Swyney claimed to own the premises until shortly before, and less than three years before, she filed her complaint in the cause,

and that defendant actively and by artifice concealed from her the fact that he asserted a claim to the premises. Swyney was examined as a witness in the foreclosure case of *Swyney v. Rising et al.*, and upon cross-examination was asked: "How much did you pay Mr. Sharp for that mortgage? Answer. Mr. Sharp was paid \$3,500. Q. How much did you pay? A. I paid that amount. Q. Who from, his wife? A. Yes, sir; I hold that for Mrs. Sharp. I am Mrs. Sharp's agent, and before the assignment of the mortgage was made Mr. Sharp was indebted to Mrs. Sharp for something like \$4,000. Mrs. Sharp instructed me that Mr. Sharp would assign to me a mortgage, and in consideration of that assignment I was to remit to him the amount of that indebtedness, \$3,500." It is clear from this evidence, given by Mr. Swyney at the time of the transaction, that he acted in the matter as the agent of Mrs. Sharp, who was the purchaser of the mortgage from Mr. Sharp, and that the foreclosure and purchase at sheriff's sale were for her benefit. It is not alleged that he ever purchased the property from her, nor paid to her the consideration she paid her husband for the mortgage. Sustaining, as he then admitted, the confidential relation of agent, Mrs. Sharp being the equitable owner of the mortgage and of the property paid for by the judgment, he could not acquire title to the property thus held by him in trust by adverse possession, without a clear and unequivocal repudiation of that trust, and an assertion of his own claim of title brought to her knowledge. The finding of the court upon the plea of adverse possession is justified by the evidence. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

99 Cal. 207

CALIFORNIA ACADEMY OF SCIENCES
v. FLETCHER. (No. 14,906.)

(Supreme Court of California. Aug. 10, 1893.)
ARBITRATION AND AWARD—JUDGMENT ON AWARD.

Code Civil Proc. § 1283, provides that a submission to arbitrators may stipulate that it be entered as an order of the superior court, being filed with the county clerk, who shall thereupon note it in his register of actions, setting out the names of the parties and arbitrators, the date of the filing, and the time, if any, limited for the award. A submission was delivered to the clerk April 22d, and marked by him "Filed." The same day he noted in his register the names of the parties, and date of submission, and on May 12th added, in brackets, the names of the arbitrators, and the time limited, noting the time of the change of entry. The award had been made and filed April 23d, and judgment was rendered thereon May 14th. *Held*, that the clerk's entries were regular

enough to support the judgment, the "thereupon" of the section being less strict than "immediately," and the submission itself stipulating that it might be entered as an order "at any time."

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Arbitration between the California Academy of Sciences, and W. M. Fletcher. Judgment on the award for Fletcher. The academy appeals. Affirmed.

W. C. Burnett, (Lester G. Burnett, of counsel,) for appellant. L. E. Bulkeley and William H. Jordan, (Aylett R. Cotton, of counsel,) for respondent.

McFARLAND, J. The appellant, a corporation, and the respondent, a contractor, having certain differences about a building contract between the parties, did on April 15, 1891, enter into a written agreement, by which they submitted said differences to arbitration. By the submission the arbitrators were to determine certain enumerated issues, and were to find what, if any, balance of money was due from appellant to respondent; and it was stipulated therein "that the award to be made by said arbitrators or a majority of them, they all being present, shall in all things, by us, and each of us, be well and faithfully kept and observed." The submission also contained this clause: "And it is hereby agreed that the submission to arbitration may be entered as an order of the superior court of the city and county of San Francisco, state of California, at any time." On April 23, 1891, the arbitrators made their written award, by which they passed on all the issues submitted to them, and found that appellant owed respondent \$7,453.30; and the award was on said April 23d filed with the clerk of said court. Afterwards, on May 7, 1891, the board of trustees of appellant passed a resolution by which it was declared that they revoked said submission to arbitration, and a notice of such resolution was served on respondent's attorney on May 9th. On May 14, 1891, judgment was entered in the superior court upon the award. Appellant afterwards moved to set aside the award, and it appeals from the judgment, and from the order denying its motion to set it aside.

Section 1283 of the Code of Civil Procedure is as follows: "It may be stipulated in the submission that it be entered as an order of the superior court, for which purpose it must be filed with the clerk of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission when filed, and the time limited by the submission, if any, within which the award must be made. When so entered, the submission cannot be revoked without

the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made." The main contention of the appellant is that the clerk did not make such an entry of the submission in his register of actions as is required by the second sentence of said section 1283, and that, therefore, there was no jurisdiction to enter judgment upon the award, and appellant had the right to revoke the submission after the award had been made. What the clerk did, that is material here, is as follows: The submission was delivered to him April 22d, and was marked by him "Filed." He also, on the same day, made the following entry in his register of actions: "32,809. Dept. No. 6. W. C. Burnett, California Academy of Sciences, and W. M. Fletcher, 1891, April 22d. Agreement to arbitrate filed." And on May 12th he added to this entry as follows: "(Arbitrators, Seth Babson, J. B. Lo Romer, and J. B. Gonyean. Time limited by the submission to award before May 1, 1891. Changes in entry made May 12, 1891, 9 A. M.)" It will be noticed that the first entry, made April 22d, did not contain the names of the arbitrators, or the time limited for the rendering of the award, and that in other respects it complied with section 1283; but this entry, and the amendment made to it on May 12th, clearly constituted a sufficient compliance with that section, even though it be held that a strict compliance is necessary.

In determining whether there was authority for entering the judgment, the attempt of appellant to revoke the submission may be left out of view. The general rule is that neither party can revoke a submission to arbitration after the award has been made, and that rule is not in any way changed by the provisions of our Code. It is provided in section 1283, with respect to cases where it is stipulated that the submission may be entered as an order of court, that after the clerk has entered the proper order "the submission cannot be revoked without the consent of both parties;" but this provision is a restriction, and not an enlargement, of the right of revocation. At common law either party could revoke before award; but under the Code a party who has stipulated that the submission be made an order of court cannot revoke before the award, after the clerk has made the proper court order. On the other hand, in such a case, "the arbitrators may be compelled by the court to make an award." But in no case does the Code give the right of revocation after award, and with respect to that right the Code does not provide for two kinds of arbitration, as contended by appellant. Of course whether a judgment can properly be entered upon the award, or

whether the prevailing party must be remitted to his common-law remedies, is another question. Viewing the question, therefore, without consideration of the attempted revocation after award, we think that there was jurisdiction to enter the judgment. If it be admitted that the clerk did not quite fully enough perform his ministerial duty in the premises by his first entry of April 22d, still his addition to said entry made May 12th, constituted, with the first entry, a full compliance with the statute, and the amendment or addition was made before the judgment. So, when the judgment was entered, it rested upon a full entry in the register of actions of everything required by the Code to be entered there. The entry is not required to be made at any particular time. "Thereupon," as used in section 1283, does not mean "immediately." Moreover, it was stipulated that the order "may be entered at any time." The objection that the oaths taken by the arbitrators do not, in form, sufficiently comply with section 1285 of the Code, is overcritical, and has not force enough in it to upset the award. We think, upon this point, that there was a substantial compliance with the Code, although it is astonishing that parties, when instituting and conducting statutory proceedings, will not look at the statute, and follow its language, instead of trusting to their memories, or their general notions of what is sufficient. There are no other points in the case which require special notice. Judgment and order appealed from affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

**CALIFORNIA ACADEMY OF SCIENCES
v. FLETCHER.** (No. 14,905.)

(Supreme Court of California. Aug. 10, 1893.)

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Arbitration between the California Academy of Sciences and W. M. Fletcher. Judgment on the award for Fletcher, and the academy appeals. Affirmed.

W. C. Burnett, (Lester G. Burnett, of counsel,) for appellant. L. E. Bulkeley and William H. Jordan, (Aylett R. Cotton, of counsel,) for respondent.

PER CURIAM. Upon the authority of California Academy of Sciences v. Fletcher, 33 Pac. Rep. 855, (No. 14,906, this day decided,) the judgment and order herein appealed from are affirmed.

99 Cal. 271

HERRLICH et al. v. KAUFMANN et al.
(No. 14,495.)

(Supreme Court of California. Aug. 11, 1893.)

EXECUTION—ACTION AGAINST GARNISHEE.

Code Civil Proc. §§ 716-721, provide that after execution issued, on a showing, by affidavit or otherwise, that a person owes the judgment debtor more than \$50, the judge may order such person to appear, and answer to the

debt. If he admit it, he may be ordered to apply the amount on the judgment. If he deny it, and the judge finds such denial bona fide, he may authorize the judgment creditor to bring suit against him for the debt. *Held*, that this remedy is exclusive, and cannot be supplied as a precedent to direct suit, by mere garnishment on execution.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Julie Herrlich and John F. Hanlon against C. H. Kaufmann and others for certain moneys due from John McKenzie—an insolvent, who had assigned to said Kaufmann—to Margaret McDonald, plaintiffs' judgment debtor. Judgment for plaintiffs. Defendant Kaufmann appeals. Reversed.

Garber, Boalt & Bishop, for appellant. Chas. F. Hanlon, for respondents.

McFARLAND, J. John McKenzie was a stockbroker, and on December 3, 1886, made an assignment for the benefit of his creditors to the defendant C. H. Kaufmann, pursuant to the provisions of the Civil Code on the subject. Prior and down to the assignment, McKenzie had been doing a stock business with one Margaret McDonald, and owed her, or some one for whom she was acting, several thousand dollars. Julie Herrlich, the plaintiff in the case at bar, recovered a judgment (the date of which is in dispute) against said McDonald for \$6,210.86; and on December 31, 1886, she had an execution issued upon said judgment, and under said execution a notice of garnishment was served on the defendant Kaufmann, notifying him that all moneys in his hands, due Mrs. McDonald, were levied upon and attached. There was another execution and notice of garnishment, of a similar character, in December, 1887, and another in January, 1889. Thereafter, in February, 1889, this present action was commenced by said Julie Herrlich to recover from Kaufmann the amount alleged to be due to said Margaret McDonald on account of her dealings with McKenzie. Other parties were made defendants, and John F. Hanlon was made a plaintiff, upon the allegation that he owned a fractional part of the judgment in the case of Herrlich v. McDonald. The court found that there was due to Mrs. McDonald, upon her said stock business with McKenzie, the sum of \$5,769.52, and judgment was rendered against Kaufmann for that amount, the judgment being "that the plaintiffs have and receive of and from the defendant C. H. Kaufmann the sum of \$5,769.52, and that execution issue therefor." Kaufmann appeals from the judgment, and from an order denying him a new trial.

Appellant contends that the complaint does not state facts sufficient to constitute a cause of action. He also makes a number of other points, as, for instance, that Kaufmann being an assignee under the Code, the

money was in custodia legis, and not subject to levy; that Mrs. McDonald could not have maintained this action, and therefore, as plaintiffs can have no greater right by virtue of the garnishment than their judgment debtor had, they cannot maintain it; that the court erred in refusing to make certain assignees of Mrs. McDonald defendants; that as the notice of garnishment was served December 31, 1886, the cause of action founded on it was barred before the action was commenced; that the judgment in *Herrlich v. McDonald* was rendered in November, 1881, and was itself outlawed; and that various fatal errors were committed in rulings upon the admissibility of evidence. But these and other points made by appellant we do not deem it necessary to discuss, because, in our opinion, the complaint does not state a cause of action. It also appears that, before the notice of garnishment, McDonald had made an assignment (claimed by respondent to be fraudulent) of her debt from McKenzie to one Scott, and notified Kaufmann thereof; that Scott assigned to one Potter, and Potter, in turn, to one Davis; that one Knowlton, before said garnishment, commenced an action against McKenzie, Kaufmann, and others, praying that the various sums due the several creditors of McKenzie, in Kaufmann's hands, be ascertained, that the plaintiff herein intervened in said action, but afterwards withdrew her intervention, and that judgment was rendered therein that said Davis was entitled to the moneys sued for by plaintiffs in the case at bar. There are other complications, also, not necessary to be here mentioned.

The complaint goes upon the theory that the plaintiff herein, Herrlich, having a money judgment against Mrs. McDonald, and having, upon an execution thereon, served Kaufmann with a notice of garnishment, thereby acquired as direct a cause of action against the latter as in any case where indebitatus assumpsit would lie. But this is not the law. There is, at common law, no privity between a judgment creditor and his debtor's debtor; there is no contract relation between them, and no relation of any kind which, of itself, gives the former a direct cause of action at law against the latter. Formerly, assets of a judgment debtor, which could not be effectively seized by the sheriff under an execution, such as a debt owing to the defendant, could be reached, upon a proper showing, through a court of equity, by means of a creditor's bill or suit; but in this state, and in most of the other states, a legal remedy is afforded by statutes providing for proceedings supplementary to execution, and the general rule is that when there are such statutory proceedings they must be pursued. The Code of Civil Procedure of this state, from section 716 to section 721, specifically provides how a judgment creditor may proceed

against a debtor of his judgment debtor. Those sections provide, in brief, that after the issuing of an execution, upon a showing by affidavit or otherwise that a person is indebted to the judgment debtor in an amount exceeding \$50, the judge may order such person to appear and answer concerning such alleged indebtedness. If he admits the indebtedness he may be ordered to apply the amount thereof to the satisfaction of the judgment. If he denies any indebtedness, and the denial seems, after a hearing, to be bona fide, the court or judge may authorize the judgment creditor to institute a suit against such person to recover such alleged debt. Now, in the case at bar, the plaintiffs entirely ignored these statutory provisions, and without procuring an order for appellant to appear and answer, and without any order authorizing them to commence an action against appellant, brought this suit upon the theory of a direct liability of appellant to them, as hereinbefore stated.

It has been several times held by this court that the statutory proceedings supplementary to execution are a substitute for a creditor's bill. In *Adams v. Hackett*, 7 Cal. 201, the court say: "In reference to the chapter prescribing the mode of proceedings supplementary to execution, it seems clear that those provisions were intended as a substitute for what was called 'a creditor's bill.' This is so stated by the practice commissioners in their original note to this chapter in the New York Code. The design was, in the language of those commissioners, 'to furnish a cheaper and easier method.' The different sections of this chapter, when taken together, form a consistent and harmonious whole, and, when fairly and liberally carried out, afford a cheaper and easier method than the former one, by creditor's bill." In *Bank v. Robinson*, 57 Cal. 522, the court say: "Proceedings under sections 714 to 721 and section 574 of the Code of Civil Procedure were intended as a substitute for the creditor's bill, as formerly used in chancery. *Adams v. Hackett*, 7 Cal. 201; *Lynch v. Johnson*, 48 N. Y. 33. So that any property which was reached by a creditor's bill may now be reached by the process of proceedings supplementary to execution." In *Habenicht v. Lissak*, 78 Cal. 357, 20 Pac. Rep. 874, the court say: "In *Bank v. Robinson*, 57 Cal. 520, it was held that the proceedings supplemental to execution are intended to take the place of the creditor's bill." See, also, *McCullough v. Clark*, 41 Cal. 302; *High v. Bank*, 95 Cal. 386, 30 Pac. Rep. 556. Also, *Graham v. Railroad Co.*, 10 Wis. 459; *Hexter v. Clifford*, 5 Colo. 168; and cases cited in note to *Lathrop v. Clapp*, 100 Amer. Dec. 501, in support of the statement therein made, that "in nearly all of the states these proceedings supplemental to execution are regarded as a substitute for the creditor's

bill of the chancery practice." It is not necessary, however, to go to the length of saying that a creditor's bill could not be sustained here under any circumstances, for there might, perhaps, be cases in which the statutory proceedings would not afford adequate relief. But they must be pursued, unless in those exceptional cases in which it appears that equity must be invoked because legal remedies are unavailing. The law is correctly stated in Freeman on Executions, (section 394,) where the author says that proceedings supplementary to execution "supplant proceedings in equity, unless some special ground exists upon which to invoke the power of chancery," and in the case at bar there was no such ground. "A code of procedure is usually understood as presenting remedies which are exclusive in their nature, and which, when applicable to the relief sought, exclude or supplant all other modes of redress." Freeman, Ex'ns, supra. And there is no need here of inquiring how strictly the statutory provisions must be followed, because in the case at bar there is no pretense that they were followed at all. The case of Roberts v. Landecker, 9 Cal. 262, cited by appellant, is not in point. In that case, Landecker had been garnished on a writ of attachment, and it was averred that at the time of notice of garnishment he had in his possession goods of the defendant, which he afterwards fraudulently disposed of, and converted to his own use. The practice act made the garnishee on attachment "liable to the plaintiff" for the property in his hands at date of garnishment, and the court construed this to mean a statutory liability upon which a direct action could be brought, and held that proceedings supplementary to execution did not apply to it. But there is no such provision respecting a garnishment upon execution, and the court makes the distinction. Speaking of the sections relating to proceedings supplementary to execution, the court in that case says: "There is nothing in the chapter concerning attachments that refers to these sections, and nothing in the proceedings supplementary to the execution that properly applies to the peculiar circumstances of this case. * * * They (the plaintiffs) sue upon a statutory liability for the value of the property. The proceedings supplementary to execution have another object in view. They seek to subject the property itself to sale under execution, or the debt to collection." The provisions of the statute at that time were the same as those now embraced in the Code.

But if it should be conceded that in a case like the one at bar the statutory provisions could be ignored, and relief sought in a court of equity by means of a creditor's bill, still the complaint here is entirely insufficient. Before equity can be invoked in such a case, it must be shown that remedies at law have

been exhausted, or would be unavailing; and with certain exceptions, of which the case at bar is not one, a necessary averment in a creditor's bill is that an execution has been returned unsatisfied. Bank v. Robinson, 57 Cal. 522; Mesmer v. Jenkins, 61 Cal. 153; Harris v. Taylor, 15 Cal. 350. "When a judgment creditor desires to bring a creditor's bill for the purpose of reaching assets which are not subject to execution at law, he must generally take out execution upon his judgment, place it in the sheriff's hands, and wait till that officer makes a return thereon, showing that he can find no property subject thereto. By this means he completely exhausts his legal remedies, and shows that they are unavailing. Then, and not before, he may successfully invoke the aid of equity to reach equitable assets." Freeman, Ex'ns, § 428, and notes. "It is a necessary result from the whole theory of the creditors' suit that jurisdiction in equity will not be entertained when there is a remedy at law." Pom. Eq. Jur. § 1415, and notes. Now, in the complaint in the case at bar, there is not only a failure to aver the return of an execution nulla bona, or at all, but there is an affirmative averment that the judgment debtor, Mrs. McDonald, has always been "fully able to pay the whole of said judgment and execution, and has, and always has had, ample moneys and properties to make said payment." The judgment and order appealed from are reversed, and the cause remanded.

We concur: FITZGERALD, J.; DE HAVEN, J.

99 Cal. 179

DALEY v. QUICK. (No. 14,119.)

(Supreme Court of California. Aug. 10, 1893.)

LANDLORD AND TENANT—DANGEROUS PREMISES—
INJURIES TO TENANT—FALSE REPRESENTATIONS
OF LESSOR'S AGENT—KNOWLEDGE OF TENANT—
AUTHORITY OF AGENT—KNOWLEDGE OF AGENT.

1. A tenant of an upper story of a building and wood shed is not entitled to recover damages of the lessor for injuries caused by the falling of the wood shed, on the ground that defendant, after the lease was made, falsely represented to plaintiff that such wood shed was safe, where plaintiff had been occupying the premises for 18 months previous to the injury, during which time he frequently expressed doubts as to its safety, and had as much opportunity as defendant to discover the defect.

2. A lessor is not bound by the representations of an agent to a tenant as to the safety of the leased building, where such agent does not have charge of renting the premises, but is employed by such lessor to make repairs on his buildings when called on by his tenants.

3. Under Civil Code, § 1709, providing that "one who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers," such lessor, if bound by the false representations of such agent, is not liable for such injuries, in the absence of evidence that the agent did not believe, or had no reasonable ground for believing, the representations to be true.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Dennis Daley against John Quick for personal injuries caused by the falling of a wood shed on defendant's premises, of which plaintiff was tenant. There was a verdict for plaintiff, and from an order granting defendant's motion for a new trial plaintiff appeals. Affirmed.

A. Morgenthal, for appellant. Jarboe, Harrison & Goodfellow, for respondent.

SEARLS, C. Appeal from an order granting a new trial. Plaintiff rented from the defendant, who was the owner thereof, from month to month, a portion of the upper floor of a dwelling house, known and designated as "No. 3 Tehama Street," San Francisco, and took possession on or about March 21, 1887. Plaintiff continued to occupy the premises as a tenant of the defendant until October 25, 1888, on which last-named day, while in the act of piling three pieces of wood, weighing in the aggregate about 150 pounds, in a wood shed situate upon the upper floor, and contiguous to the rooms occupied by him, the floor gave way, and plaintiff fell with it to the ground, whereby his foot was fractured and his ankle dislocated. The complaint, after setting out the ownership of defendant, the tenancy and occupancy of the plaintiff, proceeds, in substance, to charge that defendant, with a view to retaining plaintiff as a tenant, falsely and fraudulently represented to him that the wood shed was safe and secure, and suitable as a place to store firewood; that plaintiff did not know the fact, but, believing the statements to be true, was thereby induced to continue the tenancy, and to place the wood therein, whereby he was injured; that defendant knew the condition of the property, and that it was unsafe and dangerous, and, with full knowledge of all the facts, falsely and fraudulently, and with intent to defraud plaintiff, made the representations, etc. The answer negatives all the allegations of the complaint tending to establish neglect, fraud, misrepresentations, or any representations in the premises. Plaintiff had a verdict of \$1,000. Defendant moved for a new trial, which motion, as before stated, was granted, and plaintiff appeals.

The following is the opinion of the learned judge who presided in the court below, rendered upon granting the motion for a new trial, and which appears in the transcript:

"This action was brought to recover damages for personal injuries sustained by the plaintiff while he was a tenant of defendant. It appears from the complaint that the defendant, being the owner of certain premises, let them to plaintiff on the 21st day of March, 1887; that appurtenant to said premises was a wood shed, designed to be used

in connection with the occupation of said premises as a dwelling, that on the 25th day of October, 1888, while the plaintiff was in the act of putting wood in said shed, the underpinning thereof gave way, and said shed fell to the ground, a distance of about twelve feet, carrying with it the plaintiff; and that, by reason thereof, he suffered personal injuries. It is further alleged that the defendant made certain representations to the plaintiff regarding the safety and suitableness of said wood shed for the purpose for which it was intended. These representations, it is claimed, were false, and known to be false by the defendant at the time, and fraudulently made by him for the purpose and with the intent of inducing the plaintiff to rent said premises and occupy them as a dwelling, the advantage accruing to the defendant thereby being the rental or return for the use of said premises. The answer of defendant put in issue, among other things, the allegations relating to the defendant's conduct and representations. Upon a trial, verdict was found in favor of the plaintiff, and the defendant now moves for a new trial. Under the ruling of *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. Rep. 260, and *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. Rep. 304, without these allegations of fraud and misrepresentation the complaint would fail to state a cause of action. Holding that it became the duty of the defendant, when he offered the premises for the occupation of human beings, to put them in a condition fit for such occupation, it could not be assumed that he failed in this duty, because of the long lapse of time between the commencement of the tenancy and the time of the accident causing the injuries. This, then, became the subject of proof, and the record does not show that any was offered. The plaintiff, however, distinctly disavows this as the theory of his right to recover. He does not claim that his right of action springs out of the neglect of the defendant to make the premises fit for occupation by human beings, but he says that after he had rented the premises, and before he had used the wood shed, the defendant, through an agent, represented to him that the wood shed was safe for the storage of wood, and that he relied upon such representation, which was in fact false, and made for the purpose of inducing him to occupy said premises, and to store wood in said shed. The defendant, upon this motion, contends that there is no evidence to warrant the verdict upon this or upon any other ground; and, further, that if any representations were made upon the subject, they were not made by the defendant, or by any one authorized by him, directly or ostensibly, as agent or otherwise, to make them.

"The principle of caveat emptor applies to cases of this character. The obligation imposed by statute upon a lessor of property intended for the occupation of human beings to put it in a condition fit for such occupa-

tion must be limited by the rules and considerations ordinarily governing men in such matters. A lessor of such property would be liable for injuries resulting from defects in the premises known to him and unknown to the lessee, because arising from some cause not extraneous, if he allowed the lessee to occupy the premises in ignorance of the risks. This principle is illustrated in the case of *Baxter v. Roberts*, 44 Cal. 187. Whenever the defect is inherent, and unknown to the lessor, he is not accountable; nor can he be held when he has done all that a reasonably prudent man would have done towards fitting the place for occupation. It is as much the duty of the lessee to satisfy himself that the premises are safe as it is of the lessor to make them so; and when it would appear from an examination, such as an ordinarily prudent man would make before venturing to reside in or upon the premises, that they were unsafe, and the defect rendering them so discernible, the lessee is presumed to have had notice of such defect, and accepted the risks incident thereto if he occupies the premises. Now, to apply this rule to the case. There is no testimony tending to show that the wood shed was unsafe at the beginning of the tenancy, except that one year and a half after that time it fell down with the plaintiff, unless it be the declaration by the plaintiff to the supposed agent of the defendant, on the day after he moved in, that the platform upon which the shed was situated was 'a little shaky.' It does not appear wherein it was shaky, but it does appear that the joist underneath the shed gave way at the time plaintiff was hurt, and this was the cause of the accident. There was no evidence other than the mere fact that it gave way that the joist was not properly secured. This counsel for plaintiff considered unnecessary to prove, basing his action upon the fact that the shed was unsafe at a time when the supposed agent of the defendant assured the plaintiff in answer to an inquiry that the shed was safe. The idea seems to be that, having been so assured, plaintiff was not called upon to look further than the assurance; that, if he had not been so assured, he would have examined for himself, and discovered the defect and unsafeness of the shed. I cannot presume that he would have discovered the defect. The total lack of evidence showing what it was leaves it an open question as to whether it was inherent and undiscoverable, or extraneous and open to detection. But assume that he would have discovered it, and thus been enabled to avoid the injuries; was he justified in relying upon the assurance from him, in view of the fact that he suspected the safety of the shed from the time he took the house, and continuously spoke of its unsoundness up to the time he was hurt? Under the circumstances I do not think so. He evidently

doubted the truth of the assurance, or he would not have continued his inquiries, and there was no occasion for him to accept them. The statute gave him the right to repair the shed at the defendant's expense, provided the repairs did not exceed the amount of one month's rent, if the defendant failed to do so after notice to repair, or he could vacate the premises. He did not demand that the premises be repaired, but contented himself with the inquiry as to whether they were safe or not. He took the opinion of the supposed agent of the defendant as to their safety, and did not consult his own intelligence in the matter. The color of reason in his favor upon this point rises from the fact that he testifies that he did not have access to that part of the premises which would have enabled him to examine the joist of the shed, and that the defendant's so-called 'agent' did not have such access. But he does not show that he ever tried to gain access to that part of the premises, or that he could not have done so by applying to the defendant or to the tenant occupying that part of them. It, however, appears that this part of the premises was occupied by tenants of the defendant, and that he had no more access to them than the plaintiff had, and that they were used by the ashman, and that wood and coal were kept there. The place was accessible by a door from the outside, and through Hines' (the grocer's) premises. Hines was a tenant, and kept the key to the door outside. It is plain that, had the plaintiff made the least effort to examine the understructure of the shed, he could have done so. He presumed that this so-called 'agent' of the defendant had examined it, or knew its condition, because of his frequent appearance about the premises, and his supervision and repair of them when called upon by the tenants. This brings us down to the question as to whether this person was the agent of the defendant in that sense that would authorize him to bind the defendant by his representations, admitting for this purpose of the question that he did make representations which would bind him. The evidence shows that he did not let the premises,—another agent had charge of that,—but that he did make repairs whenever called upon to do so by the tenants. He was clearly the agent for that purpose, but he was not made the judge of whether repairs were necessary or not, nor was he authorized to assure the tenants that the premises were safe. They could call upon him to repair, and he would make the needed repairs; but, if he did not do so, they would have had the option of making the repairs (those within the rule named) or vacating the premises. His failure to make needed repairs which were called to his attention, or his assurance that they were not necessary, did not take away from the tenant the right to make the repairs himself or to

vacate. His assurance that they were unnecessary was equivalent to a refusal to make them, and its effect cannot be explained further.

"Since no cause of action has been shown against the defendant on account of any breach of duty in his capacity strictly as landlord or lessor, it becomes important to determine whether, losing sight of that relation, except in so far as it incidentally forms a part of the subject, the representations made to the plaintiff were sufficient to sustain an action upon the ground of fraudulent deceit. Section 1709 of the Civil Code provides that 'one who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.' A 'deceit,' within the meaning of this section, is defined as 'the suggestion as a fact of that which is not true by one who does not believe it to be true.' If this be the ground relied upon, the evidence is wholly insufficient to show, taking the representations to have been false, that the person making them did not believe them to be true. 'The assertion as a fact of that which is not true by one who has no reasonable ground in believing it to be true' is also a sufficient deception to have an action upon. But in this case there is no evidence tending to show that the person making the representations had no reasonable ground for believing them to be true. We have seen that it was not the duty of the defendant or his agent any more than that it was the duty of the plaintiff to discover the defects in the shed, and it is nowhere shown that the so-called 'agent' of the defendant had any less reason to believe that the shed was safe, and to so declare, than the plaintiff had in relying on the representations. This observation also applies to the third subdivision of the section of the Civil Code (section 1710) defining deceit, namely: 'The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.' The evidence does not show that any such fact was suppressed, or that any fact in connection with the subject was communicated to the plaintiff which was calculated to throw him off his guard, or to shut off further investigation. To entitle him to rely upon the representations, it must have appeared that it was the duty of the defendant to possess the information inquired for, and, by reason of their relation, to impart it to the plaintiff. It does not appear that either of these requisites existed, and I hold that no case for deceit has been proven. I am also satisfied from a careful review of the evidence that the person making the representations was not authorized directly or by the conduct of the defendant to make them. He was not the agent of the defendant for any such pur-

pose. It follows from the foregoing that the motion for a new trial must be granted, and it is so ordered. Garber, J."

The foregoing contains a correct exposition of the law applicable to the case, and is hereby adopted as the opinion of the court, and for the reasons given therein the order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

99 Cal. 187

SULLIVAN v. SULLIVAN. (No. 15,054.)
(Supreme Court of California. Aug. 10, 1893.)

CONTRACTS—SUFFICIENCY OF CONSIDERATION—
EQUITABLE LIEN—WHEN ARISES.

1. The fact that plaintiff loaned decedent money with which to pay premiums on a policy of insurance on his life, which was payable to the latter's wife, gives plaintiff no lien on the policy, nor right of action against decedent's widow.

2. A debt owing by defendant's deceased husband to plaintiff, which is barred by limitations, is not such consideration as will support an agreement by her to pay the amount of the debt.

3. A promise by an executor to look among the papers of deceased for one belonging to plaintiff, and to surrender it to her, is not sufficient consideration for a contract.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Frank J. Sullivan, executor, against Margaret Sullivan. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. H. Jordan, for appellant. F. J. Sullivan and E. P. Cole, for respondent.

VANCLIEF, C. Action to recover \$854, the complaint being in two counts,—the first on a special written agreement, and the second for money had and received for the use of plaintiff. The plaintiff is the executor of the will of his father, John Sullivan, who died in July, 1882; and the defendant is the widow of Michael Sullivan, deceased, who was a brother of John Sullivan.

It is alleged in the complaint that "on the 10th day of January, 1890, the defendant, being indebted to the estate of John Sullivan in the sum of \$854 for money before that time advanced by John Sullivan, in his lifetime, to pay certain premiums on a policy of insurance on the life of Michael Sullivan, issued by the New York Life Insurance Company, for the sum of \$7,500, and payable to defendant, which said policy was in the possession of said John Sullivan, and was among his papers, and it requiring a great deal of time and labor to discover and find the same, and the said insurance company having refused to pay said policy unless the same was found and surrendered to it," the

plaintiff and defendant entered into the following agreement: "This agreement witnesseth: Whereas, certain moneys amounting to over \$854, United States gold coin, were paid by John Sullivan, in his lifetime, for and on account of a policy held by the New York Life Insurance Company, No. 138,638; and whereas, said company will not pay the amount of money due by the death of Michael Sullivan, brother of said John Sullivan, until said policy is surrendered; and whereas, Frank J. Sullivan, executor of the estate of John Sullivan, deceased, is willing to look up said policy, and surrender the same, provided Margaret Sullivan, the beneficiary in said policy named, will give said Frank J. Sullivan, executor, an order on said New York Life Insurance Company (A. G. Hawes, agent) for said sum of \$854, conditioned on the finding and surrender of said policy to said insurance company, and guaranties the same: Now, therefore, we, the undersigned, hereby agree to the above terms, and A. G. Hawes, agent of the New York Life Insurance Company, hereby agrees to reserve said sum of \$854 from the amount due Margaret Sullivan, beneficiary, said amount to be subject to the order of said Frank J. Sullivan, executor of the estate of John Sullivan, deceased. Witness our hands and seals this 10th day of January, A. D. 1890. Frank J. Sullivan, [Seal.] Executor of the Estate of John Sullivan, ^{her} Deceased. Margaret Sullivan. X [Seal.] ^{mark.}

Witness: P. J. G. Kenna. Witness to mark of Margaret Sullivan: P. J. Sullivan." It is then alleged that thereafter the plaintiff looked for, and after great difficulty found and delivered, the policy according to the agreement, and thereupon demanded of defendant an order on said insurance company for the said sum of \$854, which she refused to give; but that she demanded and received from the insurance company the full sum of \$7,500 due on said policy, and that she has ever since refused to pay plaintiff said sum of \$854, or any part thereof. The answer of the defendant admits that the policy was in the custody of John Sullivan for safe-keeping immediately before his death, and that upon his death it passed into the possession of the plaintiff, as his executor; but avers that upon the death of her husband, Michael Sullivan, she was entitled to the possession thereof, and that it was the duty of the plaintiff to deliver it to her on her demand, without any compensation whatever; but that upon such demand the plaintiff had refused to deliver it to her, or even to look for it among the papers of his father's estate, except on the condition that she would sign the agreement above set out. She admits that she executed the agreement for the purpose of getting possession of the policy; but avers that there was no consideration whatever for the agreement on

her part, and denies that on the 10th day of January, 1890, or at any other time, she was indebted to the estate of John Sullivan in any sum for money advanced by John Sullivan to pay premiums on said policy. The court found for the plaintiff upon all the issues of fact, and rendered judgment in his favor for the sum demanded. The defendant appeals from the judgment and from an order denying her motion for a new trial.

The court found generally that the complaint was true and the answer false, and specially found as follows: "That defendant, at the time she signed said contract, knew of and admitted that John Sullivan had paid in his lifetime a large sum of money to keep alive the said policy of insurance for the benefit of defendant, and that \$854 had not been repaid to the said John Sullivan, or to plaintiff; and that plaintiff and defendant, before said contract was executed, agreed and settled that the sum of \$854 was the amount unpaid, and said defendant voluntarily offered and promised to pay the same as just and correct, to obtain possession of said policy, which was then in the possession of plaintiff, and which had been left with said John Sullivan in his lifetime by defendant and her deceased husband, Michael Sullivan; and thereupon said defendant executed the agreement set out in the complaint, and thereupon plaintiff, after much labor and trouble in searching for said policy, delivered the same to defendant." And, as a mixture of facts and conclusions of law, further found "that plaintiff, as the executor of John Sullivan, deceased, had a lien on said policy to secure the sum of \$854, premiums advanced and paid by said John Sullivan for the benefit of defendant, and to keep said policy alive; and defendant was not entitled to the possession of said policy until said sum of \$854 was paid." As contended by appellant, there is no evidence that John Sullivan, during his lifetime, advanced or paid any money as premiums on the policy, or on account of the policy, for or at the request of the defendant, or even with her knowledge or consent; and, consequently, no evidence that she was ever indebted to the estate of John Sullivan in any sum for the alleged advancements or payments on account of said policy. No such fact is recited in the agreement and there is no other evidence touching the question, except the testimony of the plaintiff, as follows: "Question. What was the indebtedness that you found Margaret Sullivan to owe? Answer. I cannot recall now the facts at all. As I take it, Margaret Sullivan was not the party at all. It was Michael Sullivan whose receipts were shown by her son; and I didn't know * * * that Michael Sullivan had paid John Sullivan anything until this young gentleman showed me the receipts, which I recognized to be in my father's handwriting, and we struck a balance,—that is, there was a certain amount

of indebtedness that I claimed to be due from Michael Sullivan, and I showed him the receipt for money paid by John Sullivan, and then he showed me receipts for money which had been paid by Michael Sullivan to John Sullivan, and the difference between the receipts is what was stated in this memorandum of agreement. * * *

This statement of account was a matter of indebtedness between Michael Sullivan and John Sullivan prior to the death of John Sullivan. The estate of John Sullivan had paid nothing to Mrs. Margaret Sullivan, as far as I know. John Sullivan, in his lifetime, never paid anything for Mrs. Margaret Sullivan." This seems conclusive that the debt, if any debt there was, which the defendant agreed to pay, was a debt of her husband, Michael Sullivan, and not her debt. Nor is there anything in the complaint, findings of fact, or the evidence, to warrant the legal conclusion that the estate of John Sullivan ever had a lien of any kind on the policy of insurance. The plaintiff testified: "I don't know anything about the circumstances under which John came into possession of that policy. * * * It had never been assigned to John Sullivan." No copy of the policy is contained in the record, but it was admitted by both parties that it "contained the name of Margaret Sullivan as beneficiary." Nor does it appear when Michael Sullivan died; but it may fairly be inferred that he died in the latter part of the year 1889. If Michael Sullivan was indebted to John Sullivan for money advanced or paid in the lifetime of the latter, the debt was barred by the statute of limitations long before the execution of the agreement upon which this action is founded; and, conceding that this agreement contains a promise of the defendant to pay that debt, the remaining question is, was there any consideration for the promise? The plaintiff testified that "the consideration of this agreement is expressed in the agreement. The agreement expresses the consideration, and there were no other considerations than those expressed in the agreement." Yet, in his brief he contends that there was "a moral obligation, founded upon an antecedent valuable consideration," which constituted a good consideration for the agreement, though no such moral obligation founded upon an antecedent valuable consideration is expressed in the agreement. Nor did the court find, or the evidence tend to prove, any antecedent valuable or good consideration for the agreement. The defendant was under no kind of obligation to pay a debt of her deceased husband for which she had never before been liable, either as principal or surety, even though such debt had not been barred by the statute of limitations. Whart. Cont. §§ 494, 512-514; Cook v. Bradley, 7 Conn. 57. Surely not after the debt had been barred. Rosenberg v. Ford, 85 Cal. 610, 24 Pac. Rep. 779. And this is all that

need be decided in this case. The only consideration expressed in the agreement, other than the alleged moral obligation, is plaintiff's promise to look for, find, and surrender the policy. This it was his duty to do, on demand of defendant, without compensation. After the maturity of the policy by the death of her husband, if not before, the defendant was entitled to the possession of it, unless the plaintiff, in his character of executor, had a lien on it. Whether the finding of the policy among the papers of the estate required more or less labor must have depended upon the degree of care or negligence with which the plaintiff had kept it, for which the defendant was not responsible. But it does not appear why a search of more than 10 minutes was necessary to find it. It is well settled that neither a promise to perform a duty, nor the performance of a duty, constitutes a consideration of a contract. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

99 Cal. 167

ROWE v. BLAKE et al. (No. 15,042.)
(Supreme Court of California. Aug. 5, 1893.)
JUDGMENT—ENFORCEMENT BY ACTION—WHEN ALLOWED.

An action may be brought on a judgment entered in an action for the foreclosure of a mortgage, by which the indebtedness of defendant to plaintiff was ascertained and declared a lien on the mortgaged land, and a sale of the land to satisfy the judgment was ordered.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by William B. Rowe against P. H. Blake and others to enforce a judgment. From a judgment for defendants, plaintiff appeals. Reversed.

J. H. Henderson, (James D. Thornton, Jr., of counsel,) for appellant. Wm. H. Fifield, for respondents.

HARRISON, J. December 31, 1879, judgment was entered in the late twenty-third district court of the city and county of San Francisco, in favor of the plaintiff and against the defendants, in which the amount of the indebtedness of the defendant Blake to the plaintiff was ascertained and declared to be a lien upon certain lands, and directing a sale of the lands to satisfy the said indebtedness. This judgment was entered of record January 26, 1880, and on the 30th of December, 1884, the plaintiff brought the present action, and in the amended complaint therein alleges "that said judgment and de-

cree has not been satisfied in whole or in part by execution or otherwise, and said property has not been sold, and said judgment and decree is still in full force and of binding effect, unmodified and unreversed;" and asks for a judgment that the lands therein described be sold to satisfy the amount of said indebtedness. The defendants demurred to this complaint upon the ground that it does not state facts sufficient to constitute a cause of action, and, their demurrer having been sustained, judgment was entered in their favor, from which the plaintiff has appealed. The amended complaint contains also averments of certain facts in excuse of the delay in prosecuting the action, some of which have supervened since the filing of the original complaint, and to which defendants have demurred on the ground of uncertainty. But, in the view we take of the case, it is unnecessary to consider either these averments or the demurrers thereto. It is contended by the respondents that an action cannot be maintained in this state to enforce a judgment for the foreclosure of a mortgage; that the only remedy of the plaintiff in such judgment is its enforcement by a sale within five years from its entry; and that, failing to effect such sale, the judgment ceases to be operative. In *Ames v. Hoy*, 12 Cal. 11, it was held that an action could be maintained in this state upon a domestic judgment, and in *Stuart v. Lander*, 16 Cal. 373, it was held that such an action would lie, although the time within which an execution might issue had expired. Respondents seek to distinguish these cases from the present by the fact that they were brought to recover a specific sum of money that had been fixed by the prior judgment, whereas the present action is brought to procure a sale of the same property which the prior judgment directed to be sold. We are unable, however, to perceive any substantial reason for denying the right to maintain this action that would not be applicable in the other cases. There is certainly nothing in the opinion in *Ames v. Hoy* that warrants such distinction. It is there said: "The chief argument is that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien." The Code of Civil Procedure defines a civil action as a proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, and declares that it arises out of an obligation by which one person is bound to do or not to do a certain thing. Sections 22, 25, 26, Code Civil Proc. Whether the judgment be regarded as the evidence of a contract between the parties or as the creation of an obligation upon the defendant, the cor-

relative right of the plaintiff which is created thereby may be enforced by a civil action. By the former judgment it was determined that the plaintiff had the right to have the land therein described sold for the purpose of paying the indebtedness of the defendant Blake, and there was also created thereby an obligation upon the defendant to subject the land to a sale for the satisfaction of this indebtedness, and this obligation is as well defined and as binding upon the defendant as is the obligation upon a defendant to pay the amount of a money judgment recovered against him. The obligation upon a defendant to pay a specific sum of money out of his general estate, which an ordinary money judgment implies, differs in kind, rather than in nature, from the obligation to subject a specific parcel of land to the payment of a specific sum of money; and the reasons for enforcing this implied obligation or promise by an action are as cogent in the one case as in the other. The judgment herein sought to be enforced has nothing in its terms, nor is there anything in the statutes of this state, which limits the mode for its enforcement. The provisions of section 681, Code Civil Proc., limiting the issuance of an execution for the enforcement of a judgment to the term of five years, is but a limitation upon a certain mode for its enforcement, and does not purport to limit or qualify the right to its enforcement in any other mode. The right to bring an action upon a judgment or decree is recognized by that Code as the subject of a civil action, and may be brought within five years. Section 336, *Id.* The provisions of this section are applicable to domestic judgments, (*Mason v. Cronise*, 20 Cal. 211,) and the time thus limited begins to run from the entry of the judgment, (*Trenouth v. Farrington*, 54 Cal. 273.) Under the chancery practice, bills to carry decrees into execution were frequently entertained. Story, Eq. Pl. § 429; 2 Daniel, Ch. Pr. *1585. As in this state there is only one form of civil action for the enforcement of a private right, (Code Civil Proc., § 307,) the rules which, under a former system, prevented the enforcement of a decree in equity by a proceeding at law are inapplicable. The action of *Ames v. Hoy* was based upon a decree rendered in a suit in equity. The judgment is reversed.

We concur: DE HAVEN, J.; GAROUTTE, J.

4 Cal. Unrep. 76

CLEARY v. FOLGER. (No. 15,103.)

(Supreme Court of California. Aug. 10, 1893.)

SALE OF LAND—RESCISSION—LAW OF THE CASE—
NONSUIT—ESTOPPEL—HARMLESS ERROR.

1. Where the vendee of land notifies the vendor that he cannot and will not complete the purchase, the vendor need not offer to perform, and by failing to do so does not authorize the vendee to consider the contract as rescinded, so that he can recover the payments made by him.

2. The fact that on an appeal from a judgment of nonsuit the court treats certain facts as established, does not make these facts the law of the case, so that defendant cannot on a new trial prove a different state of facts.

3. A judgment against plaintiff at the close of his evidence on the ground that he has not made out his case is a judgment of nonsuit, though part of the evidence introduced by him was a stipulation with defendant which provided that it could be used as evidence by either party.

4. The withdrawal of defendant's cross bill for specific performance would not estop him to claim damages under the prayer of his answer.

5. Allowing defendant to prove damages because of plaintiff's failure to complete his purchase is harmless error where he was not allowed to recoup for the reason that plaintiff did not make out his case, and there was therefore nothing against which defendant could recoup.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Michael Cleary against J. A. Folger, Jr., to recover an installment paid on a contract for the purchase of land. Judgment for defendant. Plaintiff appeals. Affirmed.

B. McFadden, for appellant. R. M. Fitzgerald and F. S. Stratton, for respondent.

TEMPLE, C. This is the second appeal in this case. 84 Cal. 316, 24 Pac. Rep. 280. The former appeal was from a judgment of nonsuit, and the judgment was reversed, and the cause remanded for trial. In the lower court the defendant amended his answer, adding a claim for recoupment against the demand of plaintiff. On the last trial the defendant proved and the court found that before the time for performance arrived, according to the terms of the contract, plaintiff had notified defendant that he could not

and would not complete the purchase, or pay anything further on account thereof. The court therefore held that defendant was excused from offering to perform, and had not made default, and had not, therefore, authorized plaintiff to consider the contract rescinded. The evidence justified this conclusion, and, of course, it follows that plaintiff cannot maintain his action.

The appellant contends that certain facts were considered by this court as established on the first appeal, and that it was error to allow such facts to be controverted at the trial, as they had become the law of the case. But in this contention appellant's counsel entirely misapprehends what is meant by the "law of the case." That doctrine is merely that when this court has decided that from the facts presented by the record certain legal conclusions follow, such legal conclusions must be accepted by the parties upon a retrial, if the same facts are again established. This will not prevent the parties, however, from proving an entirely different state of facts upon the retrial, and, in so far as the facts proven are different, the case will not be controlled by the first decision. As the first appeal was from a judgment of nonsuit, which this court held was erroneous, it would necessarily follow that the defendant should then have an opportunity of putting in his case. The former decision was merely that, taking plaintiff's evidence as true, it made a prima facie case for plaintiff. But plaintiff maintains that the first judgment was not a judgment of nonsuit, because, he says, plaintiff put in evidence a stipulation as to certain facts, in which it was stipulated that it could be used by either party. This, he says, constituted evidence for the defendant, which he claims would prevent a nonsuit, and necessitate a judgment on the merits. Conceding the rule to be as claimed, still there is nothing in this contention. All the evidence put in by plaintiff is available to defendant as evidence for him, and it makes no difference whether plaintiff proves his case by testimony or by admissions and stipulated facts. If, when he has put it in, it does not make out his case, a nonsuit is proper. The first judgment was strictly a judgment of nonsuit.

On the last trial defendant put in evidence tending to show damage because of the failure of plaintiff to complete the purchase. This was objected to by plaintiff, and is here assigned as error. Counsel says he cannot comprehend how damages can be recovered for the breach of a stipulation in a contract which has been canceled by mutual consent, or has been abandoned by both parties. How can there be a right of action upon a contract which has become nonexistent, and when, because it has become nonexistent, payments made upon it are without consideration, and may, therefore, be recovered as money had and received to the use of the

payor? Of course, under such circumstances, no such action could be maintained, and I think it hardly fair to say that it has ever been so held in any authoritative decision. No such claim was asserted on the former appeal, and no such question was before the court. The remarks alluded to were evidently made in momentary forgetfulness of the main idea advanced in the opinion, to wit, that the contract had been abandoned and canceled. In none of the subsequent cases in which the suggestion is cited with apparent approval was any such question involved, and all that is said is plainly obiter. See *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. Rep. 749; *Newton v. Hull*, 90 Cal. 487, 27 Pac. Rep. 429; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. Rep. 774. In each of these cases the citation is rather to the doctrine, coupled with the statement in regard to recoupment, to the effect that, when both parties have failed to perform the contract, either may elect to consider it rescinded and recover moneys paid upon it. But if such be the law of this case, it would justify the admission of the evidence complained of, unless there be other grounds of objection. Plaintiff claims that such ground there is, because the defendant had by consent dismissed a cross complaint, in which he asked for specific performance of the contract, each party paying his costs; and he cites as authority for the proposition *Merritt v. Campbell*, 47 Cal. 542, and *Parnell v. Hahn*, 61 Cal. 131. Notwithstanding these authorities, I think it is at least doubtful whether the mere withdrawal of the claim to equitable relief under the circumstances can operate as an estoppel upon defendant's right to claim damages. It left defendant still an answer in which he claimed damages, to wit, the installment paid. In one point of view the decision may be understood as holding that, while defendant cannot retain the installment as liquidated damages, he may retain sufficient to cover actual damage. But defendant did not recover any damage under this plea, the court holding that the agreement had not been canceled or abandoned, and that, therefore, plaintiff could not recover the installment paid, and there was, therefore, nothing against which a recoupment could be made. It would seem to follow that before plaintiff can complain of this evidence as injurious error he must show his right to recover the money he had paid. As we have seen, he did not make out such a case, and therefore, whether the ruling were right or wrong, he was not injured. I think the judgment and order should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

99 Cal. 278

COLTON LAND & WATER CO. v. SWARTZ
et al. (No. 19,131.)

(Supreme Court of California. Aug. 15, 1893.)

JUDGMENT—COLLATERAL ATTACK—EFFECT OF APPEAL—RECORDED MAP AS EVIDENCE—LOCATION OF LAND.

1. Where a judgment roll offered in evidence contains two judgments, the last in point of time will be treated as the true and final judgment, and the prior judgment will not be considered as forming part of the roll so as to affect its admissibility.

2. Under Code Civil Proc. § 942, providing that an appeal does not stay the execution of a judgment unless an undertaking is given as therein provided, one claiming under an execution sale cannot be deprived of the right to use the judgment roll as evidence in support of his title during the pendency of an appeal from the judgment, unless such undertaking was given.

3. The map of an "addition," which is of record in the office of the county recorder, is not inadmissible in evidence because not acknowledged.

4. The fact that a tract of land is within the limits of a city may be shown by oral testimony.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Ejectment by the Colton Land & Water Company against Daniel Swartz and others. From a judgment for defendants, and order denying a new trial, plaintiff appeals. Affirmed.

Chas. R. Gray, for appellant. Frank F. Oster, for respondents.

HARRISON, J. Ejectment for a lot of land in the city of Colton. Judgment was rendered in favor of the defendants, and the plaintiff has appealed. The title of the defendants is derived from the plaintiff through a sale under an execution issued upon a judgment against it in favor of the San Bernardino National Bank, rendered by the superior court of San Bernardino county; and, unless the judgment under which that sale was had is valid, the judgment herein should have been in favor of the plaintiff. The appellant contends that the superior court had no jurisdiction to render the judgment under which the sale was had, and that the execution issued thereon and the sale by virtue thereof were void and ineffective to transfer any title to the property sold. The action of the San Bernardino National Bank against the present plaintiff was commenced March 27, 1889, and, a demurrer to the complaint therein having been overruled, judgment was ordered in favor of the plaintiff as asked in the complaint, and entered May 29, 1889. Subsequently the plaintiff herein filed an answer to the complaint, and upon the issues presented by its answer a trial was had, and findings filed by the court, upon which judgment was entered November 21, 1889. Upon this judgment an execution was issued, and by virtue of a sale there-

under is derived whatever title the defendants have to the demanded premises. When this judgment roll was offered in evidence the appellant objected to its introduction, upon the ground that it was incompetent, irrelevant, and immaterial, and now urges that the court erred in admitting it, and that it is not entitled to be considered as evidence in establishing the transfer of title to the land, for the reason that the judgment of May 29th was the final judgment in the case, and that, upon its entry, the court lost jurisdiction to enter any other judgment in the action, so long as that remained upon its record; and that, inasmuch as there was no evidence introduced showing that it had been vacated or set aside, the judgment of November 21st was void, and not the basis of an execution or sale.

1. A judgment roll is defined in section 670, Code Civil Proc., and consists of the papers therein enumerated. This "roll" does not depend upon the fact that the clerk has fastened these papers together, nor do any other papers which the clerk may have joined with those which the statute declares shall constitute the judgment roll become a part of such roll by reason of having been so joined. The papers thus designated as forming the judgment roll are those which are elsewhere mentioned in the Code as a part of the proceedings culminating in the judgment. The "judgment," of which a copy is to be included in the "roll," is the judgment defined in section 577, Code Civil Proc., as "the final determination of the rights of the parties in an action or proceeding;" and, as there can be but one "final determination" in an action, it follows that there can be but one judgment in the judgment roll, and that if during the proceedings in an action a judgment shall be set aside, and another one thereafter entered, only this last judgment can form a part of the judgment roll, just as, when the complaint or answer is amended, only the amended pleadings or those upon which the cause was tried form the "pleadings" which are a part of the judgment roll. In *Paige v. Roeding*, 96 Cal. 388, 31 Pac. Rep. 264, the plaintiff appealed from the judgment, and brought up in the judgment roll a judgment that had been entered in the records of the court. The respondents caused to be certified to this court a judgment that had been previously entered in the same cause, and claimed that this prior judgment was the only one that could be considered. It was held, however, that the statute clearly contemplates that there shall be but one judgment in a judgment roll, and that, if two are found therein, the last in point of time is the only one which can be considered as a part thereof. When, therefore, the defendants offered in evidence "the judgment roll" in the action of the San Bernardino National Bank against the plaintiff herein, as is stated in the statement on motion for

a new trial, it must be assumed that the judgment roll so offered consisted of only the papers which are designated by the statute as constituting the judgment roll; and also that, if there were any other papers bound up with that, they were not considered by the court as forming a part of said roll, and consequently could not impair its admissibility in evidence. Neither does the fact, found by the court, that a judgment between the parties had been previously rendered in the same action, impair the effect of this judgment, which forms a part of the judgment roll. If upon a direct appeal the fact that a prior judgment does not impair the efficiency of the judgment appealed from, (*Paige v. Roeding*, supra,) much less can such prior judgment be invoked to impeach a subsequent judgment when the same is collaterally attacked. The court had jurisdiction of the parties to the action and of the subject-matter, and upon a collateral attack every presumption will be indulged in support of its judgment. If necessary, therefore, it will be assumed that the former judgment was vacated by consent of the parties, and that an order showing such consent and the vacating of the judgment appears in the minutes of the court. Any entry in the minutes vacating the judgment, whether by consent of the parties or upon an order of the court after a new trial had been granted, would form no part of the judgment roll, and it was not necessary to offer any evidence to show that the former judgment had been annulled. *Carpentier v. Oakland*, 30 Cal. 439; *Drake v. Duenick*, 45 Cal. 455; *Crim v. Kessing*, 89 Cal. 478, 26 Pac. Rep. 1074; *Caruthers v. Hensley*, 90 Cal. 560, 27 Pac. Rep. 411. "Circumstances may have arisen wherein the trial court would have been justified under the law in setting aside the first findings and judgment, and in filing the second findings and judgment; and, with no showing to the contrary, we must assume that such circumstances did arise." *Paige v. Roeding*, 96 Cal. 391, 31 Pac. Rep. 264.

2. The sale under this judgment was made December 23, 1889, and the sheriff's deed issued to the purchaser June 24, 1890. On the 21st of November, 1890, the plaintiff herein appealed from the judgment of November 21, 1889, in favor of the San Bernardino National Bank, and now contends that by virtue of such appeal the judgment was not admissible in evidence. No such objection, however, was made at the trial, and, as it does not appear that the fact of an appeal from the judgment had been shown at the time when the judgment was offered in evidence, it was not embraced in the objection that the judgment roll was incompetent, irrelevant, and immaterial. The judgment was not offered as evidence of any issue in the case, or for the purpose of showing that the matters in controversy in this action had been determined in an-

other action, but as a collateral fact in support of the execution, and for the purpose of showing that at the time the execution under which the sale was made issued a judgment had been rendered, and was then in force. Section 681, Code Civil Proc., provides that an execution may be issued for the enforcement of a judgment at any time within five years after its entry; and section 942 provides that an appeal does not stay the execution of the judgment, except upon giving the undertaking therein provided for. For the purpose of recovering possession of the property purchased at a sale under such execution it is necessary to introduce in evidence the judgment as the basis of the execution, and if the enforcement of the judgment has not been stayed the fact that an appeal therefrom has been taken does not prevent the judgment from being received in evidence and considered.

3. The objection that the deed from the San Bernardino National Bank (the purchaser at the execution sale) to the defendant Swartz does not show upon its face that the grantor was a corporation does not deserve any consideration. If in fact the grantor was a corporation, the proper execution of the deed to the grantee would transfer all its title to the land therein described; and if it was not a corporation, any statement in the deed that it was would not make it such. This objection to the introduction of the deed was not taken at the trial, the only objection being that it was incompetent, irrelevant, and immaterial; and it is well settled that under this general objection a party cannot upon appeal urge an objection which is merely formal or special, and which, if it had been pointed out when the evidence was offered, might have been obviated. *Crocker v. Carpenter*, (Cal.) 33 Pac. Rep. 271. The court, in finding 6, finds that the San Bernardino National Bank was a corporation, and the seal affixed to the deed was evidence that it was a corporate act. *Burnett v. Lyford*, 93 Cal. 117, 28 Pac. Rep. 855. If the plaintiff would claim as a fact that the grantor was not a corporation, it was incumbent upon it either to make the objection when the deed was offered in evidence, or to offer evidence to that effect. The recitals in the judgment roll and in the sheriff's deed, as well as the identity of the name of the grantee in the sheriff's deed with that of the grantor in the deed offered in evidence, together with the recital in such deed that the property was the same as that conveyed by the sheriff, giving its place of record, supports the finding that the grantor was a corporation.

4. The court did not err in receiving in evidence the map of Colton addition, which was produced from the county recorder's office. The plaintiff, in its complaint, described the land sued for as the north half of block No. 36, "as designated on a map

of Colton addition, filed in the office of the recorder of said county on or about the 12th day of October, 1887, at the request of P. A. Raynor." The property conveyed by the sheriff is described as the north half of block 36, Colton addition, a plat or map of which addition "is of record in the office of the county recorder of San Bernardino county, state of California;" and the map offered in evidence was shown to be a map of Colton addition, which appears in volume 6, p. 10, Book of Maps, Records of San Bernardino County, and purported to have been recorded on the 12th day of October, 1887, at the request of P. A. Raynor. The objection that the map was not acknowledged so as to entitle it to record is without merit. A map is not an "instrument" which affects the title or possession of real property, within the meaning of the recording act, (*Hoag v. Howard*, 55 Cal. 564;) nor is it an instrument which is to be executed by the party who prepares it, (Code Civil Proc. § 1933,) or of which an execution can be acknowledged. There is no provision in the statute which requires a map or plat to be recorded in the county recorder's office, but section 123 of the county government act (St. 1883, p. 325) declares that the recorder "must keep all books, records, maps, and papers deposited in his office;" and a map thus deposited within the recorder's office is properly referred to in an instrument of conveyance as being "of record" therein, and may be received in evidence, even though it be not acknowledged. It is only requisite to offer evidence sufficient to connect the map referred to with the map produced, as in the case of a map produced from any other custody.

5. It was competent to show by oral testimony that the tract of land known as "Colton Addition" is within the limits of the city of Colton. *Heinlen v. Heilbron*, 97 Cal. 101, 31 Pac. Rep. 838. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

4 Cal. Unrep. 92
TOWN OF SANTA MONICA v. ECKERT
et al. (No. 19,156.)

(Supreme Court of California. Aug. 15, 1893.)
WRIT OF PROHIBITION—EFFECT OF REFUSAL—APPEAL—JURISDICTION.

1. Where a writ of prohibition is asked for to restrain a court from proceeding on the ground that it has no jurisdiction, the denial of the writ, without any decision on such question, does not take away the right to have it considered on writ of review.

2. An appeal cannot be considered where the amount in controversy, as shown by the *ad damnum* clause of the complaint, is less than the jurisdictional amount of the supreme court, and the "legality" of the license tax for which the action is brought is not questioned, but the contention is that a license already obtained covered the premises.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the town of Santa Monica against Robert Eckert and others. From a judgment of the superior court reversing a judgment for defendants, defendants appeal. Appeal dismissed.

Thomas B. Brown, for appellants. Richard R. Tanner, for respondent.

HAYNES, C. This action was brought by the town of Santa Monica, a municipal corporation of the sixth class, in the recorder's court, to recover the amount of a license alleged to be due from the defendants for keeping a saloon, the amount of the license fee fixed by the ordinance being \$300. In the complaint, plaintiff alleged the amount required to be paid to be \$300, but remitted all in excess of \$299.99, for the avowed purpose of giving the recorder's court jurisdiction. Upon the trial in that court defendants had judgment, from which the plaintiff appealed to the superior court, and the trial in that court resulted in a judgment for plaintiff for said sum of \$299.99, and costs, from which judgment, and an order denying defendants' motion for a new trial, the defendants appeal.

The point principally relied upon by appellants for a reversal is that the superior court had no jurisdiction to entertain the appeal, because, as they contend, the recorder's court from which the appeal was taken had no jurisdiction. This contention is based on the fact that the ordinance of the town of Santa Monica fixed the amount of the license at \$300, a sum beyond the jurisdiction of that court, and that plaintiff could not legally remit any portion of that sum for the purpose of giving jurisdiction. After the appeal was taken to the superior court, the defendants applied to this court for a writ of prohibition to restrain the superior court from proceeding in the cause, upon the ground that it had no jurisdiction. The writ was denied, and respondent contends that the denial of the writ was an adjudication that the superior court had jurisdiction of the case brought into it by appeal. But that conclusion does not follow. It will not issue where there is a plain, speedy, and adequate remedy in the ordinary course of law. Code Civil Proc. § 1103. In this case, if the superior court had jurisdiction, there could be no appeal from its judgment, as the amount demanded was less than \$300; but there was still left an adequate remedy by a writ of review. The writ of prohibition will not ordinarily issue where certiorari will lie, unless it appears that the applicant for the writ will necessarily be injured if the court sought to be prohibited is permitted to proceed at all, as that court may, before final judgment, discover its want of jurisdiction, and dismiss its proceedings; while, if it should proceed

to final judgment, the party is not injured by the entry of a void judgment, and proceedings to enforce such judgment may be prevented, and the judgment declared void under a writ of review. The mere denial of the writ of prohibition, where the question of jurisdiction, as in this case, was not decided, does not take away the right to a writ of review. Defendants' answer raised no question as to the "legality" of the license tax, but only the question of their liability to pay it, upon the ground that they already had a license which covered both bars, and the answer was not verified, as required by section 838, Code Civil Proc. *Williams v. McCartney*, 69 Cal. 556, 11 Pac. Rep. 186. As the legality of the license tax was not involved, and the amount in controversy, as shown by the ad damnum clause of the complaint, is less than \$300, this court has not jurisdiction of the appeal, and therefore cannot consider the question of the jurisdiction of either of the courts below. The appeal herein should be dismissed.

We concur: **TEMPLE, C.; BELCHER, C.**

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion the appeal in this cause is dismissed.

DE HAVEN, J. I concur in the judgment.

99 Cal. 196

RORKE v. SAN FRANCISCO STOCK & EXCHANGE BOARD. (No. 14,981.)

(Supreme Court of California. Aug. 10, 1893.)

SAN FRANCISCO STOCK EXCHANGE — FAILURE OF MEMBER TO PAY DEBTS — SUSPENSION — PROCEDURE — TIME OF PRESENTING CLAIM BY CREDITOR — ARBITRATION COMMITTEE.

1. The constitution and by-laws of a stock exchange provide that any member failing to meet his engagements shall be suspended; that if he does not settle within six months his seat shall be sold for the payment of creditors; that the board will take no cognizance of contracts that remain unsettled five days after due, "unless continued by mutual consent;" and that where a member fails to comply with his stock contracts his creditors must report said default to the president of the board within 48 hours. No claim, unless so reported, shall ever after be recognized or enforced by the board. *Held*, that the 48-hour limitation applies only to contracts for purchase or sale of stocks in the board, and not to open accounts, where stocks are carried for the debtor for months, assessments paid thereon, interest charged, and dividends credited to the account, etc.

2. Such constitution and by-laws also provide that all differences as to claims between members shall be referred by the president, unless otherwise ordered, to committees for arbitration, which shall report in writing within 15 days after their appointment, and their report shall stand as the award of the board. *Held* that, though there was no dispute between the parties to such account, it was properly referred to such committee for "investigation" or "settlement."

3. In a proceeding by such debtor to compel the board to restore him to membership from

which he had been suspended, it appeared that on his failure to pay the account the creditor requested a committee of investigation; that two days thereafter the committee reported the amount of the indebtedness; that two days afterwards such creditor reported the claim unpaid; that such member was then suspended; and that six months thereafter, the claim remaining unpaid, his seat or membership in the board was sold to pay his debts. *Held*, that such member was properly suspended, and was not entitled to be restored to membership.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Application by Benjamin B. Rorke for a writ of mandate to compel the San Francisco Stock & Exchange Board to restore him to membership therein. From a judgment in favor of such board, and from an order denying his motion for a new trial, Rorke appeals. Affirmed.

Sullivan & Sullivan, for appellant. Jarboe, Harrison & Goodfellow, for respondent.

SEARLS, C. The proceeding in the court below was had under an alternative writ of mandate, issued on the application of appellant to the San Francisco Stock & Exchange Board, (an unincorporated association,) commanding it to restore the applicant, Benjamin B. Rorke, to membership in said association, and to all the rights, privileges, and immunities pertaining thereto, or that it show cause, etc., why it had not done so. Respondent appeared and showed cause, whereupon a trial was had, and judgment rendered in favor of the association. Rorke moved for a new trial. His motion therefor was denied, and he prosecutes this appeal from the order.

The San Francisco Stock & Exchange Board is a voluntary association of individuals, and as such is, and for over 20 years has been, engaged in the business of buying and selling stocks in the city and county of San Francisco, and has adopted and is governed by certain articles of agreement known as its "constitution and by-laws," which have been agreed to and subscribed by each and all of its members, the appellant herein included. Plaintiff was a member of the board, as were S. B. Wakefield and A. W. Foster, doing business under the firm name of S. B. Wakefield & Co. On the 29th day of July 1885, plaintiff was suspended from membership of respondent, and on the 31st day of January, 1886, more than six months having elapsed, and he not having been restored, his membership or "right to a seat in the board," as it is termed, is claimed to have reverted to the board, and was by it sold to meet his liabilities to Wakefield & Co. and other members of the board, to whom he was indebted. Plaintiff claims that the act of defendant in depriving him of membership was illegal, and in contravention of its constitution and by-laws. Prior to July, 1883, plaintiff herein had various

transactions with Wakefield & Co. in buying and selling stocks, and Wakefield & Co. had paid out for plaintiff various sums of money in purchasing and carrying for him stocks, so that on said last-mentioned day plaintiff was indebted to the firm in the sum of \$5,137.42, which he promised but failed to pay. On the 25th day of July, 1885, there was due and owing to Wakefield & Co. from the plaintiff \$4,994.92, which, as the court found, had been by mutual consent of the parties continued from the time the same accrued up to the last-mentioned date. On said 25th day of July, 1885, the said firm of S. B. Wakefield & Co. presented to the president of defendant a written request for a committee to investigate the matter in dispute between them and the plaintiff herein, and on said day the vice president of defendant (said Wakefield being president) appointed a committee of three to investigate and report. Such action was had that the committee reported to defendant on the 27th day of July, 1885, that plaintiff was indebted to Wakefield & Co. in the sum of \$4,994.92. This report was unanimously adopted by defendant. On the 29th day of July, Wakefield & Co. reported the delinquency of plaintiff to the board, and thereupon plaintiff was suspended from his seat or membership in the said board.

The constitution and by-laws of defendant are in evidence in the case. They are too voluminous to be copied at length, and, except those under which the contention here arises, may be referred to as follows: Any member failing to meet his engagements in the board shall be suspended until he has settled with his creditors. If he settles within six months he may be restored by a two-thirds vote. If he does not settle in six months his seat is to be sold, and proceeds applied to payment of his creditors, as therein provided. The seat and privileges of every member is a continuing security to all members with whom he may deal, for the performance of his contracts and the fulfillment of his engagements. The following articles of the by-laws are given at length: Article 17: "Limitation of Contracts. This board will take no cognizance of contracts that remain unsettled five days after they become due, unless continued by mutual consent." Article 25: "Default must be reported within forty-eight hours, and claim filed within thirty days thereafter. In cases where a member of the board shall fail to comply with his stock contracts it shall be the duty of his creditors to report said default to the president of the board within forty-eight hours after said defalcation becomes known to them. No claim or contract, unless so reported, shall ever after be recognized or enforced by this board. During the suspension of a member no such report shall be required. All claims of members and nonmembers against said delinquent member must be filed with the secre-

tary of the board within thirty days after he has been reported, and must be accompanied by a detailed statement of the account. No claims, unless so filed, shall ever after be recognized or enforced by this board." Article 49: "Investigation of Claim by Arbitrating Committees. All differences, investigations of claims, or settlement of accounts between members, or between members and nonmembers, shall be referred by the president, unless otherwise ordered, to committees of arbitration, consisting of at least three members. Said committees shall report in writing, within fifteen days from date of appointment, unless further time be granted; and their report, if adopted, shall stand as the award of the board."

The contention of appellant is that by failing to report the default of Rorke to the board within 48 hours after it became known to them, as provided by section 25 of the by-laws, Wakefield & Co. lost all right to recognition, and the board had no authority to suspend appellant. Counsel for respondent, on the other hand, claim that section 25 relates to contracts entered into for the purchase or sale of stocks in the board, the price agreed to be paid therefor, the delivery and payment for stocks so purchased, (questions, most of which are to be solved by reference to the records of the board; questions which can be more readily solved while transactions are fresh in the memory of the parties in interest and members, and when mistakes, if any, can be more certainly corrected,) and that it has no application, and was not intended to apply, to cases like the present, where stocks were carried for appellant for months, assessments paid thereon, interest charged up, and dividends, if any, credited to the account, etc., to what in fact was an open and running account between Wakefield & Co., as brokers, and appellant, who, while himself a broker, and liable as such, was a customer of Wakefield & Co., at least to this extent. So long as Wakefield & Co. and appellant by mutual consent permitted the open account to run, there was no default on the part of appellant to be reported within the meaning of article 25 of the by-laws. It was only upon the ascertainment of the balance due by the committee of arbitration, and a failure to meet it, that the default occurred. The court below evidently did not regard section 25 as having any application to transactions of the character involved here. In this, I am of opinion, it was correct. "In cases where a member of the board shall fail to comply with his stock contracts, it shall be the duty," etc. The section was evidently intended to meet cases in which the member has contracted as a broker in the board to purchase or sell and deliver stocks; contracts which are within the knowledge and jurisdiction of the board and its members. The transaction between ap-

pellant and Wakefield & Co. commenced by the employment of appellant by Wakefield & Co. to purchase and sell stocks for them in the board on a commission, during which employment he purchased on his own account certain stocks for which the firm paid, and which, in the language of the guild, they carried for him, and which in July, 1885, culminated in an indebtedness on his part for the sum of \$4,994.92. Thereupon Wakefield & Co. called for arbitrators, under article 49 of the by-laws, who reported the indebtedness as above stated, and within two days thereafter they reported his delinquency.

The contention of appellant is that there was no dispute between the parties to settle, and hence no occasion for a committee of arbitration. The answer is that section 49 provided not only for "differences" between parties, but for an "investigation of claims or settlement of accounts," and is the mode by which the board becomes informed of the amount due and owing by its members, and is the method adopted by which the debtor may have a hearing, and the board obtain authentic knowledge upon which to base its subsequent action. It is not clear, however, that there was no dispute. Foster, the surviving partner of Wakefield & Co., who was a witness, says: "I presented our claim against Rorke to the committee for consideration. Rorke was present, and his protest was that the account was wrong; that the figures were not correct; that something was the matter with the account. The committee then adjourned for two days. At the second session he did not have any evidence that the account was wrong." This looks very much like a dispute between the parties as to the balance due on the account. The court found that the indebtedness of appellant to Wakefield & Co. was by their mutual consent continued from the time the same accrued until reported, etc. The whole course of dealing between the parties indicates this. Appellant testified that he expected to pay it off by securing commissions from the firm, as he had theretofore done. The whole proceeding whereby appellant was suspended from his seat or membership in the board, and his right thereto sold to satisfy the lien thereon for debts contracted by him as a member, seems to have been in obedience to the constitution and by-laws of the association; and, having failed for six months to settle up the claims against him, and seek restitution, his membership in defendant ceased, and all his rights appertaining thereto were extinguished. The order appealed from should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(4 Cal. Unrep. 80)

CLARKE v. MOTT et al. (No. 15,153.)
(Supreme Court of California. Aug. 10, 1893.)

INSOLVENCY—EVIDENCE.

Evidence that a debtor, when called on to pay his notes when due, replied that he was unable to pay them; that he had tried to raise the money, but could not,—warrants a finding that he was insolvent.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Petition of C. W. Mott and others to have Alfred Clarke adjudged an insolvent debtor. From an order so adjudging him, he appeals. Affirmed.

Witnesses Hutton and Stewart both testified that, when demand was made on Clarke for the payment of certain of his notes, he replied that he was unable to pay them; that he had tried to raise the money, and was unable to do so.

Alfred Clarke, in pro. per., (Naphtaly, Friedenrich & Ackerman, of counsel,) for appellant. Wilson & McCutcheon, Page & Eells, W. T. Baggett, and Warren Olney, for respondents.

PER CURIAM. This is an appeal by Alfred Clarke from an order of the superior court adjudging him to be an insolvent debtor. We can discover from the record only two points legitimately before us: (1) Did the court err in overruling the demurrer to the petition? And (2) does the evidence warrant the finding of appellant's insolvency? As to the first point, appellant has pointed out no defect in the petition, and we see none. As to the second point, the facts testified to by the witnesses Hutton and Stewart clearly show the insolvency, not considering the 19 attachments. The order appealed from is affirmed.

(4 Cal. Unrep. 81)

MENDENHALL v. ROSE. (No. 15,058.)
(Supreme Court of California. Aug. 10, 1893.)

REAL-ESTATE AGENT—ACTION FOR COMMISSIONS—WRITTEN CONTRACT—SUFFICIENCY—EVIDENCE.

1. R. wrote a broker that, "if there is any possibility of selling both or either piece of property, see if you can make it this week. * * * Also V. told me S. told him he had a man who wanted Hoza Bernal's place. * * * You had better see S., and get hold of the buyer, * * * for if V. finds out who it is he is bound to spoil the sale. * * * In case you make a sale of the 29½ acre piece," a certain mortgage can remain on the place for one year. "Also the Ratke place, there can be" a mortgage for one year or longer. *Held*, that such letter did not authorize such broker to sell real estate situate in the county of A., "generally known as the 'Jose Reyes Bernal Rancho,'" or any other real estate, and was inadmissible in an action by such broker against R. for services in selling such real estate, under Civil Code, § 1624, subd. 6, which requires agreements authorizing or employing brokers to sell real estate for compensation to be in writing.

2. Such letter was not rendered admissible by evidence by plaintiff which tended only to ap-

ply the description in the complaint to a particular one of Jose Bernal's several tracts, and did not show which one of such several tracts was intended by the expression "Hoza Bernal's place," in such letter.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by William W. Mendenhall against Jason A. Rose to recover on a written contract for services rendered in the sale of certain real property. From a judgment for plaintiff, defendant appeals. Reversed.

D. M. Conner and Welles Whitmore, for appellant. Lindley & Eickhoff, for respondent.

VANCLIEF, C. It is alleged in the complaint in this action that by a written contract the defendant authorized and employed the plaintiff as his agent and broker to sell certain real property situate in the county of Alameda, "generally known as the 'Jose Reyes Bernal Rancho,'" and agreed to pay plaintiff for his services as such agent and broker what said services were reasonably worth. That thereafter "plaintiff found and secured for defendant a purchaser at a price satisfactory to defendant of the real property aforesaid, to whom said defendant sold said property." That the services so rendered by plaintiff for defendant were reasonably worth the sum of \$950, no part of which has been paid, and for which he prays judgment. The defendant answered, specifically denying the alleged contract, authorization, and employment, and also denying the alleged services. The court found the facts as alleged by plaintiff, and rendered judgment accordingly, and the defendant appeals from the judgment and from an order denying his motion for a new trial.

To prove the alleged authorization and employment, the plaintiff offered in evidence the following letter: "Pleasanton, Nov. 30, 1887. W. Mendenhall, Esq.—Dear Sir: If there is any possibility of selling both or either piece of property, see if you can make it this week. If it is not sold this week, by the first of next week I will have to buy it right out, or let it slide. Also Mr. Vandervoort told me Mr. Saulsbury told him he had a man who wanted Hoza Bernal's place. I don't think there is any truth in it, but if there is you had better see Mr. Saulsbury, and get hold of the buyer, and keep hold of him; for if Vandervoort finds out who it is he is bound to spoil the sale. This letter is private, and you will do me the favor to burn it as soon as you read it. In case you make a sale of the 29½ acre piece, there can be \$3,000 or \$4,000 mortgage remain on the place for one year. Also the Ratke place, there can be \$5,000 mortgage for one year or longer if the buyer or buyers so desire. Yours, truly, J. A. Rose." Written in lead pencil on reverse: "P. S. There is no hurry about selling Bernal's for a week or two. Sell the others first, if possible. R." To

the introduction of this letter the defendant objected, on the grounds that it is not such an agreement in writing authorizing or employing plaintiff to sell real estate as is required by the sixth subdivision of section 1624 of the Civil Code;¹ that it does not contain a description of the real estate which plaintiff was authorized to sell, nor refer to any other paper or writing containing such description; and that it is irrelevant, and does not tend to prove any allegation of the complaint. The court overruled defendant's objection, and admitted the letter as evidence, to which ruling the defendant excepted, and contends here that it was error.

I think defendant's objection should have been sustained, and, as this letter was the only written evidence offered of the authority or employment of plaintiff, the error in admitting it must be presumed to have been prejudicial to the defendant. The letter does not purport to authorize or employ the plaintiff to sell the real estate described by name ("Jose Reyes Bernal Rancho") in the complaint, or any other real estate; nor does it admit or acknowledge any prior authorization or employment to sell any real estate; nor does it purport to authorize a sale of "Hoza Bernal's place," wherever and whatever that may be; nor can authority from defendant to sell Jose Bernal's place be inferred from the letter, since such an inference involves the legal absurdity that defendant authorized and employed plaintiff to sell Bernal's property. The only object of the letter, to be inferred from its language, was to hurry a sale of the "29½" acre place and the "Ratke place," from which the only legitimate inference is that defendant was interested in the sale of those, and understood that plaintiff had authority to sell them; nothing more. But from the merely incidental reference to "Hoza [Jose] Bernal's place" it cannot be inferred that defendant was interested in or had authorized the sale of that place. The language of the letter is perfectly consistent with a total want of the authority and employment alleged in the complaint. Besides, the letter contains no description of "Hoza Bernal's place," even by name, by which it could have been identified as the land described in the complaint as "certain real property situate in the said county of Alameda, (generally known as the 'Jose Reyes Bernal Rancho,')" without proving at least that Jose Bernal owned only one place, that this one place was situate in the county of Alameda, and was generally known as the "Jose Reyes Bernal Rancho." The evi-

dence on the part of plaintiff to identify "Hoza [Jose] Bernal's place" as the real estate described in the complaint was a failure. The plaintiff himself testified: "The land I have been testifying about is known as the 'Jose Reyes Bernal Rancho.' Jose Reyes Bernal had other tracts of land in this immediate neighborhood. I don't know whether this land is a portion of Augustine Bernal's ranch or not. I knew Bernal had other tracts of land in Alameda county. I don't know that they were all spoken of generally as the 'Jose Reyes Bernal Rancho,' 'Bernal Land,' or 'Bernal's Place.'" He lived in this place, and this place was known by that name. Always spoken to me that way by Rose and other people. I have learned since that he did have other places. I did not know it at that time. I know this was called the 'Jose Bernal Place,' because this was his place of residence. When you spoke of it that way, everybody knew what you meant. It was the largest tract he had. I have heard this place called the 'Jose Reyes Bernal Rancho' by different parties for a good while. Mr. Rose called it by that name. At that time Jose Bernal resided on the place." This testimony tends only to apply the description in the complaint to a particular one of Jose Bernal's several tracts, but has not the slightest tendency to remove the ambiguity of the letter. It still remains wholly uncertain which one of Jose Bernal's tracts was intended by the expression "Hoza Bernal's place;" and what the parties intended by that expression could not have been proved directly by parol evidence, but only indirectly by evidence of such extraneous facts as would remove the uncertainty and ambiguity as above indicated. *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. Rep. 386; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. Rep. 179. For the error of admitting in evidence the letter of the defendant I think the judgment and order should be reversed, and the cause remanded.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

(99 Cal. 210)

KELLETT v. IDA CLAYTON & G. W. WAGON-ROAD CO. et al. (No. 14,143.)
(Supreme Court of California. Aug. 10, 1893.)

EASEMENT—WHAT CONSTITUTES—EXEMPTION FROM TOLLS—INJUNCTION—WHEN GRANTED—ADEQUATE REMEDY AT LAW.

1. An agreement by a turnpike company to give the owner of a ranch the right to use the road free of toll for all the purposes of the ranch, in consideration of his giving the company a right of way over the ranch, does not give the ranch owner an easement in the road.

2. One claiming exemption from the payment of tolls on a turnpike road is not entitled to an injunction to restrain interference by the turnpike company with his use of the road,

¹Civil Code, § 1624, provides as follows: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent: * * * (6) An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."

when such interference consists merely in demanding payment of the regular tolls; since, for such wrong, he has a sufficient remedy by an action for damages.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

Injunction by Samuel Kellett against the Ida Clayton & Great Western Wagon-Road Company and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

Stanly, Stoney & Hayes, for appellants. W. H. Barrows and J. F. Wendell, for respondent.

TEMPLE, C. This appeal is from a judgment and order refusing a new trial. The action was brought to obtain an injunction perpetually enjoining and restraining defendants from asking, demanding, or collecting any toll for or on account of the use of the toll road of the corporate defendant as a highway, or in any way interfering with such use either by the plaintiff, his grantees, or by his or their agents, tenants, or employees, or any other person using the road for the purposes or business of plaintiff's ranch, and for \$100 damages. Plaintiff avers that he is the owner of the Habishaw ranch, in Sonoma county, which land in 1874 was owned by one Habishaw. That in November of that year the corporation defendant entered into an agreement with Habishaw, whereby Habishaw agreed to grant it a right of way over said ranch for its toll road, in consideration of a perpetual right to use said road free of toll as a highway for all purposes of said ranch; and said defendant agreed with Habishaw, as the owner of said ranch, that it would allow him, his grantees and all of his or their agents, tenants, and employees, and all other persons engaged in any business connected with said ranch, without interruption, to use said road as a highway for all purposes and business connected with said ranch for all time without payment of toll. In pursuance of the agreement, Habishaw executed a deed which he believed conveyed to the corporation such right of way. That the corporation accepted the deed, took possession of the right of way, and has ever since used and enjoyed the same. That said Habishaw and his tenants, servants, etc., used the road free of toll. Plaintiff purchased the land from Habishaw in 1877, having, before he completed his purchase, inquired of the corporate defendant whether such agreement and right existed in Habishaw, and whether, if he purchased the land, such right and privilege would pass to him as appurtenant to the land. That said defendant, after full knowledge of plaintiff's intended purchase and his reasons for making the inquiry, and that he would not complete the purchase unless such right existed and would pass to him as appurtenant to the land, af-

firmed that such right existed, and would pass with the land. That he thereupon completed the purchase, paying a large consideration for the land. Plaintiff claims that the alleged right to use the road free of toll is an easement in defendant's road, and that it is appurtenant to the land. Appellants contend that the alleged facts do not show that plaintiff is entitled to an injunction, and, as his claim for damage is less than \$300, the superior court had no jurisdiction.

1. The first question is, is plaintiff's alleged right an easement? for, if it is not, the court had no jurisdiction to issue the injunction on that ground. In Washburn on Easements (page 3) it is said: "The essential qualities of easements are these: (1) They are incorporeal. (2) They are imposed on corporeal property, and not upon the owner thereof. (3) They convey no right to a participation in the profits arising from such property. (4) They are imposed for the benefit of corporeal property. And (5) there must be two distinct tenements,—the dominant, to which the right belongs, and the servient, upon which the obligation rests." The defendant corporation had only an easement in the road. The right to take toll is called an "easement." Civil Code, § 802. In Wood v. Turnpike Co., 24 Cal. 475, it was said: "The road of the turnpike company is not the private property of the company, but belongs to the public, and all the interest the company has in it is the right and power to collect tolls on the line of the road as a compensation for building it. Every traveler has the same right to use the road of a turnpike company upon paying tolls established by law that he has to use any other public highway." See, also, Pol. Code, §§ 2619, 2799, 2815, 2743, 2756, 2827, 2800; Civil Code, § 1001; People v. Davidson, 79 Cal. 166, 21 Pac. Rep. 538; Blood v. Woods, 95 Cal. 78, 30 Pac. Rep. 129. The right of plaintiff, therefore, to exemption from paying toll, is not an easement. It is not a right imposed upon corporeal property. There is no servient estate. It does not confer upon plaintiff the right to use the road. That right he always had as one of the public. It was simply an agreement made by the corporation which had the right to the tolls that he and his grantees should be exempt from payment while enjoying this common right.

2. Is the plaintiff entitled to an injunction on the ground that the remedy for the breach of his contract by way of damages is inadequate, and will entail a multiplicity of suits? I think not. The injury is not irreparable. Plaintiff is not denied the use of the road. He is only required to pay toll. His damage is easily ascertained. No disposition has been manifested on the part of the defendants to vex or annoy plaintiff. The dispute seems to be an honest difference of opinion as to the respective rights of the parties. We are not warranted

in presuming that, after an adjudication at law, defendant would still insist upon its claim if the decision were adverse to it. After such decision the matter will not again be open to litigation. The presumption is that an action at law would be final, and prevent further dispute. I think, therefore, conceding that plaintiff has acquired the right he claims, this action cannot be maintained, and that the judgment and order should be reversed, and the cause remanded, with direction to dismiss the action.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded, with direction to dismiss the action.

99 Cal. 173

FORNI v. YOELL et al. (No. 14,959.)

(Supreme Court of California. Aug. 10, 1893.)

UNDERTAKING ON APPEAL—WAIVER BY STIPULATION—NEW TRIAL—NOTICE OF APPLICATION—WHEN TO BE GIVEN.

1. Where it is expressly stipulated that "the appellant has in due time given and filed a good and sufficient undertaking on appeal," the respondent cannot have the appeal from an order denying a new trial dismissed on the ground that no undertaking was filed.

2. Where defendants give notice of a motion to dismiss the action on the ground that plaintiff neglected for six months to have judgment entered on the court's findings of fact and conclusions of law in his favor, file the notice among the papers in the cause, and prosecute their motion to a decision, they will be held to have waived, as of the date of such notice to dismiss, the "notice of the decision of the court," within 10 days of which a motion for a new trial must be given, and the 10 days begin to run from the date of such motion.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; Francis E. Spencer, Judge.

Action by A. Forni against George M. Yoell and Jesus Lopez. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Wm. L. Gill, for appellants. F. B. Laine and Jackson Hatch, for respondent.

SEARLS, C. This is an action of ejectment. Plaintiff had judgment, from which, and from an order denying a new trial, defendants appeal. Respondent objects to the appeal from the order denying a new trial, and moves to dismiss the same upon the ground that no undertaking was filed. This motion would be unanswerable, under the rule laid down in *Paving Co. v. Bolton*, 89 Cal. 154, 26 Pac. Rep. 650; *Perkins v. Cooper*, 87 Cal. 244, 25 Pac. Rep. 411; *Crew v. Diller*, 86 Cal. 554, 25 Pac. Rep. 66; and other cases of like import,—but for one thing, and that is that counsel for respondent and appellants stipulated in due form as follows: "And it is stipulated and agreed that the

appellant has in due time given and filed a good and sufficient undertaking on appeal in said cause." Under such a stipulation, we must suppose either that a good and sufficient undertaking was filed, or that the filing thereof was waived, under section 940, Code Civil Proc. *Bonds v. Hickman*, 29 Cal. 461; *Carrey v. Brown*, 58 Cal. 185. The motion to dismiss for this cause should not prevail.

There is another and a fatal objection to the appeal from the order denying a new trial. It is that the notice of the motion for a new trial was not given within 10 days after notice of the decision of the court. The statement shows that the cause was tried by the court; that on the 27th day of February, 1890, "the court filed its findings of fact and conclusions of law, in writing, ordering judgment to be entered in favor of the plaintiff, and against the defendant, for the relief prayed for in the complaint." The judgment was not entered on the findings and order until April 6, 1891. On the 16th day of March, 1891, the defendants, by their attorney, gave notice of a motion to dismiss the action, upon the ground that "the findings and decision of the court upon the final submission of this action were filed February 27, 1890, and the party plaintiff thereby entitled to judgment has ever since neglected to demand and have the same entered for more than six months since the filing of said findings and decision." The motion was noticed for hearing March 23, 1891. Service was made upon the attorney for plaintiff March 16, 1891, and the notice filed on the same day. The motion to dismiss was argued and denied by the court March 30, 1891. It will be observed that if the notice of March 16, 1891, is deemed sufficient evidence of notice of the filing of the decision, the notice of intention to move for a new trial, given more than 10 days thereafter, to wit, on April 6th, came too late, and defendants' right to move was lost. Counsel for plaintiff objected to the settlement of the statement upon the grounds above set forth, and in support of their objection offered the records, files, notice, etc., establishing the foregoing facts. Hon. Francis E. Spencer, before whom the proceedings to settle the statement were being had, declined to rule upon the objection upon the ground that, having ceased to be a superior judge, he had no power to do so; and he thereupon ordered the facts incorporated in the statement, and they were so incorporated, settled, and certified. Plaintiff's counsel excepted to the refusal. The statute, section 659, Code Civil Proc., provides that "the party intending to move for a new trial must within ten days after * * * notice of the decision * * * if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention," etc.

The question here is, did the appellants either have or waive the notice of decision

more than 10 days before giving their notice of intention to move for a new trial? The strongest case in favor of appellants, which I have found, is that of *Blagi v. Howes*, 66 Cal. 469, 6 Pac. Rep. 100. In that case, defendant's attorney was present in court when the decision was rendered, and asked for and obtained an order from the court staying proceedings on the judgment for 20 days, and the court held that he was not bound thereby, but had a right to wait for a notice in writing. The decision proceeds upon the ground that a written notice is more definite and certain, and tends to prevent controversies, which under any other construction would be likely to arise, "and which all accords, in our opinion, with the intention of those enacting the statute." In *Barron v. Deleval*, 58 Cal. 95, the defendant's attorney was present in court when his demurrer to the complaint was overruled, and thereupon asked and obtained leave to file an answer within five days. His answer not having been filed, default was entered. His contention was that, not having been served with written notice of the decision on the demurrer, the time did not run against him, and based his contention upon section 476, Code Civil Proc., which provides that "when a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order." The court held the notice sufficient, and said: "What purpose would a written notice of a fact of which the attorney had direct and positive knowledge have subserved? Would it not have been a vain and idle ceremony to have given him a written notice, under the circumstances discussed in this case? And not only did the attorney have actual knowledge of the fact that his demurrer was overruled, but he acted upon such knowledge, by asking and obtaining leave of court to file his answer within five days. To hold that the party and his attorney were not bound by this proceeding had in open court would be trifling with justice, and also subversive of sound principles of law and morals." There is no doubt but that where, under the various provisions of our Code, notice of a decision is required to be given, written notice is usually intended. Section 1010. The principle involved in nearly all the cases, whether relating to the time of filing cost bills, amendments to pleadings, the time within which to plead, to move for new trials, and to perform other acts where time is given after notice of the decision, is substantially the same; and it is believed that the seeming discrepancy between a few of the cases is to be found in the fact of confounding the question of what is a sufficient service of notice with the very distinct one of a waiver of notice, and what amounts to such waiver. "Any one may waive the advantage of a law intended solely for his bene-

fit. But a law established for a public reason cannot be contravened by a private agreement." Civil Code, § 3513. The evidence of a waiver which deprives a party of a positive right granted him by law should be of such positive and conclusive character as to leave no rational doubt; but where, as in the present instance, it is furnished by the party himself, has by him been placed upon the files of the court, and made the basis upon which to predicate an application to the court for relief, which could only be granted upon the theory that the given fact existed, (viz. that the findings and decision were made and filed,) there is nothing left to doubt or uncertainty. In such a case there is no room for suggesting that the party may not have comprehended the information which he received, no room for a discussion of the really important question as to whether knowledge is, and should in all cases be treated as, notice, and, if so, as to the extent of the knowledge which constitutes notice. In *Waddingham v. Tubbs*, 95 Cal. 249, 30 Pac. Rep. 527, it was held that a notice by the plaintiff, in whose favor the judgment had been rendered, of his intention to move for a new trial, and to "set aside and vacate the decision and judgment heretofore rendered and entered herein," was a sufficient notice in writing that a decision had been rendered therein to conclude the defendant, who also gave a like notice of intention to move for a new trial, but not within 10 days after receiving plaintiff's notice. In *People v. Center*, (Cal.) 5 Pac. Rep. 263, it was held that, by taking an appeal from the judgment without waiting for notice of decision, the losing party waived such notice, and that a notice of intention to move for a new trial, given more than 10 days thereafter, came too late. I am of opinion that when, on the 16th day of March, 1891, defendants gave notice of a motion to dismiss the action upon the ground that the "findings and decision upon the final submission of this action were filed February 27, 1890, and the party plaintiff thereby entitled to judgment," etc., filed the same among the papers in the cause, and prosecuted their motion to a decision in the court, they must be held to have waived the notice of decision provided for in section 659 of the Code of Civil Procedure, as of the date of such notice to dismiss, to wit, March 16, 1891; and as the notice of intention to move for a new trial was not served and filed until April 6, 1891, more than 10 days thereafter, and as no extension of time was had, their notice came too late. *Association v. Porter*, 58 Cal. 81; *Barron v. Deleval*, Id. 95; *Kelleher v. Creclat*, 89 Cal. 38, 26 Pac. Rep. 619; *Wall v. Heald*, 95 Cal. 364, 30 Pac. Rep. 551; *Waddingham v. Tubbs*, 95 Cal. 249, 30 Pac. Rep. 527; *Dow v. Ross*, 90 Cal. 562, 27 Pac. Rep. 409; *Gray v. Winder*, 77 Cal. 525, 20 Pac. Rep. 47; *Mullally v. Society*, 69 Cal. 559, 11

Pac. Rep. 215; O'Neill v. Donahue, 57 Cal. 226; Cottle v. Leitch, 43 Cal. 322.

As to the appeal from the judgment, section 950 of the Code of Civil Procedure provides, among other things, that "any statement used on motion for new trial * * * may be used on appeal from a final judgment," etc. Conceding, without deciding, that the statement in this case upon a motion for a new trial, which came too late, can be thus used, still the exception to the decision, "on the ground that it is not supported by the evidence," cannot be reviewed on this appeal, because such appeal was not taken within 60 days after the rendition of the judgment, as provided in subdivision 1 of section 939 of the Code of Civil Procedure. The judgment was entered April 6, 1891, and the appeal perfected December 31, 1891, a period of more than eight months after the rendition of the judgment. *Handley v. Figg*, 58 Cal. 578; *Bettis v. Townsend*, 61 Cal. 333.

The findings support the judgment. There was no error on the part of the court in refusing to strike out testimony given by Brassy, Sauawain, Farin, and Bury. The motion for a nonsuit was properly refused. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, judgment and order affirmed.

99 Cal. 194

JORDAN et al. v. GROVER et al. (No. 14,385.)

(Supreme Court of California. Aug. 10, 1893.)

NEGOTIABLE INSTRUMENTS—BONA FIDES OF HOLDER—BURDEN OF PROOF—EVIDENCE.

1. In an action by the indorsee of a note procured by fraud, the burden is on plaintiff to show that he is an innocent holder for value.

2. On an issue as to whether plaintiff is an innocent holder of a note which was procured by fraud, the jury may properly consider the fact that he purchased it for half of its face value, with knowledge, from inquiries made, of the maker's solvency, but without inquiry as to the consideration of the note, or explanation of the inadequacy of price.

Department 2. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Action by P. H. Jordan and William P. Veuve against D. W. Grover and Edward H. Flemming. The action was dismissed as to said Flemming. From a judgment for defendant Grover, and an order denying a new trial, plaintiffs appeal. Affirmed.

Frank D. Ryan, (Spalsbury & Burke, of counsel,) for appellants. George E. Lawrence, for respondent.

FITZGERALD, J. This is an action on a promissory note for \$2,000, made by the

defendant Grover to his codefendant, Edward H. Flemming, or order, and by the latter indorsed and delivered to the plaintiffs before maturity. The answer denies "that there was any consideration for the note," and avers fraud in the procurement thereof by the payee from the maker, and notice by plaintiffs prior to the purchase. The action was dismissed by plaintiffs as to the defendant Flemming, and, upon a trial of the case by a jury, defendant Grover had verdict and judgment. Plaintiffs appeal from the judgment and the order denying their motion for a new trial.

As to the question of fraud in the procurement of the note by Flemming from Grover, that is a fact which must be assumed on this appeal, for the reason that the evidence upon this issue is sufficient to justify the verdict; and as proof of this fact would have constituted a valid defense against Flemming, had he sought to recover on the note, it would, for the same reason, be equally as good a defense against the plaintiffs, whose position was no better than the payee, unless they were bona fide holders; and the rule is well settled by the weight of modern authorities, both in this country and England, that, where fraud or illegality in the inception of the note is shown by the maker, the burden of proof is then cast upon the indorsee to show that he is an innocent holder. *Graham v. Larimer*, 83 Cal. 173, 23 Pac. Rep. 286; *Stewart v. Lansing*, 104 U. S. 505; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. Rep. 801; *Smith v. Livingston*, 111 Mass. 342; *Kellogg v. Curtis*, 69 Me. 212. The reasons generally given for this rule is "that a presumption exists that a fraudulent payee would be likely to shield himself by placing the note in the hands of another person to sue upon it, and such presumption operates against the holder." The plaintiffs must therefore, in order to sustain the burden thus cast upon them, show that they purchased the note before maturity in good faith, for value, in the usual course of business, and "under circumstances which create no presumptions that they knew the facts which impeach its validity." 1 Daniel, Neg. Inst. (4th Ed.) § 815.

It appears that the note was purchased by plaintiffs before maturity for one-half its face value, with knowledge, upon inquiry previously made, of the maker's solvency, but without inquiry as to the consideration thereof, nor was there any reason or explanation given for the purchase of the note at a price so grossly inadequate to its actual value. These circumstances were of themselves sufficient to arouse the suspicions of an ordinarily prudent man, and put him on inquiry as to the consideration; therefore material for the consideration of the jury in determining whether the purchase was made by plaintiffs in good faith. They were therefore properly considered

by the jury in connection with the testimony offered by plaintiffs upon this issue in determining whether they were innocent holders; and, as the jury found therefrom that they were not such holders, it follows that the verdict rendered thereon cannot, under the well-established rule of this court, be disturbed. The instructions and charge of the court state the law correctly and with singular clearness, and, as the alleged errors of law occurring at the trial are either not well founded or immaterial, the judgment and order should be affirmed; and it is so ordered.

We concur: DE HAVEN, J.; McFARLAND, J.

(99 Cal. 202)

In re ROBB. (No. 15,096.)

(Supreme Court of California. Aug. 10, 1893.)

EXECUTION — EXEMPTIONS — NECESSARY TOOL OF MECHANIC — WHAT CONSTITUTES — LATHE — USE IN MANUFACTURING.

1. A turning lathe, which is easily turned by one man, and such as is ordinarily used by mechanics, is exempt from execution, to a mechanic, under Code Civil Proc. § 690, subd. 4, exempting "the tools or implements of a mechanic necessary to carry on his trade."

2. Evidence that a journeyman machinist, when working for others, is not usually required to provide a lathe, is insufficient to show that it is not exempt, since the law does not require that a mechanic shall be employed as a journeyman, to entitle him to the exemption.

3. The fact that such mechanic used the lathe to manufacture machinery does not make him a manufacturer, instead of a mechanic, so as to render it liable to execution, where it appears that he did not employ others to use such tool in manufacturing.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Petition by J. A. Robb, an insolvent debtor, asking to have set aside, as exempt to him from execution, a lathe, and certain appliances used in running it. From an order granting the petition, the assignee in insolvency appeals. Affirmed.

H. H. Lowenthal, for appellant. Jas. P. Langhorne, for respondent.

TEMPLE, C. This is an appeal by an assignee in insolvency from an order made, on the petition of the insolvent, setting aside, as exempt from execution, a lathe, and certain appliances used in running the lathe. The insolvent is a mechanic and machinist.

Section 690, Code Civil Proc., provides: "The following property is exempt from execution: * * * (4) The tools or implements of a mechanic necessary to carry on his trade," etc. It is contended that a lathe is not a tool or implement required by a mechanic, and evidence was given to the effect that a journeyman machinist, when working for others, is not usually required

to provide an implement of that character. This evidence tended simply to show that such a tool or implement is not necessary for a mechanic who is a machinist, while employed as a journeyman; but the law does not require that a mechanic shall be employed as a journeyman, in order to be entitled to the exemption. Nor is the phrase, "necessary to carry on his trade," used in such strict sense that, because some journeyman machinist can get employment with a manufacturer who will supply the implement, therefore it is not necessary to the trade, within the meaning of the statute. The implement in question, according to the testimony of the claimant, was necessary to carry on his business as a mechanic and machinist, and is a tool used for shaping wood or metal, cost about \$250, was run by man power,—one man easily turning it,—and was a tool ordinarily and necessarily used by mechanics and machinists in their trade.

Appellant also contends that the insolvent was a manufacturer, and not a mechanic. The insolvent testified that he used the lathe to manufacture machinery. What machinery he manufactured, or upon what terms, is not shown. He did not employ others to use the tool or implement in manufacturing. It was used by himself. Many mechanics who would be clearly entitled to the exemption are manufacturers; tailors, for instance. Suppose he was doing piece work for some establishment. In such case, I see no reason why he would not be as clearly a mechanic as a journeyman who worked in the establishment, and had such tools supplied by the manufacturer. I think the order should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(4 Cal. Unrep. 113)

PEOPLE v. GALLAGHER. (No. 20,972.)¹

(Supreme Court of California. Aug. 16, 1893.)

EMBEZZLEMENT — DRAWING FUNDS FROM BANK — AIDING AND ABETTING — CROSS-EXAMINING DEFENDANT.

1. The president of a corporation, to pay an indebtedness of the corporation, the exact amount of which he did not know, signed, as president, a blank check, payable to the secretary, which was given to him, with directions to fill in the amount, and pay the debt. He filled it in for a larger amount, and on having it paid to him appropriated the entire sum. Held, that the money paid him was the money of the corporation, and not that of the bank.

2. It being within the course of the secretary's employment to draw, on like checks, the money of the corporation from the bank, and to pay its debts, he is estopped to claim that the money did not come into his control by virtue of his employment, because he filled in the check for a larger amount than he was authorized.

3. By previous appointment defendant went

¹ Rehearing granted.

to a saloon near a bank, while the secretary drew the funds. They immediately went to another city, where defendant registered under a fictitious name, procured currency for part of the coin, took most of the funds, in a valise, to a railroad station, where he obtained two tickets, paying therefor from the appropriated funds. Defendant carried the funds part of the way, and when arrested had some of them on his person. *Held*, that the evidence warranted a conviction of defendant for aiding and abetting in the embezzlement.

4. Pen. Code, § 688, provides that in a criminal action one cannot be compelled to testify against himself, and section 1323 provides that, if a defendant in a criminal action offer himself as a witness, he may be cross-examined as to matters about which he was examined in chief. *Held* that, where defendant had merely denied that he had advised another to draw money from a bank for the purpose of embezzling it, and had denied all knowledge of intention of the other so to do, it was error on cross-examination to allow him to be asked questions relating to facts transpiring after the money was drawn.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

B. F. Gallagher was convicted of embezzlement, and appeals. Reversed.

W. F. Aram, for appellant. Atty. Gen. Hart and Geo. W. Reed, Dist. Atty., for the People.

SEARLS, C. Defendant was convicted of the crime of embezzlement, and appeals from the judgment and from an order denying a motion for a new trial.

The indictment charges that at the county of Alameda one Richard C. Beggs, a clerk, agent, and servant of the "Oakland Consolidated Street-Railway Company," (a corporation,) embezzled \$8,500, the personal property of said company, and that the defendant, B. F. Gallagher, did aid and abet said Beggs in such embezzlement.

The first point made by appellant is that Beggs did not commit the crime of embezzlement, as charged in the information. "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. Section 508 of the Penal Code is in the following language: "Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement." The crime of embezzlement is a statutory offense, and was unknown to the common law. It is said that in the common-law definition of larceny there were two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps was caused by the rule that to sustain a charge of larceny it was necessary that the stolen goods should have been at some time in the prosecutor's possession. The second was in the assumption that when possession of goods was

acquired by a bailee no subsequent fraudulent conversion constituted larceny while the bailment lasted, save in a few excepted cases. It was to meet these defects in the common law that statutes have been passed in most, if not all, of the states of our Union, in some of which an offense is created known as embezzlement larceny, and in others, as in our own statute, designating the offense as embezzlement. The case at bar relates to the remedy for the first defect mentioned in the common law, viz. a case in which the personal property alleged to have been fraudulently converted had not been in the prosecutor's possession.

These preliminary remarks with a view to the better understanding of the initial points in the case, and we proceed to a review of the contention of appellant, the underlying theory of which is that the money alleged to have been embezzled did not come into the control or care of Beggs by virtue of his employment as a clerk, agent, or servant. The uncontradicted evidence was to the effect that the Oakland Consolidated Street-Railway Company (a corporation) was doing business at Oakland, in the county of Alameda, was indebted to two companies in several sums of money aggregating say \$2,500; that Richard C. Beggs was secretary of the corporation, and as such secretary his duties were, among other things, to keep the books of the company, to receive all the coin due the company, and deposit it (except small sums, kept to pay off discharged workmen) in the First National Bank of the city of Oakland; to draw and sign checks as secretary, which checks were also to be signed by the president or vice president; that the corporation had in the bank aforesaid some \$8,000 to \$10,000 and credit for an overdraft of \$10,000; that on or about June 3, 1892, J. E. McElrath, vice president of the corporation, for the purpose of paying off the indebtedness of the corporation to the two companies aforesaid, and not knowing the precise amount thereof, signed and delivered to Beggs two checks, payable to his (Beggs') order, on said bank, leaving the amount to be paid thereon and on each of them in blank. The evidence is contradictory as to whether Beggs was to indorse the checks and deliver them to the creditors or to draw the money thereon from the bank and pay them. As there was evidence to that effect, we must, in favor of the verdict, assume the latter theory to have met the approbation of the jury. On the 6th day of July, 1892, Beggs filled up the checks, one for \$4,000 and the other for \$4,519.20, signed them as secretary, drew the full amount thereof, aggregating \$8,519.20, from the First National Bank, converted \$1,300 thereof into currency, left \$2,500 with his wife, and fled with the residue to the northern part of the state, where he was arrested two or three days later, and thereupon confessed his guilt. The connection of defendant with the trans-

action is not here mentioned for the reason that the contention under this head relates only to the receipt of the money by Beggs in the course of his employment. The argument that the money received by Beggs was that of the bank, and not that of his corporate employers, cannot be maintained. The corporation had funds in the bank. The checks were duly signed by the authorized officer of the corporation, and countersigned by Beggs, its secretary. Under such circumstances, it was not only the privilege, but the duty, of the bank to pay the checks to Beggs, who was the payee and holder thereof, upon presentation; and when paid the amount of payment was a proper charge against the corporation. This being so, the money, when received by Beggs, was as much the property of the corporation as though collected by the former for it upon a lawful account against any other debtor of the corporation.

It is further urged that Beggs had no authority to draw the money from the bank, and hence it did not "come into his control or care by virtue of his employment," within the purview of the statute. The earlier English authorities are not uniform on this proposition. In *Rex v. Snowley*, 4 Car. & P. 390, the prisoner was hired to perform certain services, and was authorized to receive not less than 20 shillings in each case. In a single instance he charged only 6 shillings, which he received, and did not account for. Held, that there was no embezzlement of the 6 shillings, inasmuch as it was his duty to take no sum less than 20 shillings, and therefore the 6 shillings were not received by the prisoner in the course of his employment. There are other English cases of like import, while perhaps an equal number of cases in the same courts hold a contrary doctrine. Bishop, in his work on Criminal Law, in commenting upon *Rex v. Snowley*, uses the following language: "That in reason, whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel, known throughout the entire civil department of our jurisdiction, apply in the criminal? If it is applied here, then it settles the question; for by it, when a man has received a thing from another under a claim of agency, he cannot turn round and tell the principal asking for the thing, 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.'" Bish. Crim. Law, (3d Ed.) § 367. In the seventh edition of the same work, like language, with some additions, is used at section 364 of volume 2. In *Ex parte Hedley*, 31 Cal. 109,—a case involving the same question, and in many respects similar to the one at bar,—this court quoted with marked approval the foregoing extract from Bishop, and in its opinion regarded as conclusive of the

question here held that, if an agent obtains the money of his principal in the capacity of agent, but in a manner not authorized, and converts the same to his own use, with intent, etc., it is money received "in the course of his employment" as agent. The evidence shows that it was within the course of the employment of Beggs to draw, upon like checks with those in question, the money of the corporation from the bank, and to pay its debts. In the present instance he held the two checks with authority to fill them up in amounts aggregating about \$2,500, and, according to his evidence, to draw the money, and pay the creditors of the corporation, or, according to the evidence of the vice president, to indorse and deliver them to the creditors. It was as the secretary, and in the course of his employment as such, that he received the checks and filled them up, but in a manner different from his instructions, in that he filled them for larger amounts than he was authorized. Under such circumstances, he comes within the rule laid down by Bishop, *supra*, as interpreted in *Ex parte Hedley*, *supra*.

Appellant further insists that there is no evidence whatever that defendant aided and abetted in the appropriation and conversion of the money. In the light of the testimony this claim seems somewhat extraordinary. There was testimony tending to show that by previous appointment defendant repaired to a saloon in the vicinity of the bank while Beggs procured the money; that they immediately met, and came to San Francisco with the funds, procured a private room at the Lick House, where defendant registered under a fictitious name; that he procured currency for \$1,300 of the coin, took all of the funds except \$2,500, in a valise, to the Oakland station, procured tickets for himself and Beggs to Sacramento, paying therefor from the appropriated funds, had access to and carried the money at least a portion of the time, and when arrested had \$50 or \$60 of the money on his person, coupled with the fact that they did not pursue the usual course of travelers in procuring through tickets to their destination, but only for short distances, and in various ways acted unlike men with money in hand, honestly acquired, intent upon a journey, taken in connection with the statements of defendant when arrested and subsequently, lead irresistibly to the conclusion that the two men were particeps criminis. Waiving therefore, the evidence that it was the defendant who previous to the commission of the crime, had "advised and encouraged" it, and we think the evidence against defendant was ample to warrant a conviction. The very fact that the embezzlement was determined upon before the money was drawn from the bank detracts nothing from the guilt of defendant as an aider and abettor under such circumstances. Mere intention to

commit a crime does not constitute an offense. Had Beggs, after procuring the money from the bank, honestly appropriated it to the legitimate uses of his employer, then, although the amount was in excess of the sum he was authorized to draw, his offense would have been incomplete. It was the subsequent wrongful appropriation of the funds that constituted the crime, and in this the defendant participated under circumstances clearly indicating guilty knowledge and criminal intent. He was not simply an accessory after the fact, but a coworker in the performance of the acts constituting the *corpus delicti*.

Defendant, Gallagher, was a witness in his own behalf at the trial, and upon cross-examination certain questions were propounded by the court, against the objection of defendant's counsel, and this action is assigned as error. Beggs was a witness for the prosecution, and had testified at length in the case, and as to all, or nearly all, of the facts therein. Among other things, he related that after he received the two checks defendant saw them, and advised filling them up, drawing the money, and fleeing to Seattle, or some foreign port; that they met on Saturday, June 4th, again on Sunday, and talked the matter over, and finally agreed that on Monday, June 6th, at 12 o'clock, the witness was to draw the money, and defendant to wait outside until Beggs came out, and, if detained long, defendant was to go to a certain saloon across the street, and wait for him; that he drew the money, and met the defendant at the saloon. Beggs further detailed their acts from thence until arrested. As a witness in his own behalf, defendant denied that on Saturday next before June 6th he saw the checks, or that he ever saw them prior to the trial; denied that he ever advised Beggs to take the funds of the bank or of the corporation, or to draw the funds, or that he suggested that they would or could go to Canada or elsewhere and divide the money. He admitted they met on Sunday, (June 5th,) and that Beggs made an appointment to meet him at the saloon the next day, but declared there was no particular purpose for which they were to meet, and averred that nothing was said about drawing money from the bank. Defendant was then asked if he and Beggs did go to San Francisco and take the \$8,500, etc.?

(2) If he, in San Francisco, assisted Beggs in changing the money to the extent of \$1,300 into currency? (3) If he took \$6,000 of the money back to Sixteenth street, Oakland? These questions were each of them objected to upon the ground of not being proper cross-examination, not having reference to any matter testified to by the witness in his examination in chief, etc. Upon the objections being overruled, and exceptions duly taken, the witness declined to answer, upon the ground that such answer would

tend to criminate him, whereupon the court compelled the witness to answer. He answered that he did go with Beggs and take the money to San Francisco; that he did exchange \$1,300 of the coin into currency; and did take \$6,000 of the money to Oakland, etc. "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." Pen. Code, § 1823. "No person can be compelled, in a criminal action, to be a witness against himself." Pen. Code, § 688. In *People v. O'Brien*, 66 Cal. 602, 6 Pac. Rep. 695, it was held that where the accused offers himself as a witness, and testifies to particular facts only, he cannot be cross-examined generally as a witness in the case. "He may be cross-examined * * * as to all matters about which he was examined in chief." By this expression it is understood that the cross-examination must be confined strictly, not to the precise questions put to the witness in chief, but to the subject-matter concerning which he has testified. In other words, it must be a legitimate cross-examination, within the rules of evidence, and with no discretion on the part of the court to enlarge the field of inquiry,—an examination the trend of which must be in the direction of disproving, explaining, or enlarging the proofs upon the very subject concerning which he has spoken in his direct examination. Within this field he may be tested in like manner with other witnesses. But when, under the guise of discrediting the witness, he is questioned and compelled to testify upon branches of the case to which his direct testimony did not extend, and thus to become a witness against himself, the testimony is without the pale of cross-examination, and his constitutional and statutory rights are as clearly violated as though he had never consented to become a witness. Tested by this rule, it would seem the court below erred in compelling defendant to answer the questions to which objection was made. He had testified to the extent of denying that on or before June 6th he had advised Beggs to draw the money from the bank for the purpose of embezzling it, and denied all knowledge of the latter's intention so to do. The cross-examination extended to facts transpiring after the money was obtained, including its disposition, the flight of the parties, and other damaging facts; all of which was highly injurious to defendant. The following cases bear more or less directly upon the subject in hand: *People v. Sutton*, 73 Cal. 243, 15 Pac. Rep. 86; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. Rep. 396; *People v. Rozelle*, 78 Cal. 84, 20 Pac. Rep. 36; *People v. Cline*, 83 Cal. 374, 23 Pac. Rep. 391. See, also, *Rice*, *Ev.*, note to page 344, where

the whole subject is discussed, and cases cited. I find no other error in the proceedings worthy of note. For the error in admitting the evidence of defendant on cross-examination the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

4 Cal. Unrep. 95

SANBORN et al. v. CUNNINGHAM et al.
(No. 14,994.)

(Supreme Court of California. Aug. 15, 1893.)

PARTNERSHIP—PURCHASES BY PARTNER.

1. Plaintiffs, having taken a crop of barley under a mortgage of \$1,045, accepted the offer of C., one of defendants' firm, to take the crop, and pay them \$750 the following week. Soon after, plaintiffs received a check for \$500, drawn in favor of, and indorsed by, defendants. In a suit for the balance of the \$750, one of the plaintiffs testified that he told his partner to ship the barley to defendants; but it appeared that the warehouseman billed it to C., as he often did shipments from plaintiffs to defendants. Plaintiffs had charged defendants the \$750, and it appeared that the \$500 was the firm's money, and was charged to C. on their books. Defendants asserted that it was C.'s personal affair, and that he had bought the crop from the grower, who had directed him to pay plaintiffs the \$750 to release it. *Held*, that there was enough evidence to support a verdict against defendants for goods sold and delivered.

2. Plaintiff's testimony that, in answer to his inquiry at the bank for a check which he wished to use as evidence, the cashier told him that he did not think plaintiff could get it, was competent, and there was no need to call the cashier to prove that fact.

3. Defendants insisting that the transaction was the personal affair of one partner, a question by plaintiffs whether such transaction was in defendants' general line of business, was proper.

4. In an action for an agreed price, evidence of the value of the goods is irrelevant.

5. Misnomer of the mortgagor of chattels, (E. H. Wheeler for E. H. Walker,) in the body of the affidavit, is immaterial, where the mortgage purports to be made, and is signed, by E. H. Walker, as is the affidavit.

6. Plaintiff testified that he had written certain letters to defendants; that the postage was prepaid, and the letters put in the mail box at his store; that said box was emptied daily; that it was the business of W., an employee, to take the letters, and mail them in the post office. W. testified that he was such employee at the time in question; that it was his duty to take the mail to the office, and that he did so; that if any letter was addressed, and put in the box, he took and mailed it. *Held* sufficient proof of mailing to support secondary evidence of the contents of the letters.

7. An entry in plaintiffs' ledger, which the bookkeeper swears to be an original entry, if competent for nothing else, yet may be admitted to show with whom plaintiffs understood that they had dealt, and to whom they looked for payment.

8. It is within the court's discretion to allow the presence of the jury while counsel, in

the course of argument, reads from the books.

9. Under Code Civil Proc. § 475, providing that no judgment shall be reversed or affected by reason of errors and defects not going to the substantial rights, a verdict and judgment in the name of the original plaintiffs, partners, overlooking the death of one of these, and the substitution of his executors, may be corrected, and are not ground for reversal.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Action by Lucius Sanborn and William Vanderhurst, executors of the will of Charles Ford, deceased, A. A. Morey, and J. S. Menasco against J. F. Cunningham, James Dougherty, and Henry L. Middleton, partners trading as J. F. Cunningham & Co., for the balance of an account for goods sold and delivered. Judgment for plaintiffs. Defendants appeal. Affirmed and amended.

Spalsbury & Burke, for appellants. Julius Lee, for respondents.

HAYNES, C. This action was brought by Charles Ford, A. A. Morey, and J. S. Menasco, copartners in the name of Charles Ford & Co., against J. F. Cunningham, James Dougherty, and Henry L. Middleton, copartners in the name of J. F. Cunningham & Co., to recover \$406.08, balance of an account for goods, wares, and merchandise sold and delivered, alleging that the whole value of the goods sold was \$906.08, of which \$500 had been paid. The answer denied a sale and delivery to the defendants of goods, etc., of the aggregate value of \$906.08, or of any greater value than \$156.08, which last-named sum they admitted to be due and unpaid. Upon the first trial, plaintiffs had judgment, and upon appeal the judgment was reversed, and a new trial ordered. *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. Rep. 403. Afterwards, Charles Ford died, and Lucius Sanborn and William Vanderhurst, his executors, were substituted as parties plaintiff in his stead. The sum of \$156.08, admitted by defendants to be due, was for three lots of potatoes sold and delivered to them by Ford & Co. The remaining \$250 is part of the sum of \$750 agreed to be paid to Ford & Co. for a lot of barley, but whether the firm of J. F. Cunningham & Co., or J. F. Cunningham individually, is liable therefor, is the ultimate question. A jury trial was had, and resulted in a verdict against the defendants for the amount claimed.

The circumstances connected with the barley transaction are the following: E. H. Walker was indebted to Ford & Co. in the sum of \$1,045, and gave them a chattel mortgage upon his crop of barley, then growing, to secure said indebtedness. This barley, after it was harvested and threshed, was delivered to Ford & Co., and stored in a warehouse at Watsonville, in which town Ford & Co. conducted a mercantile business. The defendants, Cunningham & Co., were also merchants doing business at Felton, in

the same county. On September 8, 1884, after the barley had been delivered to Ford & Co., J. F. Cunningham came to the store of Ford & Co., and said to Mr. Menasco, of the last-named firm: "I will take that Walker lot of barley; you have it shipped up right away; and I will send you \$750 the following week,"—to which Mr. Menasco replied, "All right." Soon after this, Ford & Co. received a check or draft drawn by the Santa Clara Valley Mill & Lumber Company in favor of Cunningham & Co. on the First National Bank of San Jose for \$500, indorsed by Cunningham & Co., on account of the barley, leaving a balance of \$250 unpaid, which is the sum in controversy. Menasco testified that he instructed his partner Morey to have the barley shipped to Cunningham & Co., but it was billed by the warehouseman to Cunningham. Cunningham testified that in January, 1884, he bargained with Walker for his crop of barley, 50 acres at \$25 per acre; that Walker then owed him \$250, which was to be considered paid on the contract, and he was to pay the balance in money; that, in May, Walker said he wanted to reserve 10 acres, and the amount to be paid was reduced to \$1,000; that, a few weeks before the conversation with Menasco, Walker told him he had given a "crop mortgage" to Ford & Co., and that he should pay them \$750 on the barley. It further appears from the evidence that Ford & Co. charged the \$750 to Cunningham & Co.; that the \$500 remitted was the money of the last-named firm, and was charged to Cunningham. It also appeared that, for a year or more prior to the transaction relating to the barley, there had been more or less dealings between the two firms, and some if not all the shipments of potatoes making up the item of \$156.08 were shipped to Cunningham,—that is, the shipping bills named him as the consignee. Some correspondence, and other matters of evidence, will be noticed in another connection.

It was urged upon the motion for new trial, and is urged here, that the evidence is insufficient to justify the verdict, in that it does not show the transaction to have been with the defendants as a firm or copartnership, but that it was the individual transaction of Cunningham; that the facts do not show a sale by Ford & Co., but that Cunningham bought the barley from Walker. Whether there was or was not a contract between Cunningham and Walker for the purchase and sale of the barley, is immaterial. The barley was in possession of Ford & Co., and was delivered by them to defendants, or to Cunningham, upon the agreement that they should be paid \$750. Whether the defendants are liable, or whether Cunningham alone is liable, was submitted to the jury upon an instruction prepared by the defendants, which fairly presented the material questions of fact, and the jury found in favor of plaintiffs. The

evidence was conflicting, but is sufficient to support the verdict. A large number of errors of law occurring upon the trial are also specified and argued by appellants.

1. Menasco's statement that "Morey ordered it shipped to Cunningham & Co.," if erroneously permitted to remain, did not prejudice defendants, as Morey afterwards testified that he so ordered it. Besides it did not appear, at the time the motion to strike out was made, but that the witness had personal knowledge of the fact.

2. The refusal of the court to strike out of Menasco's testimony the statement of the bank cashier that "he did not think it possible for me to get it," referring to the \$500 check received by plaintiffs, was not error. The inquiry appears to have been made of the bank for the purpose of obtaining the original check as evidence. As the plaintiff had no right to make a personal search among the papers of the bank, the inquiry was proper, and it was not necessary to call the cashier to testify.

3. Whether the court erred in permitting the witness to testify to its contents is immaterial. There was no controversy between the parties as to its contents.

4. Defendants' objection to the following question put to plaintiffs' witness was properly overruled: "Question. Was this barley transaction with Cunningham & Co. in their general line of business?" The controversy was whether it was a transaction by defendants as copartners, or by Cunningham individually. If the defendants dealt in grain, or especially in barley, it would tend to show that it was a partnership transaction. These two firms had had transactions with each other, and, if the transaction was within their general line of business, plaintiffs had a right to assume that he was acting as the agent of his firm. He was at least the ostensible agent in all transactions within the scope of their ordinary business, and, if he did not intend his firm to be charged with the transaction, Cunningham should have disavowed his agency for the firm.

5. One of plaintiffs' witnesses was asked upon cross-examination, "What was the value of that barley?" Plaintiffs' objection was properly sustained. The agreement was to pay \$750 for "the Walker barley." Nothing was said as to the quantity or value. Defendants received all of it, and were bound to pay the agreed price, regardless of its value.

6. Defendants' objection to the introduction in evidence of the Walker crop mortgage was properly overruled. The special objection urged was that it was void as to creditors, of whom Cunningham was one, because it was not sworn to by Walker, the mortgagor. This objection is based upon the fact that in the body of the affidavit the name "E. H. Wheeler" is written, instead of "E. H. Walker," thus: "E. H.

Wheeler, the mortgagor in the foregoing mortgage named," etc. The mortgage purports to be made, and is signed, by Walker, and the affidavit is also signed by E. H. Walker. The error does not affect its validity.

7. The court overruled an objection made by defendants to oral evidence of the contents of certain written statements of accounts and letters which the witness stated had been addressed and mailed to defendants. Upon the former appeal, certain questions relating to the same statements of accounts and letters were considered. See *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. Rep. 403. It was there said: "The witness stated that he had no personal knowledge that the communications addressed to Cunningham & Co. were mailed, except that copies thereof appeared in plaintiffs' copy book, and that it was a general custom of his firm to place letters in a box in the store, from which they were taken to the office. No foundation, therefore, was laid for the introduction of the evidence. Assuming that secondary evidence could, under such circumstances, be introduced, the press copies were the best evidence, next to the originals themselves." For that, and another erroneous ruling, the judgment in favor of the plaintiffs was reversed, and a new trial ordered; and upon the second trial the same witness, after testifying as above in regard to writing the letters, and that the postage was prepaid, and the letters put in the mail box at the store, further testified: "This box was emptied daily. It was the business of Mr. White, then in our employ, to take these letters, and deposit them in the post office." Mr. White testified that he was employed by plaintiffs from 1883 to 1887; that during the fall of 1884 it was his duty to take the mail to the post office every night, and that he did so during September, October, November, and December, 1884; that if any letter was addressed, and put in the box at the store, during that time, he took it to the post office, and deposited it there in the United States mail box, and that he also did so during March and April, 1885. We think this sufficient proof of the fact of mailing. Indeed, it is all the proof such a fact is capable of, unless in exceptional cases. Demand was made by the defendants for the production of the original letters and statements, and, the same not being produced, the witness was permitted to read the copies of the letters from the letter-press book. The statements were not copied in the book. There was no error in permitting this secondary evidence to be given.

8. Plaintiffs were permitted to give oral evidence of the contents of a letter written by Cunningham & Co. to Ford & Co., September 25, 1884, over defendants' objection. The letter had been used on the former trial, but was mislaid or lost. The evidence accounting for its nonproduction

was not very satisfactory as to the efforts made to find and produce it. The letter was as follows: "We have not received bill of last oats or barley. Would you please send the same." Conceding, without deciding, that the court erred in receiving this evidence, the defendants were not prejudiced, as there was no controversy in regard to the contents of the letter, and the writer, Mr. Middleton, testified in regard to it, and fully explained it.

9. Objection was made to the introduction in evidence of the entry of the barley transaction in the ledger of Ford & Co. One of the objections urged here is that "the ledger is secondary evidence." Mr. Morey testified that he was the bookkeeper of Ford & Co.; that the entry in the ledger was an original entry; that it was not entered in a pass book or elsewhere, and then transferred to the ledger. It is also urged that the preliminary proof of the account books kept by Ford & Co. was not sufficient. The entry in the ledger, being original, was competent for one purpose, if no other, viz. it tended to show with whom Ford & Co. understood they made the transaction, and to whom they looked for payment. The question here presented is clearly distinguishable from that decided upon the former appeal. There defendants' books were offered to show the absence of an entry relating to the barley, and as such absence might have been from negligence, or an intention to improperly or fraudulently omit it, it was not only proper, but necessary, to prove, preliminarily, the correctness of the books; and, having so proved them, they were improperly excluded. Here, this entry, though in the ledger, was original, and, as to the fact of its existence, was affirmative evidence, and, besides, there was other testimony, though not as to the correctness of their books, yet which tended more directly to establish the correctness of this particular entry than the technical proof of the correctness of the books, insisted upon by appellants. The court did not err in receiving the evidence objected to.

10. Appellants further contend that the court erred in permitting respondents' counsel, during his closing argument to the jury, "to read to the court, in the presence of the jury," from one of the California Reports. The fact that a cause is being tried before a jury does not take away the right of a party to instruct the court upon the law of the case by proper argument, or the reading of authorities; and whether the jury shall be directed to retire during such reading is a question resting in the sound discretion of the trial court, and to be determined in view of the circumstances of the particular case. There is nothing in this record to indicate that the court did not properly exercise its discretion in ruling upon this objection of appellants.

11. Defendants' request to instruct the

jury, marked "2," was properly refused. If plaintiffs were entitled to judgment against the defendants, it was upon the promise to pay \$750 for the Walker barley, and not for the value of the barley, which may have been more or less than that sum.

12. Appellants' request No. 3 was also properly refused. Whether or not there was an agreement or understanding between Cunningham and Walker that Cunningham would pay \$1,000 for the barley could not affect defendants' liability. The barley was mortgaged to Ford & Co. as security for a prior indebtedness, and was in their possession. Defendants agreed to pay a certain sum to plaintiffs if they would ship the barley to them. Whether plaintiffs knew of the agreement between Walker and Cunningham, or what the defendants should do with or concerning the barley after it was delivered to them, was immaterial. They were not in any manner affected by such prior agreement. The defense does not show that Ford & Co. had any notice of the arrangement between Cunningham and Walker at or before the time they took the mortgage, nor was there any element of ratification of the Cunningham-Walker arrangement in the transaction. They were content to receive \$750, and let the barley go, and were not concerned with anything else.

13. The remaining requests on the part of defendants, which were refused, are sufficiently covered by what has been said. Besides, the fourth instruction requested by defendants fully and clearly stated the law applicable to the case, so far as it was, or could be, under the evidence, affected by the prior arrangement between Cunningham and Walker, and this instruction was given. There was no error in the instructions given at the request of the plaintiffs.

14. The verdict and judgment were entitled, "Charles Ford, A. A. Morey, and J. S. Menasco, partners trading under the firm name of Charles Ford & Co.," as the plaintiffs; overlooking the change made by the death of Ford, and the substitution of his executors, which had been made by order of court. It is contended by appellants that the verdict and judgment are void for this reason. The mistake is capable of correction, and does not require a reversal of the judgment. Code Civil Proc. § 475.

Finding no error in the record which would justify a reversal, I advise that the judgment and order appealed from be affirmed, with a direction to the court below to amend the title of the verdict and judgment so as to conform to the former order, substituting Ford's executors as parties.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the verdict and judgment, as entered in the court
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below, be amended so as to conform to the former order, substituting Ford's executors as parties in place of Charles Ford, deceased, and that, as amended, the said judgment, and also the order appealed from, be affirmed.

99 Cal. 401

HARVEY v. DUFFEY et al. (No. 15,155.)
(Supreme Court of California. Aug. 30, 1893.)

SALE—REVOCATION OF ORDER—PRINCIPAL AND AGENT.

1. Defendants ordered goods from plaintiff through its agent, having reference to its catalogue, stating that it kept the goods in stock. The agent testified that the goods were to be manufactured, but defendants claimed that they thought they were already manufactured, and dealt solely with reference to a contract of sale, and that no mention was made of necessity for manufacture. *Held*, that there was no contract for manufacture of the goods, so as to prevent defendants from countermanding the order before shipment.

2. Plaintiff's agent took defendants' order for goods, and afterwards testified that the goods were to be manufactured by plaintiff, defendants claiming that they contracted solely with reference to a sale of goods already manufactured. The agent had on hand manufactured goods of plaintiff, and the only authority on his part of which defendants had notice was a telegram to him from plaintiff speaking of defendant's prospective order "if taken from consigned stock," and a letter from plaintiff to defendants instructing them to order from the agent. *Held*, that the agent was not authorized to sell goods to be manufactured.

3. An order for goods to a manufacturer given to his agent, to be forwarded to him, until it is accepted and notice of acceptance given the maker, does not constitute a contract of sale, or for the manufacture of the goods, so as to prevent the maker from revoking it.

4. In such case a letter from the manufacturer to his agent, acknowledging receipt of the order, does not constitute an acceptance, where no notice thereof is given the maker of the order before he revokes it.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by C. D. Harvey against Duffey Brothers for breach of contract. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Olney, Chickering & Thomas and Warren Gregory, for appellant. E. R. Taylor, for respondents.

FITZGERALD, J. The complaint in this action, in substance, alleges that, at the time therein stated, plaintiff's assignor, the A. A. Griffing Iron Company, a New Jersey corporation, manufactured for defendants, at their special instance and request, certain standard hot-water radiators, of the sizes described, and were ready and willing to ship and deliver the same at the agreed price of \$909.72; that, after the manufacture thereof, defendants notified the corporation not to ship or deliver the goods, as they would not accept or pay for them, or for any part thereof, and that they have not paid the whole or

any part of the said sum above mentioned; that afterwards, upon due notice to the defendants by the corporation, it resold the goods at public auction to the highest bona fide bidder, and that the net proceeds of such sale were \$43.25. The answer specifically denies the allegations of the complaint, except the allegation of notice not to ship or deliver the goods, which is admitted, with the averment that the notice was given before the corporation informed or notified the defendants that it intended to or would manufacture the same, and that said notice was given before, and not subsequent to, such manufacture. The facts necessary to be stated are as follows: On April 3, 1890, the defendants had in their possession a catalogue of the Griffing Iron Company, in which were listed the goods in question, and upon the fly leaf thereof was the following statement: "To enable us to fill our orders promptly, we carry at all times an enormous stock, comprising at all times every style as shown in our list." On that day the defendants, acting upon this statement in the catalogue, sent to the Griffing Iron Company the following telegram: "Give us lowest prices on three thousand (3,000) feet thirty-nine (39) inch hot-water standard radiators. Answer. [Signed] Duffey Bros." On the following day, upon the receipt of this telegram, the Griffing Iron Company telegraphed plaintiff as follows: "Duffey Bros. telegraph for prices culprit [hot-water] standard. Sell, if necessary, at your price, and we will give you ten per cent. commission on order if taken from consigned stock. Impossible for them to buy, even cheapest type of radiator, at better than forty-nine cents imbibel, [in less than car-load lots,] and thirty-four cents illusion, [in car-load lots,] in San Francisco. Even if you have to give an extra five, don't lose the order. Mich. radiator salesman is due in San Francisco to-day to see Duffey. [Signed] A. A. Griffing Iron Co." On the same day the company mailed to defendants a letter, which, among other things, contained the following: "Immediately upon receipt of your telegram to-day, we wired C. D. Harvey to call on you and name you prices. We trust that before this comes to hand you will have given him your order. * * * We did not wire you an answer, thinking that Mr. Harvey would call and give you personal attention, which, no doubt, he did do so. Trusting to receive your order through Mr. Harvey, we remain, yours, truly, A. A. Griffing Iron Co." Harvey, on receipt of the company's telegram, called on the defendants, and obtained from them the following order: "A. A. Griffing Iron Co.: Please ship to us at San Francisco the following Bundy hot-water standard radiators, 39 in. high: 145, 1x4; 16, 1x10; 1, 1x20. Duffey Bros. A." This order was delivered to Harvey, to be by him transmitted to the company, and was on the same

day transmitted by him with the following letter: "A. A. Griffing Iron Co.—Gents: Inclosed I send order from Duffey Bros. for H. W. radiators. Those crossed I can supply from stock here. The balance you will prepare at once, as Mr. D. desires them as soon as possible. I will send you Monday a list to make up car load. Your telegram of 4th inst. relating to this order received. I had already given them prices, 60 & 5 off, and now give on such as are here in stock an additional five per cent., as you directed. Yours, truly, C. D. Harvey." At the time the order was given, Harvey, in his testimony, says: "I told Mr. Duffey at the time that the 1x4 radiator was a radiator that we had never used here in my business, and I did not think the company had them on hand." Duffey testified that "nothing was said between me and him about the necessity of manufacturing them. I did not know they would have to be manufactured. They were catalogued, and I had the catalogue, and acted according to it;" and that, when he revoked the order, he did not know that the company was manufacturing the good for him. On April 18, 1890, the defendants having received no reply whatever to the order sent through Harvey, and being in entire ignorance as to whether it had been received, or, if received, whether it would be accepted, sent a telegram to the company countermanding the order. This telegram was received by the company before the manufacture of the goods was completed, but, notwithstanding this fact, it proceeded to complete the manufacture of them, and afterwards insisted upon the defendants receiving them.

The findings of the court are as follows: "(1) That at no time did the A. A. Griffing Iron Company manufacture at the special instance or request of the defendants, or at the special instance or request of either of them, or for the defendants, or either of them, any of the hot-water radiators mentioned in the amended complaint, or any of the goods described in the amended complaint. (2) That the defendants did not agree, nor did either of them agree, to pay the A. A. Griffing Iron Company, for the goods described in the amended complaint, the sum of nine hundred and nine dollars and seventy-four cents, (\$909.74,) or any sum whatsoever. (3) That defendants did not, subsequent to the manufacture of said goods, notify the A. A. Griffing Iron Company not to ship or deliver the same, but that said modification was prior to the manufacture of said goods, and prior to any notification to the defendants, or to either of them, by said A. A. Griffing Iron Company that it intended to manufacture any of said goods. (4) That said goods were sold by the A. A. Griffing Iron Company on or about the 2d day of September, 1890, at public auction, but that said sale was without notice to defendants, or to either of them, or to the

world." And thereupon judgment was accordingly entered for defendants, from which judgment, and the order denying his motion for a new trial, plaintiff appeals.

The contention of appellant that the first finding is not justified by the evidence cannot be sustained. Conceding to Harvey's testimony all that is claimed for it,—that is, that the order was given for the manufacture, and not the sale, of the goods,—and that his testimony fully sustains the allegation of the complaint that the goods were manufactured for the defendants at their special instance and request, yet this is opposed by Duffey's testimony, which is to the effect that, in giving the order, he dealt solely with reference to a contract of sale, and that nothing was said by any one at any time before the order was revoked as to the necessity of the manufacture of the goods. Admitting, then, that Harvey, in obtaining the order for the goods, understood that they were to be specially manufactured for the defendants at the prices named, such was not the understanding of the defendants, for it appears that, in giving the order to the company through Harvey to ship the goods, they acted upon the representations contained in the catalogue that they were in stock. It is therefore clear (notwithstanding appellant's claim that Harvey, as the agent of the company, was authorized to make the contract alleged and relied on, and that his acts, in this respect, were binding upon the company) that the minds of the parties never met on a contract of manufacture, for "it is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense." *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. Rep. 179. But the record does not show that Harvey had any such authority. It is true the telegram to Harvey, dated April 4th, says: "Sell, if necessary, at your price, and we will give you ten per cent. commission on order if taken from consigned stock." This, we think, had reference to the company's goods which Harvey had in stock in San Francisco, and this view is further supported by the company's letter to defendants of the same date, acknowledging receipt of their telegram of April 3d, in which it says: "We wired C. D. Harvey to call on you, and name your prices. * * * Trusting to receive your order through Mr. Harvey," etc.,—from which it would seem that Harvey's authority was limited to naming prices and receiving the order for transmission to the company, and it nowhere appears that defendants had any knowledge other than this of Harvey's authority.

But, assuming that he was authorized to sell, he certainly, so far as the record shows, never exercised any such authority, but simply contented himself with receiving the order, and transmitting it to the company, by whom it was never accepted, nor was anything said or done by it from which

an acceptance could be inferred. In fact, neither the defendants, nor any one for them, ever received any reply or notice whatever of the receipt or acceptance of the order either from the company or Harvey, or any one else, until after they had revoked it. As the order was merely an offer or proposal to buy, it was revocable by the defendants at any time before acceptance, and, as there was no acceptance of it by the company before it was revoked, it follows that there was no contract either of manufacture or of sale. It does appear, however, that the company, in a letter to Harvey, dated April 11th, acknowledged the receipt of the order, but this fact was never communicated to defendants until the 20th of April, two days after the order was countermanded, and only then in the most casual manner, by the accidental meeting of Harvey and Duffey on the street. Nor did this, or any other letter emanating from the company prior to the revocation of the order, contain the slightest intimation that it would be necessary to manufacture the goods; but the company's letter to Harvey of the 11th contains language that might be easily construed to the contrary. It is as follows: "Yours of the 5th, containing an order from Duffey Bros., duly received. * * * Soon as specifications are received to make up the balance of the car load, we will forward the same to Messrs. Hawley Bros. Hardware Co., of your city. * * *" This language was used in reply to that part of Harvey's letter inclosing the order which read as follows: "I will send you Monday a list to make up car load." These views apply with equal force to the other exceptions to the findings, except the one relating to the resale of the goods, and that finding is unnecessary to be considered, for the reason that it has no material bearing upon the question upon which this decision rests, and that is that no contract either of manufacture or sale was ever entered into between the parties. Let the judgment and order be affirmed.

We concur: McFARLAND, J.; DE HAVEN, J.

99 Cal. 172

STEEN v. HENDY et al. (No. 15,313.)
(Supreme Court of California. Aug. 8, 1893.)
SUBSTITUTION OF ATTORNEY OF RECORD—RIGHTS
OF ASSIGNEE OF PARTY.

1. The party of record can change his attorney of record, though the motion for permission to substitute is resisted by a person claiming to be the assignee of the interests of such party, where there is a controversy as to such assignment.

2. In such case the attorney for the alleged assignee will be permitted to make an argument on the merits, and notice of all motions affecting the final disposition of the case must be served on him.

In bank.

Action by Steen against Hendy and others, in which plaintiff moved for permission to substitute an attorney in place of his attorney of record. A person claiming to be the assignee of plaintiff's interest in the controversy resisted the motion, and asked permission to substitute his attorney. Motion granted, and the attorney of the alleged assignee permitted to file brief.

R. Thompson and Wm. H. Jordan, for the motion.

BEATTY, C. J. In this case the plaintiff and appellant, Steen, moves to substitute an attorney in place of the attorney by whom he has hitherto appeared. The motion is resisted by a party claiming to be an assignee of Steen's interest in the matter in controversy, who desires the substitution of a different attorney. Affidavits and counter affidavits have been filed and read presenting a variety of questions as to the nature, purposes, and effect of the alleged assignment. We cannot upon a motion of this character undertake to investigate and decide the questions so raised. The party appearing by the record to be the plaintiff and appellant in the action must be allowed the privilege of changing his attorney of record; but the fact being brought to our attention that another party claims an interest in the controversy as assignee of the appellant, we think he should be allowed the privilege of presenting his argument on the merits of the case, and that he should have notice of any motion affecting the final disposition of the cause. It is therefore ordered that William H. Jordan, Esq., be substituted as attorney for the appellant, Steen, and that R. Thompson, Esq., be allowed to file a brief or briefs in behalf of appellant, and that notice of all motions affecting the final disposition of the cause be served on said Thompson.

We concur: DE HAVEN, J.; FITZGERALD, J.; GAROUTTE, J.

PEOPLE v. McNULTY, (two cases. Nos. 20,945, 20,896.)

(Supreme Court of California. Aug. 10, 1893.)

In bank. Appeal from superior court, city and county of San Francisco.

John McNulty was convicted of murder in the first degree, and sentenced to death, and appeals from an order fixing the time and place of execution. Affirmed.

For former reports, see 26 Pac. Rep. 597; 28 Pac. Rep. 816; 29 Pac. Rep. 61; and 30 Pac. Rep. 963. See, also, McNulty v. People, 13 Sup. Ct. Rep. 959.

Carroll Cook, for appellant. Atty. Gen. Hart and Wm. S. Barnes, for the People.

PER CURIAM. The orders herein appealed from are affirmed. They raise no questions necessary to be noticed which have not already been passed upon on former appeals taken by the appellant.

PEOPLE v. McNULTY. (No. 20,659.)
(Supreme Court of California. Aug. 10, 1893.)

In bank. Appeal from superior court, city and county of San Francisco.

John McNulty was convicted of murder in the first degree, and sentenced to death. He appealed, and the judgment was affirmed. 26 Pac. Rep. 597; 28 Pac. Rep. 816; 29 Pac. Rep. 61. Thereupon a writ of error was allowed by one of the justices of the supreme court of the United States to the supreme court of California, which was dismissed. 13 Sup. Ct. Rep. 959.

Carroll Cook, for appellant. Atty. Gen. Hart and Wm. S. Barnes, for the People.

PER CURIAM. In this cause, a writ of error having been heretofore issued out of the supreme court of the United States, and all proceedings under the judgment in said cause stayed by that court until the disposition of said writ of error, and it appearing from the certificate of the clerk of that court that the writ of error had been dismissed for want of jurisdiction, it is now, upon the motion of the attorney general, ordered that the cause be remanded to the superior court, and that court is directed to make such order as may be necessary to carry its judgment into effect.

PEOPLE v. VINCENT. (No. 20,852.)
(Supreme Court of California. Aug. 10, 1893.)

In bank.

F. O. Vincent was convicted of murder in the first degree. On appeal by defendant, the judgment of conviction was affirmed. 30 Pac. Rep. 581. Afterwards a writ of error was allowed by one of the justices of the supreme court of the United States to the supreme court of California, which was dismissed. 13 Sup. Ct. Rep. 960.

PER CURIAM. In this cause, a writ of error having been heretofore issued out of the supreme court of the United States, and all proceedings under the judgment in said cause stayed by that court until the disposition of said writ of error, and it appearing from the certificate of the clerk of that court that the writ of error had been dismissed for want of jurisdiction, it is now, upon the motion of the attorney general, ordered that the cause be remanded to the superior court, and that court is directed to make such order as may be necessary to carry its judgment into effect.

99 Cal. 227

PEOPLE v. GORDON. (No. 20,963.)

(Supreme Court of California. Aug. 11, 1893.)

CRIMINAL LAW—FORMER ACQUITTAL—WHAT CONSTITUTES—CONVICTION OF LOWER OFFENSE—NEW TRIAL AT DEFENDANT'S INSTANCE—EFFECT—CONSTITUTIONAL LAW—EVIDENCE.

1. Where, on a trial for an assault with intent to commit murder, defendant is convicted of an assault with a deadly weapon, such conviction is an acquittal of the higher offense.

2. The fact that the judgment of conviction of the lower offense was set aside, and a new trial granted, at the instance of defendant, does not entitle the state to place him on trial the second time for the higher offense.

3. Pen. Code, § 1180, provides that, on grant of a new trial, all testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment. *Held* that, if such statute authorizes the placing such defendant on trial for the higher offense after a conviction of the lower offense has been set aside at his instance, the statute is in conflict with Const. art. I, § 13, which provides that "no person shall be twice put in jeopardy for the same offense."

4. Under Pen. Code, § 686, providing that in a criminal action defendant is entitled "to be confronted with the witnesses against him in the presence of the court," except in specified instances, the transcribed testimony of a witness taken by the shorthand reporter on a previous trial of a criminal action, not within the exceptions of such statute, is not admissible in evidence on the second trial because such witness is absent from the state.

5. Where evidence is absolutely incompetent, a general objection to its admission is sufficient.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

H. L. Gordon was convicted of an assault with a deadly weapon, and appeals. Reversed.

Morehouse & Tuttle, for appellant. V. A. Scheller, for respondent.

BELCHER, C. The defendant was charged with the crime of assault with intent to commit murder, and pleaded not guilty to the charge. He was tried, and found guilty of an assault with a deadly weapon. On appeal to this court, the judgment entered against him was reversed, and the cause remanded for a new trial. *People v. Gordon*, 88 Cal. 422, 26 Pac. Rep. 502. When the case was again called in the trial court, the defendant entered two additional pleas,—one that he had already been acquitted of the offense of assault with intent to commit murder by the verdict and judgment rendered on the former trial; and the other that he had been once placed in jeopardy for the offense charged. At the trial which followed, the defendant, to sustain his plea of former acquittal and once in jeopardy, offered and read in evidence the whole record and proceedings on the former trial. At the conclusion of the trial, the court, of its own motion, gave to the jury, among others, the following instruction: "The de-

fendant in this case has interposed the plea of 'not guilty,' and has also interposed two other pleas,—the plea of 'once in jeopardy,' and the plea of 'former acquittal.' In that regard it is insisted by the defendant that, having been heretofore tried upon information in this case, and convicted by a jury of an assault with a deadly weapon with intent to inflict great bodily injury upon the prosecuting witness, he had been acquitted of the higher offense, an assault with intent to commit murder, and it is further insisted that he had been once in jeopardy. Upon these two pleas, gentlemen, the court instructs you that you shall find for the people, that is, you shall return your verdict upon the plea of once in jeopardy against the defendant, that is, that he has not been in jeopardy; and, as to the plea of former acquittal of the higher offense charged in the information, you shall also return your verdict in favor of the people, and against the defendant." The jury found as directed on the two pleas referred to in the instruction, and also found the defendant "guilty of an assault with a deadly weapon, with intent to inflict upon the person of C. H. Potter, the prosecutor, great bodily injury as charged in the information." Upon this verdict, judgment was entered as on the former trial that the defendant be fined in the sum of \$2,500, and, in default of the payment thereof, that he be imprisoned in the county jail of Santa Clara county at the rate of one day for each four dollars of said fine, and not to exceed in the aggregate 625 days. The defendant appeals from the judgment and an order denying his motion for a new trial.

The appellant contends that the court erred in instructing the jury to find against him on his pleas of former acquittal and once in jeopardy, and this contention, we think, must be sustained. Section 1159 of the Penal Code provides: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." It is settled law in this state that the offense of assault with a deadly weapon is necessarily included in that of assault with intent to commit murder, and that, under an indictment or information charging the greater offense to have been committed with a deadly weapon, the defendant may be found guilty of the lesser. *People v. English*, 30 Cal. 215; *Ex parte Donahue*, 65 Cal. 474, 4 Pac. Rep. 449; *People v. Pape*, 66 Cal. 366, 5 Pac. Rep. 621; *People v. Bentley*, 75 Cal. 407, 17 Pac. Rep. 436. It is also settled law that when one is charged with an offense which includes another offense of lower grade, and is regularly tried and found guilty only of the lesser offense, the verdict operates as an acquittal of the offense charged, and he cannot be again tried for that offense. In *People v. Gilmore*, 4 Cal. 376, the de-

defendant was charged with murder, and found guilty of manslaughter. On his motion, a new trial was granted, and on the second arraignment he pleaded a former acquittal. The court, by Murray, C. J., said: "A conviction for manslaughter is an acquittal of the charge of murder, and the verdict, though general in its terms, must by legal operation amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guilty." And the court quoted with approval the following language used by the supreme court of Mississippi: "The jury in such a case in contemplation of law render two verdicts; the one acquitting him of the higher crime, the other convicting him of the inferior. They must first determine his guilt or innocence upon the charge made by the indictment, before proceeding to inquire whether he is guilty of an inferior crime. The verdict of manslaughter is as much an acquittal of the charge of murder as a verdict pronouncing his entire innocence would be, for the effect of both is to exempt him from the penalty of the law for such crime." *Hurt v. State*, 25 Miss. 378. In *People v. Appgar*, 35 Cal. 389, the defendant was indicted for an assault with a deadly weapon, and convicted of a simple assault only. The court, by Sawyer, C. J., after referring to prior cases, said: "Upon the principle of these cases, the defendant is acquitted of the higher offense charged, and cannot be again tried for it, so that the case as to that offense is wholly ended. He was only convicted of the lower offense embraced in the indictment, and, if the judgment were reversed, he could only be tried for that offense." And in this case the court, on the former appeal, by Garoutte, J., said: "But, having been found guilty of the crime of 'assault with a deadly weapon' only, he is acquitted of the higher offense." There have also been numerous decisions to the same effect in other states, but we deem it unnecessary to cite them.

It is contended, however, for respondent, that the instruction complained of was proper, for the reason that the former judgment was set aside, and a new trial granted, at the instance of appellant, and hence that he cannot claim protection under a law applicable to cases of "former acquittal" and "once in jeopardy;" and in support of this contention counsel cite *People v. Keefer*, 65 Cal. 232, 3 Pac. Rep. 818, and section 1180 of the Penal Code. The constitution, in section 13 of article 1, declares that "no person shall be twice put in jeopardy for the same offense;" and section 687 of the Penal Code provides that "no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." Section 1023 of the same Code also provides that "when the defendant is * * * acquitted, or has been once placed in jeopardy upon an indictment

or information, the * * * acquittal or jeopardy is a bar * * * for an offense necessarily included therein, of which he might have been convicted under that indictment or information." Under these provisions, it must be held that, when a person is once placed upon his trial before a competent court and jury upon a valid indictment or information, the "jeopardy" attaches, to which he cannot be again subjected, unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent, or, in case a verdict is rendered, unless it be set aside at his instance. *People v. Webb*, 38 Cal. 467; *People v. Horn*, 70 Cal. 17, 11 Pac. Rep. 470. The question, then, is, did the fact that the verdict finding the defendant guilty of the minor offense was set aside at his instance subject him to be tried again for the major offense of which he had been acquitted? There can, in our opinion, be but one answer to this question, and that must be in the negative. In the case of *People v. Keefer*, supra, the defendant was indicted for the crime of murder, and convicted of murder of the second degree. On his motion, a new trial was granted. At the second trial, his counsel requested the court to instruct the jury that, "defendant having been previously tried on this indictment, and found guilty of murder in the second degree, he cannot now be convicted of murder in the first degree." The instruction was refused, and, on appeal, the refusal was held to be proper. This was based upon the fact that there is but one crime of murder, which is the unlawful killing of a human being with malice aforethought. The court said: "The indictment charges the crime of murder, and the defendant was not acquitted of murder by the first verdict. In dividing the crime of murder into two degrees, the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine in a particular case whether the crime deserved the extreme penalty of the law or a less severe punishment." It was accordingly held that the defendant had subjected himself to a retrial on the charge of murder, and that on such retrial he might be found guilty of murder in the first degree, if the evidence would warrant such a verdict. That case is not in point here, for the reason that an assault with intent to commit murder and an assault with a deadly weapon are not the same offense, but are different offenses. Pen. Code, §§ 217, 245. Section 1180 of the Penal Code is as follows: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argu-

ment, or be pleaded in bar of any conviction which might have been had under the indictment." There can be no doubt that the granting of a new trial, upon the application of the accused, for an offense of which he has been convicted, places him in the same position as if no trial had been had; but if it was meant by the section quoted to go further, and provide that when the indictment charges two or more offenses, and on the first trial the accused is acquitted of one of the offenses charged, and convicted of another, the granting of a new trial of the offense of which he was convicted places him in the same position as to the offense of which he was acquitted as if no trial had been had, and thus subjects him to be tried again for the last-named offense, then the section is clearly in conflict with the provision of the constitution above quoted, and for that reason is void. See *People v. Gilmore*, 4 Cal. 376; *Cooley*, Const. Lim. (6th Ed.) p. 401, and cases cited.

But, conceding that the instruction complained of was erroneous, still it is claimed for respondent that the appellant was not and could not have been harmed by it, since he was found guilty only of an assault with a deadly weapon. On the other hand, it is claimed for appellant that he was wrongly subjected by the court to a trial for assault to commit murder, and that the instructions tended to prejudice him materially before the jury. As the judgment must be reversed upon another ground, it is not necessary to decide this point.

At the first trial, C. H. Potter, the prosecutor, was examined as a witness for the people, and his testimony was taken down by the shorthand reporter, and thereafter correctly transcribed by him. At the second trial, proof was introduced by the prosecution, showing that the witness, after due diligence, could not be found within this state. Thereupon the district attorney offered in evidence the testimony of the witness C. H. Potter given at the former trial of this cause in the superior court of the state of California, in and for the county of Santa Clara, as extended by the then and present shorthand reporter, and the testimony was admitted by the court, and read to the jury over the objection and exception of defendant. Again, at the conclusion of the defendant's evidence, the district attorney offered and was permitted to read to the jury, over a like objection and exception by defendant, the testimony of the same witness given in rebuttal on the former trial." Section 686 of the Penal Code provides that in a criminal action the defendant is entitled "to be confronted with the witnesses against him in the presence of the court," except in certain specified instances, of which this is not one. We have no statute authorizing testimony, taken as that objected to was, to be read on a second trial; and in *People v. Chung Ah Chuc*, 57 Cal. 567, and the late case of *Peo-*

ple v. Gardner, (Cal.) 32 Pac. Rep. 880, such testimony was held to be inadmissible. See, also, *People v. Quirise*, 59 Cal. 343, where the ruling in the former case was approved and followed. Following these cases, it must be held that the testimony was inadmissible. But, if this be so, it is claimed that no sufficient objection to its admission was made, and, therefore, that the court did not err in its rulings. The objections, among others, were that the testimony was "incompetent, irrelevant, and inadmissible." The general rule, undoubtedly, is that, to entitle an objection to notice, its point must be particularly stated, (*Kiler v. Kimbal*, 10 Cal. 268; *Crocker v. Carpenter*, [Cal.] 33 Pac. Rep. 271;) but, when the evidence objected to is absolutely incompetent, a general objection is available. (*Nightingale v. Scannell*, 18 Cal. 315.) Here the testimony objected to was absolutely incompetent, and the objections taken were therefore sufficient. Other grounds for a reversal are urged, but they do not require special notice. We advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause is remanded for a new trial.

99 Cal. 234

DAMON v. WALDTEUFEL. (No. 15,159.)
(Supreme Court of California. Aug. 12, 1893.)

CARE OF PLEDGE—FINDINGS OF COURT—SUFFICIENCY.

In an action on a note, defendant, as a counterclaim, alleged the delivery to plaintiff of a piano as collateral security; that plaintiff failed to use ordinary care in storing and keeping it, and that he permitted it to be used almost continually, whereby it was injured and depreciated. *Held*, that the finding of the court that, while the piano was in pledge, plaintiff, with defendant's consent, stored it with certain persons, who, as compensation for storage, used it to a limited extent, with defendant's knowledge and consent, was a sufficient finding on the issue, and negatived any want of care or liability on the part of plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by James E. Damon against A. Waldteufel. Judgment for plaintiff. Defendant appeals. Affirmed.

Smith & Murasky, for appellant. M. G. Cobb and Edgar M. Wilson, for respondent.

VANCLIEF, C. Action on three promissory notes made by defendant to plaintiff, upon which judgment was rendered in favor of plaintiff for an unpaid balance of \$868.43. The defendant brings this appeal from the judgment, and asks a reversal thereof on the alleged ground that the court failed to find

upon one of the material issues of fact. It appears by the pleadings that, to secure payment of one of the notes, the defendant pledged to plaintiff a new concert grand piano; that plaintiff had sold the piano according to the terms of the agreement by which it was pledged, and applied the proceeds of the sale (\$250) as a payment upon the note. In his answer, defendant alleged that plaintiff did not exercise ordinary care in storing and keeping the piano during the time it was in his possession; that he permitted it to be used almost constantly by persons skilled and unskilled in the use of pianos, whereby the piano was injured and much depreciated in value, to the damage of the plaintiff in the sum of \$775. The demand for this damage is pleaded as a counterclaim to plaintiff's demand upon the note. It is the issue tendered by the counterclaim upon which appellant contends there was no finding. The court found that, during the time the piano was in pledge, the plaintiff, with defendant's consent, stored it with certain friends, who, as compensation for the storage, used the same to a limited extent, with the knowledge and consent of the defendant. This finding negatives any want of care on the part of the plaintiff in the storage and use of the piano, of which the defendant has a right to complain; and thus fully answers the substance of the issue. The defendant, having consented that the piano should be stored with friends who might use it as compensation for the storage, has no right to complain of negligence on the part of the plaintiff in thus storing it and permitting it to be used, though it may have been injured by negligent use. "He who consents to an act is not wronged by it." Civil Code, § 3515. Whether plaintiff and defendant, or either, could recover damage from those with whom the piano was stored, for excessive or negligent use thereof, are questions not involved in this case. I think the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

99 Cal. 236

BEDEL v. KOWALSKY. (No. 14,417.)
(Supreme Court of California. Aug. 12, 1893.)
ACTION FOR GOODS SOLD — PLEADING — APPEAL — EVIDENCE.

1. It is no ground of demurrer to a complaint, in an action for wheat sold and delivered, alleging sale by sample of a certain amount of wheat to be delivered in a certain time, that it avers a delivery of a greater amount, and that part of it was not delivered within the time specified, where it is further averred that defendant's agent, through whom it was delivered to defendant, accepted it for him and pursuant to his orders.

2. A judgment for plaintiff for damages for failure to accept and pay for wheat cannot

be sustained where it appears that it is based on a verdict estimating the damages on a greater amount of wheat than the evidence shows defendant had agreed or authorized any one to accept.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by J. C. Bedel against E. H. Kowalsky. Judgment for plaintiff. Defendant appeals. Reversed.

Henry I. Kowalsky, for appellant. D. H. Whittemore, for respondent.

SEARLS, C. This action was brought to recover a balance on account of wheat sold and delivered to defendant. Plaintiff had judgment, and defendant prosecutes this appeal from such judgment, and from an order denying a new trial. The demurrer to the complaint was properly overruled. The objections are twofold: (1) That it showed a sale of two lots of wheat according to sample, and at the same time averred a delivery of a greater quantity than called for by the contract; (2) that the contract was to deliver within 10 days, and the averment is that a portion of the wheat was not delivered within the specified time. The answer to these objections is that the complaint averred the delivery of a larger quantity to defendant through his agent, who accepted it for him and pursuant to his orders. It was the privilege of the defendant to receive a larger quantity than that called for by his contract if he saw fit, and to receive it at a later period than that named in the agreement, and, if he did so, he is liable.

The second point made by appellant relates to a variance between the allegations and the proofs. According to the complaint, the plaintiff, on the 2d day of August, 1887, sold to defendant 2,000 sacks of wheat, to be equal to sample No. 90, (then delivered to defendant,) at \$1.85 per cental, and 1,060 sacks, to be equal to sample No. 69, (then delivered to defendant,) at \$2 per cental, all of said wheat to be delivered to defendant in 10 days at the warehouse of Starr & Co., at South Vallejo, Cal., and to be paid for as fast as delivered; that, before August 10th, plaintiff delivered 2,395 sacks of the wheat equal to sample 90, which was received by Starr & Co. for defendant, by his order; that defendant refused to pay for the wheat so delivered, and notified plaintiff not to deliver any more, but that plaintiff delivered the remainder of the wheat, to wit, 1,060 sacks, equal to sample 69, to Starr & Co., who accepted and stored the same according to defendant's orders; that defendant has not paid for the same, or any part thereof, except \$6,000. The quantity in pounds of each quality of wheat is given, and judgment demanded for the prices specified, amounting to \$2,966.78. The complaint was not verified, and the answer denied all of the material allegations therein contained.

The cause was tried before a jury. The evidence on the part of the plaintiff was quite sufficient to sustain a cause of action against defendant for a refusal to receive and pay for 2,000 sacks of wheat equal to sample 90, and 1,058 sacks equal to sample 69, provided the latter was delivered in time, or the delivery thereof waived by defendant. But the evidence shows that the defendant contended that the wheat was to be delivered not in ten, but in five, days, and at the end of the five days he refused to receive it, and so notified the broker through whom the purchase was made, and the wheat, on reaching Vallejo, was stored as follows: The first lot, of 2,395 sacks, for account of the broker, W. H. Yates, from whom defendant had purchased; and the last lot, of 1,060 sacks, for account of the plaintiff. That defendant never paid anything on account of the wheat, and that plaintiff finally sold it, and realized therefor the sum for which he gave defendant credit. The warehouse receipts were not in evidence, but the reports to the office of Starr & Co., the owners, show that it was deposited for account of as above stated.

The court, in passing upon the motion for a new trial, says: "The case was tried by both sides in a manner so confusing that it is difficult to determine satisfactorily some of the main points of the plaintiff's case," etc. I concur fully with the court below, and may add that I have seldom found a record more uncertain and confusing than the present, and it is only by repeatedly groping through it that I am able to piece out the isolated facts so as to understand their bearing and effect. It seems that neither defendant nor his attorney was present until the trial had progressed to some extent, and this will probably account for some of the crudities presented in the record. Upon the whole case, were it not for one circumstance, I should feel inclined to say that although the action was brought to recover the purchase price of wheat sold and delivered, and the plaintiff recovered upon a breach of a contract by defendant to receive and pay for the same wheat, which was never in fact delivered, yet, the case having been tried upon this basis without objection, the verdict should stand. The circumstance which prevents this conclusion is this: The plaintiff recovered for nearly 500 sacks of wheat not included in the contract, and which there is no evidence that defendant ever authorized Starr & Co. to receive for him. As to the wheat contracted for, it is said defendant authorized Starr & Co. to receive it for him, and, while he repudiated the contract, he did not countermand the order to receive; and the wheat having been stored with that firm for him, although not as to a portion of it within the time specified in the contract, defendant waived the failure to deliver in time, and is liable. For present purposes we

may concede this. The evidence is that defendant called upon Starr & Co., and directed them to receive the wheat, for his account, and the particulars of his order are found in the instructions of the firm to their agent at Vallejo, where the wheat was to be delivered, contained in the following letter: "August 2, 1887, Vallejo. We send you samples of 2,000 and 1,050 sacks coming to you, account of E. H. Kowalsky, care of W. H. Yates. Gove says put one thousand of first and 525 of the other into one, and put one hundred tons of J. W. lot and make two of the latter cover the exact pounds of 3,050 sacks. Let us know number of lots, —J. W. lots,—and issue him storage receipts. A. B., Vice-Pres." In explanation of the foregoing, it is proper to say that there was evidence tending to show that the samples had been submitted to Gove, who was a wheat grader, and that he had decided that, if the two qualities were mixed in the proportion above specified, the whole would pass as No. 1 shipping wheat, which was designated by Starr & Co. as "J. W." There is no evidence of other or further instructions to Starr & Co., and this did not authorize them to receive at Vallejo any quantity of wheat in excess of that specified on account of defendant. When we consider that plaintiff's evidence shows that, before any wheat was delivered, defendant had notified the seller that he would not accept or pay for any of it, and that, in the interim between the contract and delivery, wheat had fallen at least 50 cents per cental, we are somewhat surprised that plaintiff sought to deliver about 400 sacks of wheat in excess of the quantity called for by the contract, and very greatly surprised that, after selling this excess with the other, he was permitted to recover for the difference between the price received and the contract price on not only that included in the contract, but the additional 400 sacks as well. To permit a transaction of this sort to go unchallenged would, upon the same principle, place a purchaser who had engaged a limited quantity, and instructed an agent to receive it, in the position of being compelled to receive an unlimited quantity, when the exigencies of a falling market made it for the interest of the seller to furnish such larger quantity. The point is made by appellant in his brief that the contract was void under the statute of frauds, but neither the pleadings nor testimony are of a character to warrant the consideration of the question. For the excess of the recovery as above indicated, the judgment and order appealed from should be reversed, and a new trial had, with leave to the respective parties to amend their pleadings if they shall be so advised.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and or-

der are reversed, and cause remanded for a new trial, with leave to the parties to amend their pleadings if they shall be so advised.

99 Cal. 340

PEARCE v. BOGGS. (No. 15,024.)

(Supreme Court of California. Aug. 18, 1893.)

SALE — CHANGE OF POSSESSION — INSTRUCTIONS — QUESTIONS OF LAW — NEW TRIAL — STATEMENT — WAIVER OF OBJECTION.

1. Objection that a proposed statement on motion for new trial was not signed by the moving party, or any one on his behalf, cannot be made after expiration of the time for preparing statement, where, on delivery of the document by the moving party's attorneys to the attorneys of the other party, receipt is acknowledged of original draft of statement on motion for new trial in the case without objection.

2. In an action of claim and delivery against a sheriff for horses taken on attachment, an instruction that, if the jury believed plaintiff bought them in good faith from the attachment debtor, and was prevented from getting possession by the wrongful act of the attaching creditor, they should find for plaintiff, was erroneous, in leaving to the jury a question of law, whether any act of the attaching creditor was wrongful.

3. S. sold to plaintiff horses in the pasture of R., where they had been put by C., with the consent of S., at the close of a season for which C. had hired them. R. refused to deliver them on the order of S. to plaintiff, when, 12 days after buying them, he first attempted to get possession; C. having given instructions when he left them that they should be delivered to no one else. On the following day they were taken by defendant, as sheriff, on an attachment in an action by C. against S. Held error to instruct that when personal property is so situated that the purchaser is entitled to and can rightfully take possession at his pleasure, he is considered as having actually received it, as the statute requires.

Department 1. Appeal from superior court, Lake county; R. W. Crump, Judge.

Action by George F. Pearce against L. H. Boggs. Judgment for plaintiff. Defendant appeals. Reversed.

Hudson & Sayre, for appellant. Ira C. Jenks and Woods Crawford, for respondent.

HARRISON, J. Action of claim and delivery. The plaintiff purchased two mares from L. G. Simmons, at Lakeport, on the 1st of April, 1891, and took from him a bill of sale and an order upon one Reynolds for their delivery. The mares were at that time at pasture on a ranch belonging to Reynolds, about 30 miles from Lakeport, where they had been placed about a month previously by one Christie. Christie had been working the mares during the winter for their feed, under an agreement with Simmons, and at the close of the working season placed them on this ranch with the consent of Simmons, and told the keeper of the ranch not to let any one have them except upon his order. The plaintiff made no attempt to take possession of the mares until the 12th of April, when he went to the ranch, and presented Simmons' order for them, but Reynolds refused to give them up by reason of the order that Christie had

given when the mares were left there. On the 13th of April Christie sent for the mares, and had them removed to his own place, about five miles from Lakeport, where, on the same day, they were taken by the defendant, as sheriff of Lake county, under a writ of attachment issued in a suit by Christie against Simmons. Christie had no knowledge that the plaintiff had purchased the mares, or had made any demand for them. Judgment was rendered against Simmons in favor of Christie on October 26th, and on the 11th of November an execution was issued thereon, under which the defendant held the mares. The present action was begun November 7, 1891. Judgment was rendered for the plaintiff for their recovery, from which and an order denying a new trial the defendant has appealed.

When the defendant's statement on motion for a new trial was presented to the judge for settlement, the plaintiff objected thereto, upon the ground that the proposed statement had not been signed by the defendant, or by his attorneys, or any one on his behalf, and could not therefore be considered by the court as a document in the case. It was shown on behalf of the defendant that the document had been delivered by the attorneys for the defendant to the plaintiff's attorney, who then gave the following receipt: "Received from Hudson & Sayre original draft of statement on motion for new trial in the case of Pearce vs. Boggs. Woods Crawford, Attorney for Plaintiff. Lakeport, Cal., Jan. 5, 1892." Upon this showing the court found that the service was sufficient, and accordingly settled the statement. We think that this action of the court was correct. It is evident from the receipt which the plaintiff's attorney gave at the time the document was delivered to him that he was in some way informed that it was the original draft of a statement on motion for a new trial in this case, and it is immaterial whether such information was given orally or by formal notice. He knew that the attorneys from whom he received the document were the attorneys of the defendant, and his written admission of its character shows that he was not misled in reference thereto; and, if it was his intention to object to the absence of a signature thereto by the defendant's attorneys, good faith on his part, as well as the dignity of conduct which should characterize all professional intercourse between members of the bar, required him to state his objection at that time, rather than to receive it, and withhold his objection until after the expiration of the time within which a statement could be prepared.

The court gave to the jury the following instructions, at the request of the plaintiff: "The court instructs you that if you believe from the evidence the plaintiff bought the property described in the complaint in good faith from the vendor, Simmons, and

paid a valuable consideration therefor, and that plaintiff Pearce was prevented from getting the possession thereof by the wrongful act of G. W. Christie, the attaching creditor herein, then you will find for the plaintiff." This instruction was erroneous by reason of the clause which left to the jury to determine whether any act of Christie by which the plaintiff had been prevented from getting possession of the mares was "wrongful." Whether any act of his was wrongful was a matter of law depending upon the facts presented in the case, and, if it was claimed that such facts had been shown to the jury, the court should have instructed them thereon as a matter of law, and directed them to find their verdict according as they should find the facts constituting the wrongful act. Its ruling would then be subject to exception and review, whereas, by leaving to the jury to determine whether any act of Christie was wrongful, the court not only left to it the determination of a question of law, but also deprived the defendant of the means of knowing what act the jury might determine to be wrongful, and thus of availing himself of any exception to their verdict. The same error was also committed by the court by adding a similar clause in modification of an instruction substantially in the words of section 3440 of the Civil Code, requested by the defendant.

The court also gave to the jury the following instruction, at the request of the plaintiff: "I instruct you that what constitutes a delivery of personal property by the vendor to the vendee depends upon the character of the property sold and the circumstances of each particular case, and for the purpose of a delivery it is not necessary that the property should pass into the actual possession of the vendee; therefore, when it is so situated that the vendee is entitled to and can rightfully take possession thereof at his pleasure, he is considered as having actually received it, as the statute requires." The latter clause of this instruction is in direct conflict with section 3440 of the Civil Code. If the property is so situated that the vendee can take possession thereof at his pleasure, his failure to take such possession constitutes the very fraud which the statute is intended to prevent, and renders the previous transfer to him void as against the creditors of his vendor. The respondent urges in support of the instruction that its very language is used in the opinion of this court in *Williams v. Lerch*, 56 Cal. 330. It by no means follows, however, that the language which a court may use in its opinion, where it is seeking to apply principles of law to the facts of a given case, would be proper to give to a jury in another case, where the same principles are inapplicable, or the facts are different. There is no rule better settled than that the opinion of a court is always to be read in connection with the facts of the case in which it is

given, and it may often occur that in its opinion it will use expressions, either by way of argument or illustration, which are correct in their application to the case before it, but would be inapplicable in many other cases. For this reason it is not always proper to give to a jury an instruction upon a principle of law couched in language taken from an opinion in the reports. Jurors are apt to be misled by instructions upon mere abstract principles of law. They deal only with facts, and instructions to them should be directed to those facts, and should be rather in the concrete than in the abstract. Abstract principles of law which point an opinion or an exceptional rule may be very misleading to a jury. This proposition is well illustrated in the very case of *Williams v. Lerch*, cited by respondent. Immediately following that part of the opinion which was taken for the instruction to the jury in the present case is found the following sentence: "Accordingly, it has been held, if a vendor of goods in the care and keeping of a third person directs him to deliver them to the vendee, and the party holding the goods, on notice and application of the vendee, assents to retain the goods for him, it is a delivery sufficient to transfer the title and to satisfy the statute;" thus pointing out, by way of illustration, the facts to which the principle stated by the court was applicable. See, also, *Etchepare v. Aguirre*, 91 Cal. 295, 27 Pac. Rep. 668.

There was nothing in the present case which justified this instruction as a principle of law applicable to the facts presented to the jury. The mares at the time of their sale to the plaintiff were under the control of Simmons, and capable of immediate delivery by him. Although they had been placed on the ranch by Christie, yet he was acting therein as the agent of Simmons, and his directions not to give them up to any but himself did not take their control from Simmons. Christie never claimed any interest in the mares until after the attachment, and it was testified at the trial that if the plaintiff had at any time before that day presented the order for them from Simmons, they would have been delivered to him.

The judgment and order denying a new trial are reversed.

I concur: GAROUTTE, J.

PATERSON, J., (concurring.) I concur. The plaintiff did not attempt to take possession immediately after he purchased the property, nor did he offer any excuse for his failure to do so. The only fact shown excusing an immediate delivery is the fact that the mares were 30 miles distant from the place of sale; but this did not excuse a delay of 11 days. Plaintiff claims that an earlier demand "would have been as futile as it was on the 12th of April," be-

cause Christie had directed that no one should be given possession except upon an order from himself; but this is mere surmise. It was his duty to use diligence. If he had made demand promptly, and had been refused possession, he could have procured an order from Christie. The latter testified that if plaintiff had presented to him an order prior to April 13th, he would have delivered possession of the mares; but whether a demand upon Christie would have been effective or not, if plaintiff had acted promptly, either by demand or suit for possession, he might have been excused for his failure to comply with the letter of the statute requiring an immediate delivery and an actual and continued change of possession.

99 Cal. 240

JOHNSON et al. v. POLHEMUS et al. (No. 14,580.)

(Supreme Court of California. Aug. 14, 1893.)

FORECLOSURE OF MORTGAGE—PLEADING—PRAYER FOR RELIEF—SUFFICIENCY.

1. Under Code Civil Proc. § 580, which provides that the relief granted to plaintiff, "if there be no answer," cannot exceed that which he demands in his complaint, "but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue," a decree of foreclosure of a mortgage, in an action in which an answer is filed, should not be denied for want of proper prayer for relief, if such relief is embraced within the issue made by the pleadings.

2. In an action to foreclose a mortgage given to secure both a note and a contract, the complaint alleged the payment of the contract, and that there was a balance due on the note, and asked judgment on the note and foreclosure of the mortgage. The answer alleged the payment of the note, and that the contract had been canceled by agreement of the mortgagee. The court found that the note had been paid, but that the contract was in force and unpaid. *Held*, that plaintiffs were entitled to decree of foreclosure for the amount due on the contract.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; F. E. Spencer, Judge.

Action by Kate Johnson and others, as executors of the estate of Robert C. Johnson deceased, against Charles B. Polhemus and others, to foreclose a mortgage. From a judgment for defendants, plaintiffs appeal. Reversed.

Geo. H. Mastie, Boyd, Fifield & Hoburg, and W. W. Cope, for appellants. Wm. Matthews, for respondents.

SEARLS, C. This is an action to foreclose a mortgage. Defendant had judgment, from which the plaintiffs appeal. There is a bill of exceptions in the record relating to the propriety of the admission of certain oral testimony, but, in view of the conclusions of law reached by the court below, it becomes unimportant, and the appeal is practically based upon the judgment roll. Appellants assign

two errors as grounds for a reversal of the judgment, which are as follows: (1) The prayer of the complaint is sufficient to entitle plaintiffs to judgment. (2) Even if the prayer of the complaint be insufficient, plaintiffs are entitled to a foreclosure, that relief being consistent with the case made by the complaint and embraced within the issue.

As the judgment in favor of defendant seems to have turned upon a decision that no relief was sought in the action upon a certain contract, a reference to the complaint is necessary to the correct understanding of the action of the court. The plaintiffs sue as the executors of the last will of Robert C. Johnson, deceased, who departed this life on or about March 8, 1889. The complaint avers, among other things, in substance, that on the 11th day of September, 1885, Charles B. Polhemus made to Robert C. Johnson his promissory note for the sum of \$31,972.90, payable on or before 90 days from date, with interest, etc.; also, that on the same day said Polhemus made a certain agreement in writing as follows: "Whereas, Charles B. Polhemus did make and deliver to Robert C. Johnson his promissory note dated September 13, 1881, for the sum of \$31,972.90, bearing interest at the rate of ten per cent. per annum, secured by mortgage; and whereas, to this date said Polhemus has paid interest on said sum at the rate of seven per cent. per annum, leaving unpaid interest thereon at the rate of three per cent. per annum, aggregating the sum of \$3,836.74, and the said seven per cent. was paid with the understanding that in the event said Johnson was not willing to receive the same in full of all interest, that said Polhemus would pay to him the remaining three per cent., aggregating said last-mentioned sum: Now, therefore, for value received, the said Polhemus promises to pay said Johnson said sum of three thousand eight hundred and thirty-six and 74-100 dollars in the event that said Johnson is not willing that the seven per cent. already paid to him should be payment in full of said interest. Dated September 11, 1885. [Signed] C. B. Polhemus,"—which agreement is averred to have been delivered to said Johnson. The execution of the mortgage by defendant Polhemus to Johnson to secure the payment of the promissory note and agreement are alleged to have been had on the same day and as a part of the same transaction. It is averred that Johnson never did elect and was never willing to take and receive the interest at the rate of 7 per cent., and plaintiffs have never consented or elected so to do; that no moneys have been paid on the promissory note or agreement except \$10,000, paid to Johnson on account of the promissory note January 11, 1886, and the sum of \$27,757.60, paid to plaintiffs November 15, 1889, "which was applied by plaintiffs—First, to the payment of the amount of principal and interest due on said agreement, to wit, the sum of four thousand nine hundred and

fifty-five and 79-100 dollars; second," etc.; showing that the remainder was applied on the promissory note, leaving a balance due thereon of \$4,907.91, with interest from said November 19, 1889, at 7 per cent. per annum. It will be observed from the foregoing that plaintiffs applied \$4,955.79 of the \$27,757.60 paid November 19, 1889, to the payment of the amount then due on the agreement of Polhemus, given on account of interest, and this gives rise to the contention in the case. At the trial the court found that the defendant had at the date of the payment, viz. November 19, 1889, indicated to plaintiffs his desire to have the entire \$27,757.60 applied to the extinguishment of the note, which it was just sufficient to do, and at the same time insisted that he was in no manner indebted upon the contract. The plaintiffs, however, credited the agreement as above stated, which the court below very properly held they had no right to do. The court finds that no other sums have been paid on the note or agreement than those above mentioned, which would leave the amount due on the agreement unpaid. The court further finds that Johnson at divers times, agreed verbally with Polhemus that he was willing to accept the interest on said first note mentioned in the agreement at 7 per cent. per annum, as paid by defendant, in lieu of 10 per cent., and was willing to waive 3 per cent. thereon as provided in the contract, but never gave to Polhemus any written agreement in relation thereto. The court finds as a conclusion of law that the oral agreement of Johnson did not in law discharge the written contract of September 11, 1885, and, as a further conclusion of law, held "that no relief is sought in this action in relation to said contract," and, as the amount paid by the defendant just paid the note, judgment was rendered in favor of defendant for costs. The prayer of the complaint asks in the usual form for a decree of foreclosure of the mortgage and sale of the mortgaged premises, and that the proceeds of the sale be applied to the payment of the amount due to plaintiffs, as such executors, for the principal sum of such interest and compound interest due and accrued on said promissory note, together with a percentage at the rate of 5 per cent. upon the amount due on said promissory note, etc. The residue of the prayer is in the usual form, asking that other defendants be barred, that plaintiffs may have a personal judgment for any deficiency, and closes with: "Fifth. For such other and further relief as may be meet and agreeable to equity." Such other facts as are necessary to elucidate the question will be stated in the consideration of the case.

Under the equity practice in vogue before the adoption of the Codes, the bill of complaint usually contained a prayer for that particular relief to which the complainant considered himself entitled. The usual practice was also to include a prayer for

general relief. The object of the latter was to meet cases in which the plaintiff had mistaken the relief to which he was entitled, as under it he was regarded as entitled to any relief agreeable to the case made by the bill. Story, Eq. Pl. § 49. If he asked particular relief only, he was restricted to his prayer by the decree. A court of equity would not, however, even under a prayer for general relief, permit a party to go beyond the general scope of the case made by the bill, and would not ordinarily permit a bill framed for one purpose answer for another and distinct purpose, especially if the defendant might be surprised or prejudiced thereby. Story, Eq. Pl. §§ 41, 42. Our Code of Civil Procedure, in prescribing the mode of pleading, has adopted the essential elements of the former equity practice. A plaintiff in his complaint must insist a demand of the relief which he claims, and, if the recovery of money or damages be demanded, the amount thereof must be stated. Code Civil Proc. § 426. It has been supposed by many that this section has the effect of rendering a prayer for general relief inappropriate. That question need not concern us here, however. Section 580 of the same Code provides that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." As there is an answer in this case, we may therefore dismiss from notice the prayer of the complaint, and are only required to look to the case made by the complaint and embraced within the issue. In the section last quoted, our Code adheres very clearly to the rules in equity; that is to say, in case of default, the relief is confined to the relief demanded in the complaint, as was the rule under a prayer for special relief in equity, while in other cases it is extended to granting relief similar to that granted under a prayer for general relief in the chancery courts. There being an answer in the case, the right of appellants to recover upon the agreement depends, not upon the prayer of their complaint, but upon the scope of that pleading and the issues made, or which might have been made under it. Turning to the complaint, it will be observed it is averred therein that the promissory note and agreement were made by defendant to plaintiffs' testator; that the mortgage was given as security for the payment of the two instruments; that no payments have been made upon the instruments except two certain payments, the first of which was credited upon the note, while the second was appropriated to the payment and satisfaction of the agreement, leaving a balance over which was credited upon the promissory note; and that a balance is due and unpaid of \$4,907.91, with interest, etc. The answer denies the

validity and binding force of the agreement as a claim against defendant; avers that Johnson elected and agreed to accept and receive 7 per cent., and did receive 7 per cent., in lieu of 10 per cent. in said agreement mentioned; denies that plaintiffs applied any part of the payment of \$27,757.60 upon the agreement; and avers that, at the time the said payment was made, he directed plaintiffs to credit the whole thereof upon the promissory note.

Here, then, were two distinct issues in reference to the agreement: (1) As to its validity as a subsisting claim; (2) as to the fact of its payment. The court found upon the first issue, as a fact, that Johnson, in his lifetime, did agree verbally with defendant to accept interest on said first note at 7 per cent., and was willing to waive the 3 per cent. which constituted the obligation of the agreement, but that he never gave to defendant any written agreement in relation thereto. As a conclusion of law, the court held that the verbal agreement of Johnson did not discharge said agreement. Upon the issue of payment of the sum mentioned in the agreement, the court found that defendant, when he paid the \$27,757.60, manifested his desire to have it applied to extinguish the promissory note, and, as a conclusion of law, held "that it was the duty of said plaintiffs to so apply said payment." The findings then show that the agreement was executed and delivered; that the mortgage was given to secure it and the note; that the principal and interest thereon up to November 19, 1889, was \$4,961.75; that no payments were made thereon up to September 11, 1885; that the payment of \$27,758.22, made on that day, was not properly applicable to satisfy the agreement; that defendant has not paid or tendered any other sum on account of the agreement. These findings are responsive to the issues made in the case, and establish plaintiffs' right to recover upon the agreement, unless they are precluded by failing to indicate in their complaint such facts as demonstrate to a reasonable certainty their right to recover upon the agreement, instead of upon the note. They stated issuable facts in reference to the agreement. Defendant, by his answer, took issue upon those facts, and the result was to establish its validity. In *Harden v. Ware*, (decided by this court April 7, 1880,) 5 Pac. Coast Law J. 317, (not officially reported,) a question analogous to that involved in the case at bar was passed upon. The action was upon a promissory note to recover a money judgment. The answer admitted the making of the note, and set up as a defense the execution of a mortgage of even date with the note to secure the payment thereof, which was averred to be in full force and effect. The court below found in consonance with the answer, and held that there could be but one action upon a debt secured by a mortgage, and that an action to

foreclose, which must be in accordance with chapter 1, tit. 10, etc., Code Civil Proc., and gave judgment for the defendant. In reversing the judgment, this court held that, upon his own allegations, plaintiff was entitled to a judgment, and that the answer, showing that the judgment should be different in form from that sought, entitled plaintiff to a decree of foreclosure. In *Belknap v. Sealey*, 2 Duer, 570, it was held that the case made by the defendant's answer furnished a ground of relief to plaintiff independent of the case made by him in his complaint. The action was brought to recover money paid on a contract for the sale of land, which, as plaintiff charged, defendant fraudulently represented to consist of a much larger area than in fact existed. The answer denied all fraud, but, as the court remarked, admitted a mistake as to quantity. The court found that a mutual mistake existed, and a judgment in favor of the plaintiff upon the ground of such mistake was upheld. *Dayton v. Dayton*, 68 Mich. 437, 36 N. W. Rep. 209, held that a bill for the discharge of a mortgage on the ground of a tender which proved insufficient might be retained as a bill to redeem under the general prayer, and an offer in the bill to pay the sum found due. The scope of the case made by the plaintiff and embraced in the bill involved a foreclosure of the mortgage and the ascertainment of the sum due and secured thereby. The amount due upon the promissory note and agreement (their validity established) was a matter of computation; the payments thereon were ascertained. Whether those payments were credited upon the one instrument or the other, or not at all, were matters for the court to determine and adjust with a view to doing justice to the parties, and with the ultimate view of ascertaining the debt due from defendant to plaintiffs, and secured by the mortgage. All these things were within the purview of the issues of this case; were the disputed points to which the parties to the action had narrowed their several allegations, and upon which they were desirous of obtaining the decision of the proper tribunal; and hence were embraced within the issues. I am of opinion the judgment appealed from should be reversed, and the court below directed to enter a judgment of foreclosure of the mortgage for the sum due upon the agreement, set out in the complaint, viz. \$4,961.75, with interest on \$3,836.74, the principal sum thereof, from November 19, 1889, at 7 per cent. per annum.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court below is directed to enter a judgment of foreclosure of the mortgage for the sum due upon the agreement set out in the complaint, viz. \$4,-

\$61.75, with interest on \$3,836.74, the principal sum thereof, from November 19, 1889, at 7 per cent. per annum.

SAWYER v. COLGAN, Comptroller. (No. 18,068.)¹

(Supreme Court of California. Aug. 16, 1893.)

STATE COMPTROLLER—ISSUANCE OF WARRANTS ON TREASURER—WHEN AUTHORIZED—INDIAN WAR BONDS—APPROVAL BY BOARD OF EXAMINERS—WHEN NECESSARY.

1. Under Pol. Code, §§ 672, 673, providing that the comptroller must not draw his warrant for any claim unless it has been approved by the state board of examiners, except for claims on the contingent fund of either house of the legislature, and for official salaries, such comptroller has no power to issue his warrant for payment of bonds authorized and issued in 1851 and 1852 to meet the expenses of expeditions against Indians, before such bonds have been presented to such board for approval.

2. The fact that such bonds were authorized and issued prior to the enactment of such statute does not render such requirement invalid as to them, since the statute in no way affects the obligations, but only the mode of procuring payment.

3. Nor does the fact that such obligations are in their nature audited claims obviate the necessity of presenting them to such board for approval.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Petition by W. F. Sawyer for a writ of mandate to compel Edward P. Colgan, comptroller of the state of California, to issue to petitioner a warrant on the state treasurer for the amount of a certain bond and coupons issued by the state to meet the expenses of certain expeditions against the Indians. From a judgment denying the writ, and dismissing his petition, the petitioner appeals. Affirmed.

W. C. Belcher and Geo. E. Bates, for appellant. Atty. Gen. Hart and Barham & Bolton, for respondent.

HAYNES, C. Appellant filed his petition in the superior court of the county of Sacramento, praying that a writ of mandate issue requiring the respondent to issue to him a warrant upon the state treasurer for the amount of a certain bond and certain coupons hereinafter mentioned. A demurrer to the petition was overruled, the defendant answered, and, upon the hearing, findings were made and judgment entered denying the writ and dismissing the petition, from which judgment the petitioner appeals. The bond in question was issued July 15, 1854, under an act approved May 3, 1852, (St. 1852, p. 59,) authorizing the state treasurer to issue bonds to an amount not exceeding \$600,000 for the payment of the expenses of certain expeditions against the Indians. Bonds to the full amount authorized by the act were issued, payable May 2, 1862, with annual interest coupons attached. These bonds were

executed by the treasurer and comptroller, and indorsed by the governor. The following is a copy of said bond presented by the petitioner, omitting the in testimonium clause, signatures, and indorsements: "Bond of the State of California. 500. For War Indebtedness. 500. In conformity with an act authorizing the treasurer of the state to issue bonds for the payment of the expenses of certain expeditions against the Indians, approved May 3, 1852, the state of California promises to pay to the order of the governor thereof, on the second day of May, A. D. 1862, at the office of the state treasurer, five hundred dollars, provided the same be not sooner paid from funds anticipated in said act to be derived from the government of the United States, with interest at the rate of seven per cent. per annum, payable at the said treasurer's office on the surrender of the annexed coupons, on the first day of January, A. D. 1853, and annually thereafter; this bond transferable by assignment on the same by the owner thereof, or by his attorney in fact." A part of the coupons presented were attached to this bond; a part were detached from others of the bonds issued under the same act; and the remainder of the coupons were detached from bonds issued for a similar purpose under the act of February 15, 1851, (St. 1851, p. 520,) entitled, "An act authorizing the treasurer of the state of California to negotiate a loan upon the faith and credit of the state for the purpose of defraying the expenses which have been and may be incurred in the suppression of Indian hostilities in the state, in the absence of adequate provisions being made by the general government." Section 1 of the act of May 3, 1852, under which the above-mentioned bond was issued, is as follows: "Section 1. A sum not exceeding six hundred thousand dollars is hereby appropriated and set apart as an additional war fund, payable in ten years out of any money which may be appropriated by congress to defray the expenses incurred by the state of California, and interest thereon at the rate of seven per cent. per annum, in the suppression of Indian hostilities, or out of the proceeds of the sale of any public lands which may be donated or set aside by congress for that purpose; and should no such appropriation or donation be made, or if an amount sufficient should not be appropriated or donated within the said ten years, then the bonds authorized to be issued by this act shall be good and valid claims against the state, and shall be paid out of any moneys in the treasury not otherwise appropriated to pay the expenses of the expeditions mentioned in this act." Section 7 of the act of February 15, 1851, under which \$200,000 of bonds were issued, and from which bonds a portion of the petitioner's coupons was detached, is as follows: "Sec. 7. Any claim which this state has

¹ Reversed in banc. See 36 Pac. 580, 102 Cal. 283.

now, or may hereafter have, upon the general government for moneys expended out of this loan, for the purposes aforesaid, shall be, and the same is hereby, set apart and pledged for the payment of the principal and interest accruing upon said bonds, together with all other moneys in the treasury not otherwise appropriated, or so much thereof as may be necessary." The act of 1851 was repealed by the said act of May 3, 1852, but the repeal contained the following proviso: "Provided, the repeal in nowise affects the war loan bonds already issued under the provisions of the act so repealed." It also appears from the record that congress made an appropriation of \$924,259.65, in August, 1854, to reimburse the state of California for the expenses growing out of the Indian hostilities mentioned; and that under that and subsequent reappropriations of the same moneys, or unexpended portions thereof, a large part of the bonds issued under these acts of the legislature were paid by the United States directly to the holders of the bonds, but that no part of it came into the state treasury; and that on December 15, 1884, an unexpended balance of said appropriation, amounting to \$8,362.16, was covered into the surplus funds of the United States treasury; but it also appears that there remain unpaid of the bonds of 1851, \$3,000; of the bonds of 1852, \$16,800; and upon coupons of both issues falling due between January 1, 1854, and September 1, 1856, \$173,322.28. The coupons attached to the bonds issued under the act of 1851 were payable by the state treasurer to bearer in the city of New York, and the coupons of 1852 were payable at the office of the state treasurer.

The petitioner presented his bond and coupons to the comptroller March 31, 1891, and demanded that a warrant issue requiring the treasurer to pay the amount of the principal of said bond and coupons, viz. \$2,923.16, and also demanded said sum, with legal interest thereon from the maturity of said bond and of said several coupons, amounting in all to the sum of \$12,464.60, which demands or either of them, the comptroller refused to comply with. It was further found that at the time of this demand there was in the general fund, after the payment of all appropriations included in and prior to the forty-second fiscal year ending June 30, 1891, the sum of \$500,000; and that from 1862 to 1889, both inclusive, there was not in any year any surplus in that fund in excess of appropriations for current expenses and special appropriations for particular purposes. On these facts several questions are presented and discussed with marked ability by the learned counsel of the respective parties. These questions are: (1) Whether the liability of the state upon these bonds is primary and unconditional; and, if conditional, whether the general government has made provision for their payment. (2) Whether there has

been an appropriation made for the payment of these bonds and coupons; and, if so, when such appropriation was made, and when it was first available for such payment. (3) Whether petitioner's claims are barred by the statute of limitations. And (4) whether it was the duty of the respondent, as comptroller, to draw the warrant demanded for the whole or any part of said claim.

I shall first consider the last of these propositions, assuming for that purpose only, but not deciding, that the liability of the state is primary and unconditional; that the claims of petitioner are not barred by the statute of limitations; and that there is a fund out of which they might now be paid. Section 672 of the Political Code is as follows: "The comptroller must not draw his warrant for any claim unless it has been approved by the board, and when, hereafter, the comptroller is directed to draw his warrant for any purpose, this direction must be construed as subject to the provisions of this section, unless the direction is accompanied by a special provision exempting it from its operation." By section 673 of the same Code, "claims upon the contingent fund of either house of the legislature, and for official salaries, are exempted from the operations of the provisions of the preceding twelve sections;" and this is the only general exemption found in the Political Code. If there is any special provision authorizing the comptroller to draw his warrant in favor of the petitioner without first having the approval of the board of examiners, our attention has not been called to it, and we do not know of any such provision. Appellant argues, however, that for two reasons it was not necessary to present these claims to the board of examiners. The first is that the acts under which these bonds were issued were passed, and the bonds were in fact issued, before the board was created; and, second, that the bonds and coupons, being in their nature audited claims, never require presentation to any auditing board or officer. As to the first of these points, it is sufficient to say that the requirement that claims against the state shall be presented to the board of examiners in no way affects the obligation of the state to pay all valid claims, but relates only to the proceeding to obtain payment, which, like all statutes relating to remedies, may be changed from time to time; nor is the validity of such statute affected by the fact that it was enacted before the board of examiners was created, even though the new remedy may be less convenient or less prompt and speedy. Cooley, Const. Lim. (6th Ed.) 347. There would seem to be much force in the second of the above points made by appellant, viz. "that bonds and coupons, being in their nature audited claims, never require presentation to any auditing board or officer." Such seems originally to have been the case. The first exception we find was the act of April 1, 1872, (Laws 1871-72, p.

905,) entitled "An act concerning duplicate bonds of the funded debt of 1857," which required the board of examiners to determine whether said bonds were genuine. Whether this act in any manner led to the adoption of section 672 of the Political Code it is not necessary to inquire, but it suggested that circumstances may at any time exist rendering an examination by the board proper, if not necessary for the protection of the state. The board of examiners have judicial powers, though restricted, while the duties of the comptroller in connection with the drawing of warrants upon the treasurer seem to be purely ministerial; and the petition in this case, as well as the briefs of counsel, would indicate that there were many questions involved requiring the exercise of judicial powers. The validity of bonds executed by the officers of the state must depend upon the law under which they are issued. The state is not bound by a bond purporting to be its obligation, unless it is authorized by law, nor is it bound by conditions inserted therein not substantially conforming to the act under which they were issued. The liability of the state, therefore, involves something more than an inspection of the bond itself. The genuineness of the signatures of the officers of the state does not necessarily fix the state's liability. They are but agents of the state, and their authority to do the act in question must be found in the law. To determine these questions is not a mere ministerial act, and cannot therefore be performed by the comptroller, if he be, as to the matter of drawing warrants, simply an executive officer. The power and duty of the comptroller in the premises are the only questions before us. If he has not, as we conclude, the power to issue the warrant under the circumstances here presented, it was his duty to refuse to issue it. This conclusion makes it unnecessary to consider other questions presented by counsel. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

4 Cal. Unrep. 121

PEOPLE v. WORTH et al. (No. 15,005.)
(Supreme Court of California. Aug. 16, 1893.)

JUDGMENT ON BAIL BOND.

The fact that judgment on a bail bond is rendered against the principal, who was not summoned, and who did not appear, does not render it invalid as to the sureties, against whom judgment was also rendered, in accordance with the terms of the bond making each surety liable for the full amount thereof.

Department 1. Appeal from superior court, Sonoma county; A. K. Dougherty, Judge.

Action by the people of the state of California against Charles H. Worth, as principal,

and others, as sureties, on a bail bond. Judgment for plaintiff, and the sureties appeal. Affirmed.

James W. Oates, for appellants. A. G. Burnett, for respondent.

GAROUTTE, J. The defendant Worth, being under arrest, charged with the commission of a criminal offense, was released from custody upon filing an undertaking on appeal, wherein he was principal, and the present appellants sureties. Upon his failure to appear, the bail bond was declared forfeited, and this action was brought to recover thereon. Judgment went for the people, and this appeal is prosecuted by the sureties on the bail bond from the judgment and order denying a new trial. There appears to have been neither a service of summons upon the defendant Charles H. Worth, nor any appearance by him, although the judgment is rendered against him, as well as the sureties upon the bail bond; and upon this ground the judgment is attacked by the appellants. The liability of each surety upon the bond was for the full amount thereof, and the judgment is to the same effect. We are unable to see in what manner appellants are injured by the judgment of which they complain. The fact that other parties are made liable by its terms should be a source of satisfaction to them, rather than of complaint, as it furnishes additional aid in bearing its burdens. Conceding the facts as contended, the wrong done by the trial court was committed against Charles H. Worth, and he has taken no appeal. The judgment is a valid judgment as to appellants in all respects, and its invalidity as to others not complaining is a matter with which they have no concern. We see no valid objection to the form of the order declaring the bail bond forfeited. For the foregoing reasons, let the judgment and order be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

99 Cal. 316

GREIG v. RIORDAN et al. (No. 14,960.)

(Supreme Court of California. Aug. 16, 1893.)

MECHANICS' LIENS—FILING CONTRACT—ASSIGNMENT—CORPORATIONS—AUTHORITY OF OFFICERS.

1. Code Civil Proc. § 1183, requiring contracts for buildings or improvements, where the price to be paid exceeds \$1,000, to be in writing, and the contract or a memorandum thereof, setting forth, among other things, a statement of the general character of the work to be done, to be filed for record, failing in which, the contract to be void, and the owner liable for labor and materials, is for the benefit of laborers and material men, as well as the owner, and failure to file the plans and specifications for a building, which are an essential part of the contract for its construction, is fatal.

2. It is immaterial that the contract does not expressly refer to the plans and specifications as a part thereof, where it appears that they did in fact form a part of it, and without

them it would be too indefinite and uncertain to meet the requirements of the statute.

3. An assignment of a claim by a corporation is not invalid because no authority, either in the by-laws or by resolution of the board of directors, is shown in the manager of the corporation and president, who executed the assignment, where it was made in the regular course of business, with the knowledge and consent of the board of directors.

4. There is no objection to assignment of choses in action to a third person for the purpose of collection, and in such case the legal title passes so as to entitle the assignee to sue, while the assignor retains an equitable interest with which the debtor has no concern.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Charles J. Slack, Judge.

Action by James Greig against Patrick W. Riordan and others to enforce mechanics' liens. From a decree for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Stanley, Story & Haynes, for appellants. Wm. H. Jordan, F. J. Fallon, Parker & Mells, Wm. H. Fifield, Joseph Leggett, Wm. L. Gibson, and Luis F. Dunand, for respondent.

SEARLS, C. This action was brought to enforce certain mechanics' liens against certain property on Bush street, San Francisco, known as the French Church, taken in favor of the San Francisco Lumber Company, a corporation, C. Williams, and F. G. Norman, respectively, and by them assigned to plaintiff. Nine other lienholders on the same property instituted actions to foreclose, whereupon the actions were consolidated, a trial had, and a decree entered foreclosing all the liens except that of C. Williams, held by the plaintiff, Greig, which was rejected. The appeal is from the final decree, and from an order denying a motion for a new trial.

The original contractor for the improvement in which all the liens had their inception was one Joseph Binet, who, on the 31st of May, 1888, entered into a contract in writing with the Reverend Father Renaudier, (acting by authority of his Grace, the archbishop, P. W. Riordan, etc.,) whom we will designate as the "owner," and Binet as the "contractor." The contractor agreed within 100 working days from date to furnish the necessary labor, material, tools, implements, and appliances, and to erect and complete in a workmanlike manner the alterations and additions to be done at the French Church, on Bush street, above Grant avenue, and known as "Notre Dame des Victoires," (with the exception of the painting,) and to deliver it to the owner free from all liens and charges, "in conformity with the plans, drawings, and specifications for the same, made by Huerne & Everett, the architects employed by the owner, and which are signed by the parties hereto, and are to be kept and remain in the office of said architects, subject to the inspection of the parties hereto

and others concerned in said election." (2) The architect was to furnish to the contractor all details and working drawings of the work to be done and materials furnished in accordance therewith, under direction and subject to approval of the architect. (3) The lot of land is described. (4) The owner was to pay therefor \$10,248,—\$2,552 when excavation, brick work, and entire rough framing of inside and west passage were complete; \$2,552 when sashes are in, and columns, walls, arches, and partitions lathed and covered with first coat of mortar; \$2,552 when work is completed and accepted by architect; and \$2,552 35 days after acceptance; extra work, if any, to be paid for three-fourths when building is accepted, and one-fourth 35 days thereafter. (5) The specifications and drawings are intended to cooperate, so that any work exhibited in drawings and not mentioned in specifications, or vice versa, is to be done as though mentioned in both. (6) Owner at liberty to have changes or alterations without avoiding contract, cost thereof to be added or subtracted, as the case may be. There are numerous other provisions in the same somewhat lengthy and carefully drawn contract, but they do not seem essential to the questions raised on appeal. The contract was duly executed and filed in the office of the county recorder on the 2d day of June, 1888. The drawings and specifications were not filed, nor was any memorandum of any kind filed, except as above stated. Work was commenced under the contract, June 5, 1888, and continued until July 14, 1888, during which period some \$500 worth of work was done, when, on the day last mentioned, the contractor was stopped by the fire marshal, the work as planned being in violation of the fire ordinance of the city and county of San Francisco. On the 28th day of July, 1888, the parties entered into another contract, which provided for changes from the plans and specifications, among which were that instead of raising the old roof, and building new side walls of studding, covered with laths and cement, the old roof was to be torn down, the side walls and piers carried up with brick work four feet above cornice, new roof built, brick walls to first story in rear of church, and various and sundry changes, presumably to meet the requirements of the fire ordinance or made necessary in complying therewith. These changes added to the expense \$735. This second contract was not recorded. The work was performed in obedience to the contract as amended; and the payments made by the owner, as therein provided for, except the last, which, with extra work, left a balance of \$2,765 in the hands of the owner, which was paid into court. In the mean time liens of subcontractors, laborers, material men, etc., were filed against the property, aggregating \$5,435.

If the contract was duly filed with the re-

corder, as required by the statute, the owner cannot be held liable beyond the contract price. If, on the other hand, the contract was not filed, as provided by section 1183 of the Code of Civil Procedure, the price agreed to be paid being in excess of \$1,000, the contract was void, and the owner (the defendant here) is liable. That portion of section 1183 involved in the question as presented is as follows: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, and shall, before the work is commenced, be filed in the office of the county recorder; * * * otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." The object of the statute in requiring contracts in excess of \$1,000 to be filed with the recorder seems to be twofold: (1) As a security to the owner, who is thereby shielded from liability to subcontractors, laborers, and material men, beyond his contract price. (2) To afford information to all others furnishing materials or performing services in and about the contemplated improvement, upon which to predicate an opinion founded upon the value of the property, the price to be paid, and the dates of payment, as to whether the contract price is such as will probably be adequate security, and the lien therefor given to them by the statute sufficient to warrant them in bestowing their labor or furnishing materials for the proposed improvement. Manifestly, if the improvement, when completed, taken with the property upon which it is situated, is of a character having no extrinsic or market value,—as, for instance, a mill for crushing quartz rock where there is not and cannot be any quartz rock to crush,—or if, the property being valueless, the price agreed to be paid is far below the value of the work to be done, it is of the utmost importance that these facts should be known to those about to become interested. "The plans, drawings, and specifications" in conformity with which the work was to be done were not filed with the contract. They constituted, so far as the "general character of the work to be done" was concerned, the very soul and essence of the agreement. Without them the dimensions and character of the work cannot be deter-

mined. Whether it was to be composed of iron, stone, brick, or wood we cannot tell. A contract to construct a church, build a house, or sink a shaft would be just as definite as the one in question. In the matter of price to be paid, the dates of payment, etc., it was definite and certain. In the matter of "the general character of the work to be done," the contract, as filed, was, without the "plans, drawings, and specifications," which formed an essential part thereof, fatally defective. If it be urged that the contract did not in terms recite that the "plans, drawings, and specifications" were attached thereto, and made a part of the contract, the answer is twofold: (1) It abundantly appears that they formed an essential part of the contract, and they became a part thereof as effectively as though in express terms so designated. (2) Without them the contract is so indefinite and uncertain as not to comply with the requirements of the statute. We regard the recent cases decided by this court, involving substantially the same question, as conclusive of the matter against the defendant. *Yancy v. Morton*, 94 Cal. 558, 29 Pac. Rep. 1111; *Willamette, etc., Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. Rep. 629; *Holland v. Wilson*, 76 Cal. 434, 18 Pac. Rep. 412. If we view the contract as filed in the light of a memorandum, the same objections are apparent and equally fatal. *Willamette, etc., Co. v. Los Angeles College Co.*, supra. Deeming the original contract void under the statute, it is unnecessary to consider the effect of the amendments to it. They were not filed, and neither add to nor detract from the original as a valid contract.

Against the three assignments to plaintiff, Greig, for which he had judgment, appellants raise objections. The first is to the validity of the assignment by the San Francisco Lumber Company, concerning which it is urged that no authority either by-law or resolution of the board of directors was shown in *Thomas Richardson*, the manager of the company, or in *Adams*, the president, to execute the assignment to plaintiff. The assignment is in due form, and is executed by "W. J. Adams, President San Francisco Lumber Co.," and "Thomas Richardson, Manager," with the corporate seal attached. The evidence tended to show that the assignment was made in the regular course of business of the corporation to plaintiff for collection, the company still having the equitable interest in the claim. In the language of the manager, *Richardson*, who was a witness: "This is a corporation. When it was necessary to make the assignment, we talked the matter over in the board, and it was decided that I should make the assignment to Mr. Greig, for the purpose of collecting this amount. * * * The company is not at present the owner of the claim. * * * The indorsement upon the document is the corporate seal of the company. It was placed there by the secretary." Again: "I

don't think it was made a matter of resolution, but it was a matter which we are in the habit of doing in the regular way of business. I had the power to do so,—to make the assignment." There was testimony to the effect that it was not entered in the record, because they did not usually do that, and that the matter was discussed at meetings of the board in the ordinary way, and Richardson, the general manager, was at a regular meeting of the board authorized to do as he thought best as to the assignment. There was a period in the history of corporations when the most ordinary transactions were required to be authorized by solemn resolution of the board of trustees, duly entered in their records, and authenticated by the corporate seal. With the multiplication of corporations, having for their object nearly every business pursuit known to modern times, the formalities previously regarded as necessary, and which were illy adapted to pursuits requiring prompt action, have been greatly abridged. "Corporations," says Bronson, C. J., in *Gillett v. Campbell*, 1 Denio, 522, "like individuals, may appoint agents and make most of the contracts which fall within the scope of their general powers without the use of a seal. The rule was once otherwise, but that day has gone by." The case in which the above language was used was one in which the president and cashier of a bank, for the purpose of securing a debt owed by the bank, had assigned a debt due to the bank, and it was objected that no authority to make the assignment had been shown by the by-laws of the company or a resolution of the board of directors, and the validity of the assignment was upheld. *McKiernan v. Lenzen*, 56 Cal. 61, was in many respects similar to the case at bar, and the power of the general manager to assign a book account for lumber sold by the corporation to a creditor of the corporation, in payment of an existing debt, was upheld. *Waterman on Corporations*, at section 30, says: "As a general managing agent and superintendent is the representative of the corporation, and may do in the transaction of its ordinary affairs what the corporation itself could do within the scope of its powers, he may assign the chose in action of the corporation to its creditors either in payment of or as security for the payment of a precedent debt of the corporation without express authority of the board of directors." The following cases uphold the same general principle: *Bank v. Kohner*, 85 N. Y. 190; *Ringling v. Kohn*, 6 Mo. App. 333; *Donnell v. Bank*, 80 Mo. 170; *Association v. Martin*, 39 Kan. 750, 18 Pac. Rep. 941; *Seeley v. Lumber Co.*, 59 Cal. 24; *Jennings v. Bank*, 79 Cal. 328, 21 Pac. Rep. 852; *Smith v. Mining Co.*, 66 Cal. 398, 5 Pac. Rep. 688; *Centertown Co. v. Swigart*, (Kan.) 23 Pac. Rep. 569. In the conveyance of real estate and in transactions outside the usual scope of their business, corporations are held to much of the strict-

ness by which they were governed in former times. They must act as individuals may act, through agents, and, within the general scope of their ordinary business, their managing agents can bind their principals as can those of an individual; and, if their agents transcend their powers, the corporations, having knowledge thereof and not specially repudiating the act, are equally bound as individuals would be under like circumstances. The defendant here is only concerned to know that the assignment here is of such a character as to bind the assignor. That the assignor is and will be bound by the act of its general manager is evident from the fact which appears, that the transaction was in the ordinary course of business of the corporation. (2) Because the corporation had notice of the assignment, and made no objection thereto. (3) Because the evidence, although not clear and explicit, is sufficient to uphold the position that the board of directors, sitting as such, authorized the assignment, it not being an act requiring a formal resolution to be entered of record. The objections to the other assignments are not deemed important. William H. Jordan was the attorney for plaintiff, and as such, at the request of the several assignors, prepared the assignments, and, after their execution they were read by the assignee, and apparently left with his said attorney. The assignments were made for collection, and no consideration was paid by the assignee. It is matter of common knowledge that, for the purpose of saving expense, commercial associations and others resort to this method. In such cases the assignee becomes the legal holder of the chose in action, which is sufficient to entitle him to recover, while the assignor retains an equitable interest in the thing assigned, which is of no moment to the debtor. *Pom. Rem.* (2d Ed.) § 132; *Gradwohl v. Harris*, 29 Cal. 154; *Allen v. Brown*, 44 N. Y. 228; *Williams v. Norton*, 3 Kan. 295; *Toby v. Railroad Co.*, (decided June 9, 1893,) 33 Pac. Rep. 550. I find no error in the record calling for a reversal, and am of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

99 Cal. 363

BURNS v. SENNETT et al. (No. 14,955.)
(Supreme Court of California. Aug. 26, 1893.)
INJURY TO SERVANT — NEGLIGENCE OF FELLOW
SERVANT—EVIDENCE—CUSTOM AND USAGE—IN-
STRUCTIONS.

1. The rule that a master is bound to furnish safe appliances, and cannot escape liability for failure to do so by intrusting the duty to a servant, by whose negligence a fellow servant is injured, does not apply where several persons are employed to do certain work, and by the

contract of employment, express or implied, they are to adjust the appliances by which the work is to be done.

2. The fact that a servant injured by the negligence of fellow servants in putting up appliances for doing the work, and which were to be put up by them, thus relieving the master from liability for their negligence, was not hired until several days after the others, and after the appliances had been adjusted, does not make the master liable, as the new servant takes the risk of existing negligence of his fellow servants.

3. In an action against master stevedores for injuries to one employed to help load a vessel, caused by the negligence of a fellow servant in adjusting the appliances, where defendants claim that the servants were required to adjust the appliances, and that the negligence was therefore that of a fellow servant, for which they were not liable, defendants may prove, where the contract of hiring is silent on the question, that there was to plaintiff's knowledge a custom among stevedores at that place under which employees were required to adjust appliances for loading and unloading.

4. On the question whether a master used reasonable care in adjusting appliances, he may show that the adjustment was made in the manner in which such appliances are usually adjusted.

5. Error of the court in the charge given on his own motion in ignoring a principle on which the case depends is not rendered harmless by a correct charge on the point, given in an isolated instruction requested by a party.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Patrick Burns against Sennett & Miller, for personal injuries. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed.

Mastick, Belcher & Mastick, for appellants. Mich. Mullany and Wm. Grant, for respondent.

McFARLAND, J. This is an action to recover damages for personal injuries alleged to have been caused by the negligence of defendants. Verdict and judgment were for plaintiff, and defendants appeal from the judgment, and from an order denying their motion for a new trial. Appellants were stevedores; and, at the time respondent was injured, they were engaged in loading wheat into a certain ship named Chala, for which purpose they had employed a gang of workmen, and a foreman named Wyatt. On June 7, 1889, respondent was one of the gang, and assisting to load the wheat into said ship. His particular work at the time was that of what is called a "slingman;" that is, it was his duty to place on the wharf a "sling," or endless ring of rope, and after the warehousemen had placed thereon a certain number of sacks of wheat, to bring the ends of the sling up over the load, to "reeve" one end of the sling through the other, to put the lift hook through the loop, and to steady the ascending load while within his reach, and then get ready another sling for the next load. When the lift hook was put into the loop, the load was raised by steam power,

applied through certain machinery and apparatus until it was above the side of the ship, when it was pulled aboard by another employe. On the day last named, while a load of wheat was thus ascending, it suddenly dropped upon respondent, and caused the injuries for which he seeks damages in this action. The transcript contains minute descriptions of the various things, which, when put in place and properly united and adjusted, constitute the apparatus used in loading or discharging cargoes, but it is sufficient to say here that they consist of a hoisting engine and certain ropes, working blocks and tackle, pulleys, straps, hooks, swivels, etc.; and, with respect to the cause of the accident by which respondent was injured, it is sufficient to say that most of the apparatus is to a great extent sustained and kept in place by being attached by hooks to what is called a "strap," which is a ring of rope placed around the masthead just above the crosstrees, and that the falling of the load of wheat was caused by the breaking or giving way of this strap. The strap was constructed and put in place by employes assigned to that work by the foreman. The strap should have been "parceled;" that is, properly wrapped or covered with canvas, so as to prevent it from being chafed by contact with the crosstrees.

We do not think that there was evidence in this case to warrant the jury in finding that the accident by which respondent was hurt was caused by the negligence of any person, except in this respect: we think that possibly, taking all the evidence and circumstances in proof, the jury were warranted in finding that the accident was caused by the negligent manner in which the strap was constructed, adjusted, or parceled. The question in the case, therefore, assuming that there was such negligence, is this: Are appellants liable to respondent for the result of the said negligence as to said strap? And this can be correctly answered only by determining whether or not the proper placing and maintaining of the strap was a positive duty which the appellants personally owed to respondent. *Daves v. Railroad Co.*, (Cal.) 32 Pac. Rep. 708; *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914. The general rule is well established that an employe cannot recover judgment against his employer for personal injuries caused by the negligence of a fellow servant. The authorities to this point are numerous, but it is only necessary to cite here the most recent decisions of this court upon the subject, (*Daves v. Railroad Co.*, supra, and *Congrave v. Railroad Co.*, 88 Cal. 360, 26 Pac. Rep. 175,) and the recent decision of the supreme court of the United States in *Railroad Co. v. Baugh*, supra; and, if in the case at bar the adjustment and maintenance of the said strap was not a duty which appellants owed personally to respondent, then all the gang of men employed by appellants in loading the ship were fellow servants, and

respondent could not recover of appellants for injuries caused by the negligence of one or more of said fellow servants in constructing, parceling, etc., said strap. There is another general rule, however, under which alone, upon the facts so far appearing, respondent can maintain this action, if he can maintain it at all; and that general rule is that an employer must furnish machinery and appliances reasonably suitable and safe for the employe to do his work. In such a case the employer is, of course, not bound to insure the employe against any defect in such appliances, but he is bound to use reasonable care in their selection or construction; and, where that rule applies, the duty to furnish such machinery and appliances is one which the employer owes personally to the employe, and he cannot escape that duty by trusting it to an employe who negligently performs it. Does that rule apply to the case at bar, and were there any errors prejudicial to appellants committed by the court below bearing upon that question?

While the general rule is as above stated, still it is well established that the rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employes are to adjust the appliances by which the work is to be done. For instance, if several men are employed to paint a building, or to do some work upon it which requires scaffolding, or some other temporary structure or appliance to support the workmen, the employer to furnish the materials and the employe to construct or adjust the scaffolding or other appliance, the employer is not liable to one of the employes for the careless act of another employe done in the construction, adjustment, or maintenance of the structure or appliance. There are many cases establishing and illustrating this principle, and applying it to a variety of facts, a few of which are the following: *Peschel v. Railway Co.*, 62 Wis. 338, 21 N. W. Rep. 269; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. Rep. 1017; *Killea v. Faxon*, 125 Mass. 485; *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. Rep. 157, 159; *Benn v. Null*, 65 Iowa, 407, 21 N. W. Rep. 700; *Bowen v. Railway Co.*, 95 Mo. 268, 8 S. W. Rep. 230.

With respect to the giving and refusing of instructions on the point above stated, it would be impossible, within reasonable limits, to notice each instruction in detail; and we will confine ourselves to a general view of them. Some of the instructions asked by appellants and refused or modified by the court—particularly Nos. 3 and 7—might well have been given as asked; but we cannot say that appellants were prejudiced by their refusal, in view of the fact that the court, at appellants' request, gave instruction No. 6, which is as follows: "If a master employs servants to perform a particular service, in the course of which it is necessary for them to

construct and adjust machines or appliances for their own use in such service, then, in the absence of any special contract to the contrary, the master is only bound to furnish proper materials from which to construct such machines or appliances, and is not bound to see that such machines or appliances are properly constructed or adjusted." But the charge given by the court of its own motion to the jury, while in the main correct, seems to overlook or ignore the principle contained in said instruction No. 6. It may be plausibly argued that the jury are presumed to have considered the charge of the court as modified by said instruction No. 6; but as the said instruction was an isolated one, given at the request of a party, the jury would have much more surely understood the court if, in its own charge, it had made express reference to the principle stated in said instruction. We do not see at present that the instructions on this point are subject to further criticism. We have said enough, we think, on the subject to guide the court in the event of another trial.

We think, however, that the court did not carry out the principle of said instruction No. 6 in ruling upon the admissibility of evidence, and that errors prejudicial to appellants were committed in excluding certain testimony which they offered. We do not think that the various isolated and detached pieces of machinery and appliances above described, when temporarily put together for the purpose of loading or unloading a particular ship, can be properly considered as one entire and permanent machine or appliance, in the sense, for instance, in which a locomotive or a railroad track may be so considered. *Peschel v. Railway Co.*, 62 Wis. 342, 21 N. W. Rep. 269. It is evident from the nature of the business of a stevedore that the temporary adjustment of these detached pieces has to be frequently made, as often as they are removed from one ship to another. Now, it is contended by appellants that, when a gang of men are employed to go to work at loading a ship, it is a part of the contract of employment that they are to adjust the appliances with which they are to work, and that to make the adjustment is not a duty owing personally by the employer. If this be so, then the employer is not liable to the employe for damages caused by the negligent act of another employe in making such adjustment. In order to prove that the employment was as contended, appellants asked their witness Wyatt, who was their foreman, and an experienced stevedore, these questions: "Question. Is there a custom among stevedores in San Francisco in regard to the putting up of gear and tackle for discharging and loading ships? Q. What is the custom, if there is any, of stevedores in San Francisco, as to putting up gear and tackle for discharging and loading ships? Does the master stevedore undertake to

furnish the men with gear and tackle put up and in order, or is it a part of the work for which the men are hired to put up their own gear and tackle, and take care of it?" To these questions respondent objected as "incompetent, immaterial, and irrelevant," and the objection was sustained. Appellants then, in connection with the last question, made the following offer: "We propose by this question, and by others which will follow it, to prove by this witness and other witnesses whom we propose to call that by the custom of stevedores in San Francisco, at and before the time of plaintiff's employment, the gang of men employed to discharge or load a vessel were required, as a part of the work for which they were hired, to put up and take care of all the gear and tackle necessary for their use, the master undertaking to furnish only suitable rope, blocks, and other material for that purpose; that this custom was well known to plaintiff at the time; that he and his fellow members of the gang were employed under that custom, and without any contract to the contrary, for the discharge and loading of the ship so far as he was employed in it,"—to which the same general objection was sustained. The witness was then asked this question: "When you hired this gang of men, was it their duty to take care of the gear and tackle? Were they hired for that purpose?" And a general objection to the question was sustained. Of their witness Redmond, also an experienced stevedore, appellants asked these questions: "Q. What does the master stevedore furnish to the gang of men when he has taken the job of discharging a ship? Q. Does the master stevedore undertake or contract to furnish to the gang of men employed to discharge or load a ship anything except the material to put up, which, when put up, will constitute the rigging necessary for the work to be done? Q. What, if anything, does the master stevedore contract to furnish to the gang of men employed to load or discharge a ship?" To each of these questions the general objection was made that it was "irrelevant, immaterial, and incompetent," and the objection was sustained. Appellants duly excepted to all of said rulings.

We think that, in sustaining the objections to the above questions and offered evidence the court erred. There possibly may have been some valid special objections to the form of some of the questions, or to some particular language used, as calling for the opinion of the witness; but we think that the general objections to them should have been overruled. The purpose of the offered evidence was to show what the real contract was between the employer and the employed, which the other evidence in the case left in doubt. For instance, we cannot imagine what valid objection there could be to the question: "Were they hired for

that purpose?" Moreover, we think that so far as the offered testimony involved proof of the usage, if any such there were, which entered into a general employment to load or unload a ship, in the absence of a special contract, it should have been admitted. A usage, of course, cannot be given in evidence to relieve a party from his express stipulation, or to vary a contract certain in its terms; but it has a legitimate office in aiding to interpret the intentions of parties to a contract, the real character of which is to be ascertained, not from express stipulations, but from general implications and presumptions. Section 1982 of the Civil Code provides that "an employe must perform his service in conformity to the usage of the place of performance;" and the general doctrine of usage has frequent express recognition in the Codes. See Civil Code, §§ 1645-1647, 1655, 1656; Code Civil Proc. § 1870, subd. 12; Id. § 1963, subd. 12. See, also, *Fraylor v. Mining Co.*, 17 Cal. 595; *Winans v. Hassey*, 48 Cal. 634; *Gillett v. Mawman*, 1 Taunt. 137; *Vaughn v. Gardner*, 7 B. Mon. 330. Our opinion, therefore, is that appellants should have been allowed to introduce evidence of the existence of said usage, and that the court erred in excluding the said testimony offered for that purpose; and it is quite clear that, if such testimony was admissible, it was material, and that its exclusion was prejudicial to appellants.

The fact that the date of respondent's employment was a day or two subsequent to that of the employment of some of the other men does not affect the operation of the rule. It was said by the court in *Butler v. Townsend*, supra, as follows: "The new servant takes the risk of any existing negligence of his fellow servants, as well as that which may thereafter occur. It may possibly be that if the lumpers had been discharged, and ceased to be servants at all, and the defendants, hiring others, had furnished the erected and completed staging for their use, a different question would have arisen, perhaps involving some new duty of the master; but nothing of that kind occurred. Calkers and lumpers at the time of the accident were working together upon the same vessel, for the same general purpose, and under the common master, when the negligence became operative which caused the injury. Tracing it back to an earlier origin is of no consequence, unless thereby some new duty of the master has been brought into existence."

There are only one or two other points necessary to be noticed. Appellants excepted to a ruling of the court excluding evidence that respondent and appellants belonged to an association called the "Riggers' & Stevedores' Union," which undertakes to regulate and restrict the employment of men by stevedores. The exception is not pressed in the briefs; but, as, the point may arise

on another trial, it is proper to say that we do not think that the court erred in excluding the evidence. It is barely possible that such evidence might be admissible under peculiar circumstances, but it was clearly not admissible when offered in this case.

Assuming that it was the duty of appellants to construct, adjust, and maintain the entire hoisting apparatus and appliances as a whole, still they could be held to only reasonable care in the premises, and it was admissible for them to prove that such care was exercised in constructing and adjusting said strap; and for that purpose we think that appellants were entitled to introduce evidence that the strap was "put up in the manner in which such straps are usually put up," and that the court erred in sustaining an objection to the question on that subject asked by appellants of their witness George Wyatt. That fact, if proven, would not be conclusive proof of due care; but it was proper matter to be considered by the jury in arriving at a conclusion on the subject. The rule was properly stated by this court in *Barrett v. Railroad Co.*, 91 Cal. 303, 27 Pac. Rep. 666, as follows: "The fact that the turntable was latched in the way such tables are usually fastened, or according to the usual custom of other railroads, although a matter which the jury had a right to consider in passing upon the question whether defendant exercised ordinary care in the way it maintained the table, was not of itself conclusive proof of the fact." *Stout v. Railroad Co.*, 2 Dill. 294; *O'Malley v. Railway Co.*, 43 Minn. 289, 45 N. W. Rep. 440."

It is not necessary to consider the denial of appellants' motion for a continuance, or the matter of newly-discovered evidence. Whether or not respondent was guilty of contributory negligence in standing under the ascending load was a question for the jury, under the conflicting evidence on that point. We notice no other points necessary to be discussed. Judgment and order reversed, and cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

(4 Cal. Unrep. 163)

CLEMENTS et al. v. MCGINN et al. (No. 15,099.)

(Supreme Court of California. Aug. 30, 1893.)

WILLS—CONTEST—MENTAL CAPACITY—EVIDENCE—BURDEN OF PROOF—FINDINGS.

1. Under Code Civil Proc. §§ 1330, 1331, providing that, where a will is admitted to probate without contest, any person interested may within one year initiate a contest, and if it shall appear that the will is invalid, etc., the probate must be annulled and revoked, and the powers of the executor must cease, where a contest is initiated in time, and the will found invalid, it must be set aside in toto, and not left standing as to persons not joining in the contest. *Estate of Freud*, 15 Pac. Rep. 135, 73 Cal. 555, explained and followed. *Samson*

v. Samson, 30 Pac. Rep. 979, 64 Cal. 327, distinguished.

2. On the contest of a will on the ground of mental incapacity, the will having been previously admitted to probate, contestants only have the burden of proving the issues raised, and an instruction that the probate of the will raises a presumption of mental capacity, which contestants must also overcome, is properly refused, as imposing an additional burden.

3. On the contest of a will on the ground of mental incapacity, declarations of testator are admissible to explain his peculiar actions only when made at about the time of such actions, and therefore a letter by him is not admissible to explain certain conduct, where it is without date, and there is nothing to show when it was written.

4. The discharge of a person from an insane asylum by the resident physician and secretary, though the certificate does not state that she is restored to reason, is prima facie evidence that she is so restored, or that she was improperly committed, and is therefore a competent witness, these being the only grounds for her discharge under the statute.

5. Under Code Civil Proc. § 1880, declaring that persons "who are of unsound mind at the time of their production for examination" cannot be witnesses, the fact that a person has been committed to an asylum as insane does not render her an incompetent witness, but the question of competency is for the court, and her testimony is properly received, in the absence of anything to show her of unsound mind.

6. A witness cannot on cross-examination, for the purpose of impeaching him, be asked as to his having been in jail, etc., as, under Code Civil Proc. § 2051, he cannot be questioned as to particular wrongful acts.

7. On the contest of a will, a special finding that testator was not of "sound mind" is a finding of an ultimate fact, and not a mere conclusion of law.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceeding by Mary A. Clements and another against Eugene McGinn and others to contest the will of James McGinn, deceased, which had been admitted to probate. There was a judgment for contestants, and proponents appeal. Affirmed.

P. Reddy, W. H. Metson, Smith & Muraskey, and Reddy, Campbell & Metson, for appellants. James L. Crittenden and H. S. Foote, for respondents.

PER CURIAM. This is a contest over the last will of James McGinn, who departed this life on or about February 6, 1888, at the city and county of San Francisco, leaving a last will, bearing date September 26, 1887, by which he left to his executors, in trust for his wife, Johanna McGinn, during her life, all of his property, real and personal, of the value of \$60,000 or more, and, upon the death of his said wife, the same was bequeathed and devised to his children by said wife, to the exclusion of certain other of his children by a former wife. The will was admitted to probate, and Eugene McGinn and Joseph Byrne, therein named as executors, were duly appointed as such executors. In due time, Mary A. Clements and Emma Burns, two of testator's daughters by a former marriage, initiated

a contest to annul and revoke the probate of said will, and to obtain a decree adjudging the invalidity thereof upon various grounds, among which were (1) that the will was made under duress; (2) undue influence and duress; (3) fraud on the part of Johanna McGinn and others, whereby the execution of said will was procured; (4) that James McGinn was of unsound mind and insane, and not of sound and disposing mind and memory, when said last will was made, signed, published, and executed. Answers were filed by the executors, by Johanna McGinn, the widow, and Ellen Frances McGinn, her daughter, which answers were, by stipulation of the attorneys, treated as the answers of all the minor children of James and Johanna McGinn. Under the pleadings, 17 issues were framed and submitted to a jury impaneled to try the cause, all of which were answered by said jury in favor of the respondents below and appellants here, except one, which was answered in favor of contestants. It was as follows: "Eleventh issue. Was the said James McGinn of sound mind at the time said instrument was subscribed by him, and when the said James F. Tevlin and said James F. Smith signed their names to the same?" To which the jury answered "No." The issues as submitted, with the answers thereto, are too lengthy to be set out in full here. It may be said of them in brief that the findings of the jury thereon were complete and specific, and were to the effect that no fraud, duress, menace, or undue influence was practiced upon the testator by Johanna McGinn or any other person in the matter of the will; that it was duly made, executed, witnessed, published, and declared to be the last will and testament of said James McGinn, and was never by him annulled or revoked, and was only invalid by reason of said testator not being of sound mind at the date of its execution, viz. September 26, 1887. Upon the verdict of the jury, the court entered a decree adjudging that the said James McGinn was not of sound and disposing mind on the 26th day of September, 1887, at the time when said alleged will was signed and published, and that said alleged will is not the last will and testament of James McGinn, deceased, and revoking the probate of the same. This appeal is prosecuted from the judgment, and from an order denying a new trial. The trial of the cause was on for 67 days, extending from November 15, 1888, to April 20, 1889. The transcript consists of 342 printed pages, of which over 150 pages are devoted to the evidence and objections thereto. The instructions of the court to the jury cover some 60 pages. Many exceptions were reserved at the trial. A careful review of the whole case leads to the conclusion that a few only of them need be mentioned.

The testimony tended to show that the

testator, James McGinn, was a long time a resident of the city and county of San Francisco, where he was engaged in the business of an undertaker. He was twice married. By his first wife he had six children, who survived him, four of whom were boys and two girls. By his second wife, Johanna McGinn, who still survives, he had five children, who survived him. Testator seems to have been naturally of an excitable temperament and irascible disposition. For some time prior to August 3, 1887, he was in failing health, and complained of severe pains in his head, and on the last-named date had a sudden and serious attack of paralysis, from the effects of which he was helpless and speechless for a considerable time, and from which he never entirely recovered. The will in question was executed September 26, 1887, and the testator died on or about February 6, 1888, as before stated. The question as to whether or not testator was of sound and disposing mind at the date of the execution of the said will involved the prominent proposition in the litigation. Many witnesses were called to the point by the contestants, the most of whom, as intimate acquaintances of testator, concurred in the opinion that he was mentally insane.

The first contention of the appellants is that the eleventh finding of the jury is not a question of fact, but a conclusion of law. The term "sound mind," as applied to the condition or status of testator, was a fact. It was for the purposes of the case a ultimate fact, in the establishment of which the physical condition of the party, his acts and conduct, were the probative facts. According to the finding of the jury, testator was not of sound mind at the date of the execution of the will; in other words, he was of unsound mind. "A person of unsound mind is an adult who, from infirmity of mind, is incapable of managing himself or his affairs. The term, therefore, includes insane persons, idiots, and imbeciles." Black, Law Dict.; *Jenkins v. Jenkins' Heirs*, 2 Dana, 103. It is the possession of a sound mind which is one of the requisites to capacity to make a will. Civil Code, § 1270. The term "disposing capacity or mind" are alternative or synonymous phrases in the law of wills for "sound mind" and "testamentary capacity." Black, Law Dict. The expression "unsound mind" equally stands for and includes the want of a disposing mind or testamentary capacity.

It is also contended that the decree or judgment should not have been to set aside or vacate the probate of the will, as to those who did not contest, and *Samson v. Samson*, 64 Cal. 327, 30 Pac. Rep. 979, is cited in support of the position. Counsel also suggests a conflict between this case and that of *Estate of Freud*, 73 Cal. 555, 15 Pac. Rep. 135. We think a reference to the Code will show—First, that the contention of ap

pellants is not tenable; second, that there is no conflict between the cases above mentioned. Section 1330 of the Code of Civil Procedure provides that where, as in the present case, a will is admitted to probate without contest, any person interested may within one year initiate a contest, and if, upon a hearing, it shall appear that the will is invalid or not sufficiently proven to be the last will of the testator, the probate must be annulled and revoked; and the next section provides that thereupon the powers of the executor, etc., must cease. The Case of Freud was, like the present one, within these provisions, and hence there was properly a revocation of the probate in toto. The case of Samson v. Samson, supra, came within the purview of section 1333, which provides that, if no person contests the validity of the will within one year after its probate, such probate shall be conclusive except against infants, etc., who within one year after their disability is removed may contest. Ten years had elapsed in that case between the probate of the will and the contest by an infant, whose disability had been removed within one year next before filing the contest, and it was held that the other heirs were concluded by the lapse of time, and hence that, as to them, the probate should not be set aside.

At the trial, one W. J. Mallady was called as a witness on behalf of contestants, and testified as follows: "I knew James McGinn twenty years. Was in his employ about eight years. James McGinn was always very friendly with me. I enjoyed his confidence and friendship up to the time of his last sickness. On one occasion, when he met me on Montgomery street during his last sickness, he was not cordial or friendly with me as he used to be. He treated me coldly. My opinion is that James McGinn was of unsound mind during his last illness. One of my reasons for this opinion is that he treated me coldly and unfriendly on this occasion when he met me on Montgomery street." Upon cross-examination, counsel for defendants, after proving by witness that he knew the handwriting of testator, showed him a paper, and asked him if it was in the handwriting of James McGinn. The paper was objected to as evidence, on the ground that it was incompetent, irrelevant, and immaterial, and that its identification is irrelevant and immaterial. The objection was sustained, and the ruling excepted to. The paper is set out in the record, and is without date. It purports to be a letter signed by James McGinn, addressed to the captain of Boston police, asking for information of one James Mallady, formerly of Boston, and now known as William J. Mallady, and residing in San Francisco; expresses doubts as to his honesty; and seeks information as to his previous career, etc. The object, as we may well suppose, was to show a lack of confidence in and friendship for the witness on

the part of McGinn, and thus to account for the treatment of the former by the latter when they met on Montgomery street, as stated in the direct examination. Wherever the bodily or mental feelings of an individual are material as proof upon an issue, the usual expression of such feelings made at the time in question is said to be not hearsay, but original evidence, and, as such, admissible. 1 Greenl. Ev. § 102. The difficulty which meets us in the solution of the question here is that there is no date to the document offered in evidence, and no means by which to determine the time when the expressions in it were used. The witness had known McGinn 21 years, and had been in his employ about 8 years, but during which 8 years of the 21 does not appear. For aught that is shown, the letter may have been written at almost any time within this extended period. The authorities are quite uniform to the effect that expressions indicative of mental or bodily feeling must be confined to the period of the happening of the event which they illustrate. If, in the present instance, the instrument was intended to show a revulsion of feeling towards the witness on the part of a sane man for valid cause, we are of opinion it should have appeared that it emanated prior to the alleged attack upon which his unsoundness of mind was predicated, or at least prior to the alleged meeting on Montgomery street. If made subsequently, it may have been promoted by the vagary of a disordered mind, and could not be received as rational support and reason for the changed conduct of McGinn towards the witness. We cannot therefore say there was error in the exclusion of the instrument.

There was no error in the ruling of the court excluding the evidence as to the reasons which induced the witness James McGinn to visit his father. The particular visit is not specified. He had testified as to the condition in which he found his father, and it might well be that he visited him upon the most weighty matter of business, supposing him sane, only to find him in the condition he described. A witness cannot, on cross-examination, for the purpose of impeaching him, be questioned as to particular wrongful acts. Code Civil Proc. § 2051; Jones v. Duchow, 87 Cal. 109, 23 Pac. Rep. 371, and 25 Pac. Rep. 256; Sharon v. Sharon, 79 Cal. 633, 22 Pac. Rep. 26, 131; Evans v. De Lay, 81 Cal. 103, 22 Pac. Rep. 408. It follows that the questions propounded to witness Thomas McGinn as to his having been in the county jail, etc., were improper. People v. Carolan, 71 Cal. 195, 12 Pac. Rep. 52.

Mrs. Johanna McGinn was called as a witness on the part of contestants, and her testimony was objected to, upon the ground that she was incompetent to testify by reason of having been found to be of unsound mind, and an exception was taken to the

ruling of the court permitting her to testify. The evidence already before the court showed that Johanna McGinn, on the 13th day of December, 1882, was by order of the superior court, or a judge thereof, committed to the asylum for the insane at Napa as an insane person, upon a certificate showing her to be afflicted with a form of insanity known as "recurrent mania;" also a certificate dated November 4, 1883, signed by the resident physician and secretary, discharging Johanna McGinn from the Napa State Asylum for the Insane, but which did not state affirmatively that she was "cured and restored to reason." The provisions of Code Civil Proc. §§ 1763-1766, both inclusive, relate to the appointment and discharge of guardians, and the care and custody of the property of insane and incompetent persons, and, for the purposes specified therein, are of controlling force and effect; and the adjudication of incompetency there provided for is conclusive against all persons dealing with the ward until he is restored to competency to manage his affairs, as provided by section 1766 of the same Code, except as limited by section 40 of the Civil Code. Kellogg v. Cochran, 87 Cal. 192, 25 Pac. Rep. 677, discusses the provisions of the Code and the cases to which their several provisions are applicable, and we need not repeat the reasoning there indulged in here. The conclusion reached in that case is that a discharge from the asylum, either because improperly committed or upon the ground that the insane inmate has recovered, as provided in section 2197 of the Political Code, restores the person to capacity to sue, save where a guardian has been appointed under the Code of Civil Procedure. The question of the capacity of a witness to testify, however, does not turn upon the point whether or not he has been declared insane, or, when so declared, upon the question of judicial restoration. Section 1880 of the Code of Civil Procedure provides as follows: "The following persons cannot be witnesses: (1) Those who are of unsound mind at the time of their production for examination." This is substantially the rule as it has existed for generations, and was the rule of the common law. The unsound mind mentioned is unsound in fact in contradistinction to those who have been judicially declared of unsound mind. An insane person is competent to be a witness if he understands the nature of an oath, and has sufficient mental power to give a correct account of what he has seen or heard. *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. Rep. 840; *People v. New York Hospital*, 3 Abb. N. C. 243; *Busw. Insan.* § 344, and cases cited. The question whether a person who is offered as a witness is insane at the time goes to the competency of the witness, and is a preliminary question to be decided by the court. *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. Rep. 164; *Holcomb v. Holcomb*, 28 Conn. 177; *Grant v. Thomp-*

son, 4 Conn. 203; *Coleman v. Com.*, 25 Grat. 865. Section 2197 of the Political Code provides that "insane persons received in the asylum must, upon recovery, be discharged therefrom." The only other ground for a discharge is that provided by the act of March 9, 1885, by which it is made the duty of the resident physician to discharge persons who have been improperly committed. St. 1885, p. 35. As was held in *Kellogg v. Cochran*, supra, a discharge for either of these causes (where no guardian has been appointed) restores the person to civil capacity. In *Hand v. Burrows*, 23 Hun, 330, it was held that a commission might be issued to take the testimony of one committed to a lunatic asylum in another state, on the ground of insanity, and that the presiding judge would, before admitting it in evidence, determine by the answers given and such witnesses as might be produced as to the mental condition of the witness, and consequent admissibility of the evidence. We are of opinion, then—First, that the discharge of the witness from the asylum was *prima facie* evidence that she was restored to reason, and was of sound mind, or that she was improperly committed to such asylum; second, that in any event the question of her incompetency to testify was one for the court below to determine, and, nothing appearing either from a preliminary examination or from the tenor of her testimony to indicate unsoundness of mind at the date of her examination, no error was committed.

There are numerous other exceptions in the record based upon the rulings of the court upon questions asked by appellants on cross-examination of witnesses, some of which rulings were correct, some clearly upon matters within the discretion of the court, and others which, although of doubtful propriety, are not of sufficient importance to warrant a reversal. We do not feel called upon to notice them in detail. The instructions were voluminous, and presented to the jury the questions of law applicable to the case with great clearness. A number of those asked by respondents and refused were evidently so refused because others precisely similar or of substantially similar import had been given. Others refused or modified related to issues decided in favor of respondents, and hence need not be considered. The court eliminated from the eighth instruction asked by appellants so much thereof as instructed the jury that the previous probate of the will raised a presumption that McGinn was, at the time of its execution, of sound and disposing mind, and competent to make a will, "and, unless the contestants have overcome not only this presumption, but all of the other evidence in the case offered in support of said presumption and the sanity of the said testator, by a preponderance of evidence and to your satisfaction, you will find in accordance with said presumption," etc. The action of the court was proper. It had

already instructed the jury very properly that "the burden is upon the contestants in this proceeding to prove and establish the issues made herein by a preponderance of evidence, and, unless so established, you will find each and every issue against said contestants." The contestants had the affirmative upon all the issues made, and therefore the burden of proof was upon them. *Estate of Dalrymple*, 67 Cal. 444, 7 Pac. Rep. 906; *In re Burrell*, 77 Cal. 479, 19 Pac. Rep. 880. That portion of the instruction stricken out, however, assumed, in addition to and beyond all this, the probate of the will cast an additional burden of proof upon the contestants, which was not true. Had they appeared at the probate of the will, and made the same issues, they would have had the same burden cast upon them, no greater, no less. The other objections to instructions are less important, and require no special mention. Those given on behalf of contestants were proper. Upon the whole, the instructions were quite as favorable to respondents (appellants here) as the law permits, and the judgment and order appealed from are affirmed.

99 Cal. 248

HOGAN v. PACIFIC ENDOWMENT LEAGUE. (No. 14,996.)

(Supreme Court of California. Aug. 14, 1893.)

ENDOWMENT ASSOCIATION—ASSESSMENTS—LEGALITY—DIRECTORS—AUTHORITY TO AMEND BY-LAWS—DIVERSION OF ENDOWMENT FUND.

1. The by-laws of an "endowment league" provided for general and endowment funds created by quarterly dues and monthly assessments, and for the payment of matured endowment coupons out of the general fund, provided the holder is "in good standing" at the maturity of the coupon. They also provided that, "when the demands on the endowment fund require, the levy of additional assessments shall be made;" that such fund should only be used to pay matured coupons; and that the board of directors are "invested with full power to enact laws for the government of the league." *Held*, that such board had no authority, without the consent of all the members, to divide the endowment fund, and create a reserve fund, by amendment to the by-laws, so that the demands on the former fund would "require the levy of additional assessments," and add to the condition of payment of coupons that "the assessment or assessments levied for the month in which the coupon is payable" must be paid.

2. Where, at the time of the levy of certain extra assessments on a member, there was more than enough money in the endowment fund, and in other funds not provided for by the by-laws at the time he became a member, to which part of the former fund had been transferred, to meet all obligations payable out of the endowment fund, such extra assessments are illegal, though the amount in the endowment fund as kept by the association was insufficient to pay such obligations.

3. Assessments levied to meet prospective obligations on endowment coupons are illegal.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Thomas C. Hogan against the Pacific Endowment League to recover the sum alleged to be due on a matured endowment coupon issued by defendant to plaintiff. From a judgment for plaintiff, defendant appeals. Affirmed.

Eugene N. Deuprey, for appellant. Geo. D. Collins, for respondent.

VANCLIEF, C. The following is a copy of the complaint in this action: "The plaintiff in the above-entitled action complains of the defendant therein, and for cause of action alleges: (1) That said defendant is a voluntary and unincorporated association of a very large number of persons, and has for its object the payment of endowments in the sum of five hundred dollars at certain periods computed according to the age of the member, until the aggregate payments to each member amount to the sum of five thousand dollars. That said sums of five hundred dollars are paid to the members out of a fund created for that special purpose, and held by defendant in trust for the purpose of said payment. That said fund is designated the 'Endowment Fund,' and is composed of the proceeds from assessments levied upon the members to meet the payment of said endowment of five hundred dollars as the same becomes due, and is also composed of fines levied for nonpayment of said assessments and the accumulation of interests derived from investments of said assessments when collected. That said assessments and fines are levied by said defendant upon its members. That, at all the times hereinafter mentioned, the persons composing the said association transacted the business thereof at said city and county of San Francisco, under the common name of 'Pacific Endowment League,' and made and executed all business concerning the same in, under, and by said name. That heretofore, to wit, during the year 1888, and prior to August of that year, this plaintiff was admitted to membership in said defendant association, and did join the same, and thereby became a member thereof, in good standing, and has continuously ever since been a member of said defendant association, in good standing therein. (2) That heretofore, on the 6th day of August, 1888, the said defendant association made, executed, and delivered to plaintiff a certain written instrument, of which the following is a true copy, viz.: 'Certificate No. 88. Coupon No. 1. \$500. San Francisco, Cal., August 6, 1888. Provided Mr. Thos. C. Hogan shall be a member in good standing thereof on the 13th day of January, 1891, the Pacific Endowment League will pay to his order on that date the sum of five hundred dollars, on presentation of this coupon to the secretary. [Signed] J. G. Severance, President. [Signed] J. Alfred Lueders, Secretary.' That plaintiff was a member of said defendant association, in good standing, on

the 13th day of January, 1891, and on that date presented said coupon to the secretary of said association, the said J. Alfred Lueders, and demanded payment thereof, and said association then and there refused to make payment of said sum of five hundred dollars provided for in said coupon. That said demand was made by plaintiff on said 13th day of January, 1891, upon said defendant association, at said city and county of San Francisco. That, at the time of said presentation and of said demand, there were ample funds and money in said endowment fund to fully pay said sum of five hundred dollars provided for in said coupon. That no part of said sum of five hundred dollars provided for in said coupon has been paid. Wherefore plaintiff prays judgment against the said defendant association for the sum of five hundred dollars, with interest and costs of suit, and that by said judgment the defendant association be directed to pay the same out of the said endowment fund, and for such other, further, or different relief as may be just."

The only issues upon which any point is made on this appeal arise from a denial by defendant that the plaintiff was a member of the "Pacific Endowment League," in good standing, on the 13th day of January, 1891, or at any time since, and the averment that he failed to pay 18 assessments levied by the league on January 2, 1891, and ipso facto forfeited and lost his right of membership in said league, and has ever since remained suspended. The court found for the plaintiff upon all the issues of fact, and gave judgment accordingly. The defendant appeals from the judgment, and from an order denying its motion for a new trial. The only point made by appellant is that the evidence does not justify the finding that the plaintiff was a member of the defendant association, in good standing, on January 13, 1891; and whether he was so or not depends solely upon the validity of the 18 assessments which, it is admitted, the plaintiff refused to pay. If those assessments were valid, his refusal to pay them effected a suspension of his good standing as a member of the league; otherwise, he was a member in good standing on January 13, 1891, and was then entitled to payment of the coupon set out in his complaint.

The defendant association or league was organized on March 8, 1888, and the plaintiff became a member thereof on March 9, 1888. On August 6, 1888, the defendant issued to plaintiff an "endowment certificate," by which it became obligated to pay to plaintiff \$5,000 in 10 equal coupon installments, of \$500 each, at the times and upon the condition expressed in the coupons. The first of said coupons matured January 13, 1891, and upon it this action was commenced, January 29, 1891. The by-laws of the league, as they were at the time plaintiff became a member, and remained until De-

cember 28, 1889, do not add to or change the condition expressed in the coupon, namely, that plaintiff "shall be a member, in good standing, on the 13th day of January, 1891;" but they provide that failure to pay quarterly dues and assessments "suspends a member without further action." The quarterly dues are \$1.50, and the regular authorized assessments are levied monthly according to fixed rates, dependent upon the age of the member assessed, the plaintiff's rate being \$3.50 per month. Besides this regular monthly assessment, section 3 of article 9 of the by-laws provides: "When the demands on the endowment fund require, the levy of additional assessments shall be made." Professing to act by authority of this section, the directors, on January 1, 1891, 13 days before the coupon in suit matured, levied 18 special assessments, of \$3.50 each, on plaintiff, all payable immediately, and addressed to plaintiff the following notice thereof: "San Francisco, Cal., January 1, 1891. The board of directors, by resolution duly passed, has levied on the above date special assessment No. 3, which is now due and payable on all certificates registered up to and including December 31, 1889. Under our present laws, no certificate is liable for a special assessment until after one year from the date of its registration; hence all certificates registered during the year 1890 are exempt from this special assessment No. 3. The special assessments are always of the same rate as the regular, and delinquent on the last day of the month for which they are called. To protect the interests of the membership, 18 extra assessments are hereby levied on all certificates of which the first coupon comes due within this month, payable, besides special No. 3, before the warrant for the matured coupon can be drawn. They will, however, after the issuance of the warrant, be credited on the 2d coupon as 18 regular monthly assessments. This will be continued on maturing coupons from month to month until repealed. By order of the board of directors. J. Alfred Lueders, Secretary. Bring this card. Thos. C. Hogan, 146 Silver St., City."

Article 1 of the by-laws provides: "There shall be a board of nine directors, invested with full power and authority to enact laws for the government of the league." Article 4, as it existed from the organization of the league until December 28, 1889, provided that "coupons shall be paid on the day they mature by warrant on the treasurer, * * * upon surrender of the coupon." But this article was amended December 28, 1889, by adding thereto the following: "Provided, the dues for the quarter, and the assessment or assessments levied for the month in which the coupon is payable, have been paid." At the same time, December 28, 1889, a new article (numbered 21) was adopted, as follows: "There shall be a reserve fund created by setting

aside from the receipts in the endowment fund such portion as shall be deemed necessary by the board of directors for the protection of the members and placed at interest." Section 6 of article 9 provides: "The proceeds from assessment and any accumulation of interest derived from investment of assessment moneys constitute the endowment fund, from which all payments for maturing coupons are made, and the endowment fund shall not be used for any other purpose whatsoever." Article 18 provides: "All moneys other than those mentioned in section 6 of article 9 go into the general fund which shall be used to defray the expenses of the league,"—this fund being composed of the initiation fees, (\$5 each,) the quarterly dues of members, (\$1.50 each, or \$6 a year,) and certain fees and fines provided for. The above amendment of article 4 and the adoption of article 21 were evidently intended to authorize the creation of a reserve fund at the expense of the endowment fund, and thereby so reducing the latter as to justify the levying of the 18 or any number of additional special assessments, at the discretion of the board, all payable within the month in which coupons are to mature, as a condition of the payment of such coupons. In this way it was proposed to make "the endowment fund require the levy of additional assessments," in the sense of section 3 of article 9 above set out. In no other way could the board have made the endowment fund "require the levy of additional assessments" to meet the demands upon it for the payment of coupons maturing in the month of January, 1891, since it appears from an official report of the secretary, issued January 1, 1891, that the league then had in its treasury \$83,034.80 properly and lawfully applicable to the payment of mature coupons, though the board had nominally divided it into three funds, as follows:

Reserve or guaranty fund.....	\$58,522 65
Emergency fund.....	15,581 95
Endowment fund proper.....	8,930 20

\$83,034 80

The same report of the secretary shows that \$62,000 was disbursed from the endowment fund in payment of matured coupons during the year 1890, leaving the balance of \$83,034.80; but it does not appear that any special assessment was levied upon the holders of the coupons paid during that year, the payment of which was enforced or required as a condition precedent to the payment of those coupons. J. Alfred Luaders, who was the secretary of defendant from its organization until May, 1891, and since its president, testified in explanation of the 18 special assessments, as follows: "The portion of the code of laws under which those 18 assessments were levied, (article 9, section 3, 4, and 5,) which gives the board of directors full power to levy

them, section 3 being the main section. At the time this coupon became due, in January, 1891, the endowment fund was not insolvent, but there were so many demands that would have to come in a future time that we had to look for those demands. It was not only our ambition to pay these coupons that matured in January, 1891, but to pay all that were contracted before that time and will mature later on. A coupon is only payable on the date of maturity, and is not a demand until it matures. It is merely a prospective demand until then. When we levied these special assessments, we had in view the other coupons that were to be paid, and we had to make provision in time to meet them when they would become due. As soon as these 18 assessments were paid, we would have turned over to Mr. Hogan \$500 for the coupon. * * * We levied the 18 assessments on the first coupon. After the first coupon had been collected by Mr. Hogan, he could have dropped the certificate. We levied them on the first coupon under our code of laws to make it legal. * * * It was a protection to the members that we levied these 18 assessments, in case Mr. Hogan would not continue his membership. \$56 is all Mr. Hogan has paid in assessments outside of the dues which are for expenses, towards the \$500. It was to devise ways and means by which to protect the endowment fund as much as possible against such a thing, as a member may drop out the first month, and it was not aimed at any particular member. Mr. Hogan paid in so little, it seemed only just to levy the 18 assessments. The Court: Why couldn't you have levied 500 assessments? If you could levy 18, why didn't you levy more? Answer. That would be highway robbery. 18 assessments levied on certificate which has only paid \$56 is very just, and only justice to the other members. We had about \$83,000 in bank to the credit of the endowment fund when the coupon matured on the 1st January, 1891, and the amount due for coupons maturing in that month was between \$15,000 and \$20,000; to speak more exactly, \$23,500. The coupons to fall due in the following month, and those to mature, required a sum largely in excess of \$83,000 to pay such coupons, and therefore it was a necessity to levy 18 assessments in January, 1891, to protect the payment of coupons immediately following." In his said report of January, 1891, the secretary further says: "This is a measure adopted for the equalization of payments, and for the protection of those members whose first coupon falls due at the later date; and, as the application for membership was made by every member for a certificate of \$5,000, of which a coupon is only a part, this action is amply justified, and meets with the cordial approval of every well-meaning member." It is obvious that the defendant association was brought into existence for the sole benefit

of its promoters and officers, who were to feed upon the so-called "general fund" which was sacredly dedicated to them, and quite as obvious that it was constitutionally doomed to a short life; hence the doctoring to prolong the agony of its sickly existence. It is, however, the creature of contract, and must be governed by the law of contracts. Not being incorporated, its written articles of association constitute a contract by which the duties of its officers, the duties and obligations of its members among themselves, and the scope of its business are to be defined and regulated. Its articles of association bear to it the same relation that a charter bears to an incorporated society, and constitute its fundamental law, in accordance with which all subsequent by-laws, regulations, and amendments must be made. *Nibl. Mut. Ben. Soc.* § 1; *Bac. Ben. Soc.* §§ 37, 62; *Austin v. Searing*, 69 *Amer. Dec.* 670, and notes; *Otto v. Benevolent Union*, 75 *Cal.* 309, 17 *Pac. Rep.* 217. The obligation of this class of contracts for the payment of money, or for the security of any other right of property, is as sacred as those of any other contract, and a breach thereof will be remedied by the courts. *Bac. Ben. Soc.* §§ 61a, 105, 106, 107, and cases cited. The mere fact (conceding it to be such) that the articles of association constituting the contract do not operate equally upon the individual members confers no authority upon the directors to change or amend such articles for the purpose of "equalization of payments" or other burdens imposed by the original compact otherwise than authorized by the original articles. As such change or amendment would impair the obligation of the original contract, it could have been made only by consent of all members to be affected thereby; and such consent is not implied in article 1, which confers upon the board of directors power "to enact laws for the government of the league," because it must have been understood that this power was limited by the laws of the land with reference to which the article conferring it must be construed. *Nibl. Mut. Ben. Soc.* §§ 20, 24; *Bac. Ben. Soc.* § 84. Besides, "the equalization of payments" sought to be effected by the 18 assessments, according to the testimony of the president, could have been accomplished only by compelling each member to pay his own coupons as they matured, in addition to his quarterly dues, initiation fee, fines, etc., for the support of officers. This, though not highway robbery, would have killed the institution immediately.

It is claimed that the levying of the 18 assessments was authorized by the original section 3 of article 9, because, it is said, "the demands on the endowment fund

required" such additional assessments; yet it appears that the amount of the coupons falling due in January, 1891, was only \$23,500, and that there was then in the endowment fund \$83,000, for there was no provision in the original articles for creating a reserve fund from the receipts of the endowment fund, nor for transferring any part of the endowment fund to any other fund, nor any provision in either the original or amended articles for an "emergency fund;" and therefore the alleged transfer of \$74,104 from the endowment fund to the supposed reserve and emergency funds had no actual existence. Indeed, there is no evidence of any resolution of the board to that effect. Besides, section 6 of article 9 provides that the endowment fund shall not be used for any other purpose than the payment of matured coupons. For what purpose could any part of the endowment fund have been reserved? The placing of such a portion of it as was not immediately needed at interest was no reservation of it from the purpose to which it was exclusively dedicated. Nor is it easy to conceive of any purpose or occasion for any "emergency fund." All possible demands upon the endowment fund were payable in definite sums at fixed times. There was no chance for any unexpected valid demand upon that fund. It follows that there was no legal necessity for levying the 18 special assessments on January 1, 1891, and therefore they were invalid. *Thomas v. Whallen*, 31 *Barb.* 172; *Insurance Co. v. Guse*, 49 *Mo.* 332; *Nibl. Mut. Ben. Soc.* § 277. In levying assessments the directors act ministerially, and not judicially, and therefore no presumption arises in favor of their legality or regularity, (*Nibl. Mut. Ben. Soc.* § 280; *Bac. Ben. Soc.* § 377;) nor can assessments be made for anticipated losses unless provision therefor is made in the articles of association, (*Rosenberger v. Insurance Co.*, 87 *Pa. St.* 207; *Crossman v. Association*, 143 *Mass.* 435, 9 *N. E. Rep.* 753.) There are other probably valid objections to the 18 special assessments, but the foregoing are sufficient to show them to have been invalid. Being invalid, the refusal of the plaintiff to pay them did not have the alleged effect of suspending him from good standing as a member of the league. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

FITZGERALD and McFARLAND, JJ. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DE HAVEN, J. I concur in the judgment.

99 Cal. 345

SAN JOAQUIN LAND & WATER CO. v. WEST et al. (No. 18,113.)

(Supreme Court of California. Aug. 18, 1893.)

JUDGMENT—ENTRY—AMENDMENT—INTEREST.

1. Where judgment is entered otherwise than authorized by the decision, it may be amended by the court.

2. As a money judgment draws interest at 7 per cent., it is properly entered for the amount recovered with interest at such rate from date of judgment, though the decision properly contains no provision therefor.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by the San Joaquin Land & Water Company against F. M. West and others. From an order refusing to amend the judgment, plaintiffs appeal. Affirmed.

E. S. Pillsbury and W. L. Dudley, for appellants. Baldwin & Campbell and S. D. Woods, for respondent.

GAROUTTE, J. The present action involved the title and right of possession to a certain fund of money, which was in the custody of the court pending the litigation. Upon the submission of the case the court filed its findings of fact and conclusions of law, and ordered judgment to be entered in accordance therewith. The conclusions of law were: "Plaintiff is entitled to have and recover a judgment against the defendants Beecher and Gray for the sum of \$35,861.25, together with its costs in this action." Subsequently defendants appealed from the judgment and an order denying them a new trial, the judgment and order were affirmed, and the aforesaid sum of money was paid to plaintiff. Thereafter it came to the notice of appellants that the judgment entered included an additional sum as interest, and a motion was made to the court to amend and correct the judgment as entered, "by striking out so much thereof as reads as follows: 'With interest thereon at the rate of seven per cent. per annum from the date hereof until paid,'—upon the ground that such portion of said judgment was inserted therein by misprision, inadvertence, and mistake, and that the same is not meant or intended to form a part of, or be inserted in, said judgment; that said judgment is not supported or warranted, but, on the contrary, is expressly contrary and in direct opposition to the decision in writing and the findings and conclusions of law heretofore made and filed in this action on the 4th day of August, 1890." The court made an order denying the motion, upon the sole ground that it had no jurisdiction to make said amendment, and this appeal is prosecuted from that order.

Under section 632 of the Code of Civil Procedure, if the trial of a question of fact is involved, the decision of the court must be given in writing and filed with the clerk, and section 633 requires that in such deci-

sion the facts found and the conclusions of law must be separately stated, and the judgment upon the decision must be entered accordingly. The "decision" of the court referred to in these sections, when filed, amounts in law to a rendition of the judgment. As was said in *Crim v. Kessing*, 89 Cal. 478, 26 Pac. Rep. 1074: "This was the rendition of the judgment, which the clerk could thereafter at any time enter at length in the records of the court. The entry of the judgment after it had been rendered by the court is but the ministerial act of the clerk. The judgment when entered becomes the record of what the court has determined, and then becomes as binding upon the parties as if entered immediately upon its rendition. The rendition of a judgment is a judicial act. Its entering upon the record is merely ministerial." *Freem. Judgm.* § 381. See, also, *In re Cook's Estate*, 77 Cal. 227, 17 Pac. Rep. 923, and 19 Pac. Rep. 431; and *Broder v. Conklin*, (Cal.) 33 Pac. Rep. 211. In the present case, if the clerk has been guilty of mistake by entering a judgment not authorized by the "decision" of the court, such mistake can be corrected by the course here adopted, for the error will be apparent from the face of the record, and the rule is universal that when a mistake is made in the entry of a judgment, and that fact is plainly apparent from the record itself, such mistake may be rectified at any time; and this rule arises by reason of the inherent power of the court over its own proceedings. It was said in *Egan v. Egan*, 90 Cal. 21, 27 Pac. Rep. 22: "Courts have the power at all times to allow amendments to judgments, for the purpose of having the judgment as entered express that which was rendered, so that the record will contain the actual decision of the court; and such amendments can be made after the expiration of six months from the entry of the judgment. Where the clerk fails to enter judgment as it was pronounced, the court has always the power to correct the matter, and to order the proper entry to be made. Clerical misprisions can be corrected at any time by an order of the court, but judicial errors can be remedied only through a motion for a new trial or on appeal." Neither does the fact that the judgment has been affirmed upon appeal by this court conclude appellants' right to have it conform to the truth. *Rousset v. Boyle*, 45 Cal. 64, was that kind of a case, and the decision of the court upon that question leaves nothing more to be said.

The foregoing principles of law being established, let us examine the facts, to see wherein the mistake in the entry of judgment exists. The court rendered a judgment against defendant for a large sum of money and costs, and such judgment was full and complete, for it covered the whole subject-matter of litigation. No judgment for interest was asked in the complaint, and no interest was awarded. There was no

issue in the case as to the rights of plaintiff to have interest upon the judgment after it was rendered. No such issue could possibly arise, and consequently the "decision" of the court should not contain any such adjudication. It follows that the mere fact of the entry of the interest clause in the judgment, without such authority being found in the decision of the court, in no way proves such entry to be a clerical mistake. Even if such clause was stricken from the judgment entered, it is not clear that execution for interest would not run. But, aside from this, the judgment was a pure money judgment, and the law says such judgment draws interest at the rate of 7 per cent. per annum. We think it was the duty of the clerk to enter the judgment exactly as it was entered, and his insertion of the interest clause therein was an exercise of a ministerial duty, under the law. It may be further suggested that we see nothing but fairness and equity in charging these defendants with interest upon the judgment. For many months they prevented plaintiff from obtaining possession of its money, and the law declares that legal interest is the true measure of damages in such a case.

For the foregoing reasons let the order be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

99 Cal. 311

DORAN v. DORAN. (No. 15,090.)

(Supreme Court of California. Aug. 16, 1893.)

TRUSTS—LANDS—GIFTS CAUSA MORTIS.

1. There can be no trust in land conveyed by deed absolute without fraud; Civil Code, § 852, providing that such a trust can only be created by writing.

2. Conceding that the assignment of a bank book was a gift causa mortis, the gift was revoked where the assignor, a few minutes before his death, told the assignee to go to the bank, get the money, and bring it to him, so that, the assignor having died intestate before the return of the assignee, the assignee would hold the funds in trust for the assignor's heirs.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Margaret Doran against James Doran to have a trust declared in land and money. Judgment for defendant. Modified.

James Gartlan, for appellant. Robert Y. Countryman, for respondent.

BELCHER, C. On the 30th day of June, 1887, John Doran was the owner of a certain lot of land in the city of San Francisco, and of \$770, money on deposit to his credit in the Hibernia Savings & Loan Society of San Francisco. On that day he executed to the defendant, James Doran, a deed of the lot and an assignment in writing of the pass book showing the amount to his credit in the said bank. John and James were brothers, and

the sons of the plaintiff. The plaintiff seeks by this action to have a trust declared in her favor as to the real and personal property so transferred. The complaint alleges, in substance, that John was moved and induced to convey the said lot and assign the said bank account to the defendant solely by reason of the confidence he had in defendant, and because of the promise defendant then made to reconvey the lot upon request to his grantor, and to hold for his use the money, and the further promise, in the event of John's death, to convey the lot to plaintiff, and to pay to her so much of the said money as might remain in his (defendant's) hands; that John died on the 5th day of July, 1887, before any reconveyance of the land had been made, and leaving intact in defendant's hands the whole sum of money transferred to him; and that plaintiff had demanded of defendant that he convey to her the said land, and pay to her the said money, but he refused, and still refuses, to do so, except that he had paid to her \$100 of the money. Wherefore judgment is asked "that he, defendant, be declared a trustee for plaintiff of said land, and for a conveyance thereof to her; that he, defendant, be declared a trustee for plaintiff in the sum of \$670, and that he be directed to pay such sum to her, together with the interest found due, and for costs of suit." The answer to the complaint was a general denial. The case was tried by the court, and the findings were, in effect, that the said conveyance and assignment were absolute, and were not made by reason of any confidence John had in defendant, nor upon any promise of defendant to reconvey the lot to John, or to hold the money for his use, nor upon any promise, in the event of John's death, to convey the lot or pay over any part of the money to the plaintiff. Judgment was accordingly entered that plaintiff take nothing by the action, and that defendant recover from her his costs and disbursements therein. From this judgment, and an order denying her motion for new trial, the plaintiff appeals.

The only point made for reversal which need be noticed is that the findings were not justified by the evidence. The proceedings at the trial are briefly stated in the record as follows: Plaintiff introduced in evidence the deed and pass book in question; the deed expressing a nominal consideration, and the pass book, numbered 108,800, showing a balance to the credit of the depositor of \$770. "Proof was then made that on June 30, 1887, John Doran was lying dangerously ill at St. Mary's Hospital, San Francisco, and expressed a desire to settle his affairs; that the sick man knew that his mother, Margaret Doran, the plaintiff, was his heir at law; that, for the purpose of avoiding the expense and delay of probate proceedings, John determined to transfer all his property in trust; that he was aware of the risk he ran in making such transfer, but declared

that he would make his brother, James, the defendant, his trustee, knowing that his said brother would do what was right; that thereupon John conveyed to defendant the aforesaid lot of land on Jersey street, and assigned to said defendant the said pass book No. 108,800. It was also proven that John Doran had died on the 5th day of July, 1887, intestate, unmarried, and without issue, and that his father had predeceased him. The defendant, James Doran, testified in substance: "I am defendant in this action. John Doran died on or about the 5th day of July, 1887. He was my brother. The plaintiff, Margaret Doran, is my mother, and mother of deceased. My father is dead. My brother, John, was never married. I was present when John made the transfer of the lot on Jersey street and the Hibernia Bank pass book. What my brother meant when he said I would do what was right was that I would reconvey the property to him if he recovered from his then sickness. Nothing further was said by John on the subject. On the morning of the day of his death, John said to me he was feeling awful bad; that he thought he was going to die; that I should hurry down to the Hibernia Bank, and get out his money, and bring it up to him. I went accordingly to the bank, and drew out his money. I was scarcely absent more than 15 minutes, but when I got back John was dead." It was further proven that, about a week after the death of John, the defendant went to the office of the attorney who had drawn up and witnessed the deed and assignment by which the deceased had transferred his property; that the defendant asked said attorney when the matter would come up in court; that the attorney there and then told defendant there would be no court proceedings; that to avoid all such proceedings his brother had transferred the property to him; that he, defendant, was trustee of the property, and the duty devolved upon him to carry out the wishes of deceased; that defendant left the office without making any reply."

1. Upon this record of the evidence we do not think the findings in relation to the real property can be disturbed. An express trust in real property can only be created or declared by a written instrument subscribed by the trustor or trustee. Civil Code, § 852. There was therefore no express trust in favor of the grantor or the plaintiff, and no facts are stated from which a trust by operation of law must necessarily arise in her favor. So far as appears, the conveyance was made by the grantor of his own motion, and without any solicitation, undue influence, or fraud on the part of the grantee; and it may have been intended to be absolute in case of the grantor's death, and to vest the title in fee simple in the grantee; and that it was so intended must, in view of the findings, be presumed.

2. As to the bank account the law is dif-

ferent. An express or implied trust in relation to personal property may be declared and proved by parol, (*Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. Rep. 659; *Perry, Trusts*, § 86;) and here the undisputed evidence on the part of the plaintiff shows that the pass book was assigned to the defendant in trust for the assignor. The respondent, however, contends that the assignment and delivery to him of the pass book constituted a complete gift of the money *causa mortis*. Conceding this to be so, still a gift *causa mortis* may be revoked by the donor at any time during his life, and without the consent of the donee. Civil Code, § 1151; *Daniel v. Smith*, 64 Cal. 349, 30 Pac. Rep. 575; *Merchant v. Merchant*, 2 Bradf. Sur. 432; *Parker v. Marston*, 27 Me. 196. Here the respondent's own testimony very clearly shows that the gift, if made, was revoked by the donor before he died. He testified that, on the morning of the day of his death, John told him to "hurry down to the Hibernia Bank, and get out his money, and bring it up to him. I went accordingly to the bank, and drew out his money; * * * but when I got back John was dead." This plainly indicates that John still claimed the money as his own, and intended to again take it into his possession. Under these circumstances it must be held that the respondent held the money in trust and as a part of the estate of John, and that the plaintiff, as the only heir of John, had a right to have the trust enforced, and the money paid over to her.

We advise that the judgment and order, so far as they relate to the real property, be affirmed, and that, so far as they relate to the money, be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order, so far as they relate to the real property, are affirmed, and, so far as they relate to the money, are reversed, and the cause remanded for a new trial.

99 Cal. 294

WARREN v. POSTEL. (No. 15,044.)

(Supreme Court of California. Aug. 16, 1893.)

STREET IMPROVEMENTS—ASSESSMENTS.

St. 1885, p. 147, § 3, provides that when the cost of any street work ordered by the city council, and chargeable against any lots, shall exceed one-half their assessed value, the excess shall be paid by the city. Section 7 provides the manner of assessment, and declares that, whenever the said assessment on any lot would exceed one-half the valuation, then the assessment shall be only to the amount of one-half. Section 26 provides that, whenever the city council orders any work done, it shall be deemed to have ordered the payment out of its treasury of the excess of any assessment for said work, otherwise chargeable on any lot, over one-half the valuation of the lot. *Held*, that a lot was not limited to an assessment, in

a single year, of half its value, but that this limitation applied only to an assessment for the work included in a single resolution.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by C. A. Warren against P. W. Postel. Judgment for plaintiff. Defendant appeals. Affirmed.

D. H. Whittemore, for appellant. J. C. Bates, for respondent.

TEMPLE, C. This action is upon a street assessment, and the defendant appeals from the judgment against him upon the judgment roll. The defendant claims that he was assessed for too much, his assessment being \$220.50, while he thinks he should be held for only \$105.67. He owns a lot at the intersection of Jersey and Noe streets, in San Francisco, thus having frontage on both streets. September 19, 1887, the board of supervisors declared its intention to do certain work on Jersey street between Noe and Douglas streets, being the work for which plaintiff's assessment was made. It was ordered to be done October 24th, and the contract awarded to plaintiff November 21st, of the same year. The assessment for the work was made December 27, 1888. In this assessment the sum of \$3,218.60 was assessed to the city and county, that being the sum in excess of one-half the last previous assessment for municipal purposes, as to certain lots which were liable. As before stated, defendant's lot was assessed for \$220.50. The last previous assessment of his lot for municipal purposes was \$565. October 3, 1887, the board declared its intention to do certain work on Noe street between Alameda and Twenty-Sixth streets, and November 27, 1887, ordered the same to be done, and December 12, 1887, awarded the contract to Conway & Co. The assessment for this work was made July 12, 1888, in which defendant's lot was assessed for \$176.83, which was paid by defendant after this suit was commenced. Defendant's position is that his lot can only be held during any tax year for one-half its assessed value for all street work done, and it does not matter that the work was ordered at different times on different streets and under different resolutions of intention. Half the assessed value of his lot is \$282.50, and he is willing to pay the difference between that sum and his assessment for the Noe street work, and thinks the assessment in excess of that is void. Respondent affirms that defendant's lot is liable to the extent of one-half the assessed value for such work, without regard to other work; or, if not, that it is the Noe street assessment which would be invalid because the notice of intention, the order that the work be done, and the contract for the work on Jersey street preceded the like steps in the Noe street procedure, although the Noe street assessment was first made.

Both proceedings were under the street law of 1885, (St. 1885, p. 147.) In section 3 of that act is the following: "Whenever the estimated or actual cost of any street work, contemplated or ordered to be done by the city council, and chargeable under the provisions of this act against any lot or lots of land or the owner thereof, shall exceed one-half of the assessed value of such lot or lots, as borne upon the last assessment roll wherein it was assessed, made for the levying of taxes for municipal purposes, the amount of the cost of said work exceeding said one-half of the assessed value of said lot or lots, shall be paid out of the city treasury. * * *" The first subdivision of section 7 reads as follows: "The expenses incurred for any work authorized by section 2 of this act, which shall not include such portion of any street which is required by law to be kept in order or repair by any person or company having railroad tracks thereon, shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expenses of the work. But wherever the said assessment upon any lot or portion of a lot would exceed one-half the valuation of said lot or portion of a lot, as it was last assessed for municipal taxation, then, unless the owner or his attorney in fact shall have previously filed with the superintendent of streets a written waiver of the partial exemption herein provided, the assessment and the lien thereof upon said lot or portion of a lot shall be only to the amount of one-half of said last preceding municipal valuation, and the proper remainder of said assessment shall be assessed to the city, and be payable out of the city treasury." And section 26 is as follows: "The city council may, in its discretion, order that the whole or any part of the cost and expenses of any of the work mentioned in section two of this act be paid out of the treasury of the municipality from such fund as the council may designate. Whenever a part of such cost and expenses is so ordered to be paid, the superintendent of streets, in making up the assessment heretofore provided for such cost and expenses, shall first deduct from the whole cost and expenses such part thereof as has been so ordered to be paid out of the municipal treasury, and shall assess the remainder of said cost and expenses proportionately upon the lots or part of lots and lands fronting on the streets where said work was done and in the manner heretofore provided. And, whenever the city council shall order to be done any of the work mentioned in section two of this act, it shall be deemed to have exercised its discretion mentioned in this section, and to include an order for the payment out of its treasury for the excess of any assessment for said

work otherwise chargeable upon any lot, or portion of a lot, over and above one-half the valuation of said lot, or portion of a lot, in its last preceding assessment for municipal taxation." It is very manifest from these provisions that the time when the city council is deemed to exercise its discretion to order that the excess of the cost of any street work above one-half the last previous assessment of the lots liable shall be paid by the city is when the work is contemplated or ordered. These words are not synonyms. The work may be said to be "contemplated" when it is resolved to do it. Then the cost can only be estimated. When the contract for it has been made, it is to be presumed that the actual cost is known. Under section 26, when the work is "ordered" to be done, the council is deemed to order the excess to be paid from the city treasury. At that time it may be manifest that no lot will be assessed for an amount beyond one-half its last previous assessment. As in such case there could be no excess, the council would not be deemed to have ordered such excess paid from the city treasury. But according to appellant's theory, subsequently work might be ordered under later resolutions of intention, for which assessments might be first made. By such means, under appellant's construction, the whole cost of the work might have to be assessed against the city. When, under such circumstances, was the council deemed to have ordered it all paid from the city treasury? Evidently not when the particular work was ordered, but when some other work, perhaps upon another street, was afterwards ordered to be done. The language of the statute will not bear that construction. The city council cannot know which will be first completed, although the time is stipulated in the contract, for they are authorized, and justice may require them, to extend the time for completion; and in this matter they cannot anticipate what exigencies may arise. I think it is equally evident from these provisions that the requirement that the excess of half the valuation of the lot should be paid by the city is limited to the assessment for an improvement ordered under one resolution of intention. Subdivision 1, for instance, of section 7, provides that, "whenver the said assessment upon any lot" would exceed one-half the valuation, "then * * * the assessment * * * shall be only to the amount of one-half," etc. Other provisions above cited, and others which might be, indicate that the requirement has reference to a street work. I think it obvious respondent's position as above stated must be sustained.

Appellant says that, under this construction, lot owners have very little protection against the city council, and that is true; and there is very little upon the construction of appellant. The only difference is that under appellant's theory they could only

take one-half the value of the lot in any one tax year; but they could take all in two years, and take it again in two more. It would be easy to have one resolution of intention for grading, another for paving, and another for sewerage, and still others for other work; and they could be extended through several tax years. Absolute protection against the city council is not attainable under any such scheme. The legislature is the proper place to go for improvement in this matter. I think there is nothing in *Kreling v. Muller*, 86 Cal. 465, 25 Pac. Rep. 10, inconsistent with these views. It was held in that case that the work covered by one resolution of intention must be considered one work with reference to the requirements of the section I have been considering, and the board cannot evade the law by letting it in different contracts, and thus providing for several assessments. If it has any bearing upon the matter here considered, it is in accord with this opinion. It seems to hold that the improvements included in one resolution of intention constitutes a "street work," within the provisions of this statute. At the time the lots are assessed, the city is also assessed for its portion. Here the defendant appealed to the board, and his appeal was sustained and a new assessment ordered. He again appealed, and the assessment was modified. There can be no further assessment. The only question left is whether the present assessment is to any extent void, not whether it is erroneous. I think, however, it is neither, and advise that the judgment be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

99 Cal. 516

FOLEY v. BULLARD et al. (No. 15,305.)

(Supreme Court of California. Sept. 11, 1893.)

**STREET IMPROVEMENTS — ASSESSMENTS — DEMAND
ON PROPERTY OWNERS — PLEDGE OF CONTRACT
— DEFECTS OF PARTIES.**

1. A demand on an abutting property owner for payment of an assessment may be made by a contractor who has assigned the contract as security for a loan, since the title is in the contractor.

2. Where the person who makes the demand states in his return that he is the manager of the contractor, and as such manager made the demand, this prima facie evidence of his character is not overcome by his testimony that he was the agent of the pledgee of the contract, as this is not inconsistent with his being the agent, also, of the contractor.

3. That a defect or nonjoinder of parties plaintiff may be relied on, objection should be made in the answer.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by Foley against Bullard and others on a street assessment. Judgment for plaintiff. Defendants appeal. Affirmed.

Geo. D. Collins, for appellants. J. C. Bates, for respondent.

HARRISON, J. Action to foreclose the lien of a street assessment. The contract was awarded to Warren & Malley, who on December 26, 1889, assigned the same to Foley & Keenan, by whom the work was performed. The warrant and assessment were issued to Warren & Malley December 23, 1890, and delivered to Foley & Keenan. Foley & Keenan had assigned the contract to Lang & Ruggles, June 2, 1890, as security for a loan of money then obtained from them, with which to complete the contract. The demand was made on the 24th of December, 1890, by John T. Foley, the son of the plaintiff, who, in his return, states that he "is the manager for Foley & Keenan, assigns for original contractors named in the assessment and warrant, and that with and by virtue thereof, as such manager, he went upon the lot of land described in the complaint, and while thereon publicly demanded payment" of the amount assessed to said lot. At the trial he testified that at the time of the demand he had the assessment, warrant, and diagram with him, and had received them from Lang & Ruggles for that purpose.

It is objected by the appellant that, as at the time of the demand the contract had been assigned to Lang & Ruggles, there was no authority in Foley & Keenan to make the demand, and that the demand by their agent was insufficient to preserve the lien. Section 10 of the act under which the improvement was made (St. 1885, p. 155) provides that the demand may be made "by the contractor or his assigns, or some person in his or their behalf." In *Gaffney v. Gough*, 36 Cal. 104, an undivided half of the contract had been assigned by the contractor, and the demand was made by the contractor alone. It was objected that he could not make a legal demand, because he only owned one-half of the contract, and did not appear to have been the agent to collect the other half, but the demand was held sufficient. The objection of the appellants herein is not directed so much to the "nature and character of the demand," which the statute requires to be stated in the return, as it is to the character of the person who made the demand; the point urged being that it appears from the return that the demand was made by the agent of Foley & Keenan, whereas the person making the demand was in fact the agent of Lang & Ruggles. We think, however, that it sufficiently appears that the demand was made "in behalf of" Foley & Keenan, even though the person making the demand was at the time the agent of Lang & Ruggles. Foley & Keenan were the assignees of the original contractors, and, although they had assigned the assessment to Lang & Ruggles as security for their indebtedness, the title to the assessment still remained in them. Civil Code, § 2888. John T. Foley was their agent, and in that capacity made a proper demand for

the amount of the assessment. He had the assessment, warrant, and diagram with him at the time he made the demand, having received them from Lang & Ruggles for that purpose, and in his return states that he was at the time of making the demand the manager of Foley & Keenan, and made the demand as such manager. This affidavit was prima facie evidence of his character, (*Whiting v. Townsend*, 57 Cal. 515,) and there is no evidence in the record that he was not their manager. His testimony at the trial that he was the agent of Lang & Ruggles is not inconsistent with the fact that he was at the same time the agent of Foley & Keenan.

The objection that the plaintiff has no title to the assessment, for the reason that it is derived merely through an assignment to him by Lang & Ruggles, who held it only as security, is without merit. As above stated, the title remained in Foley & Keenan notwithstanding the assignment, and Lang & Ruggles were merely the pledgees thereof, (Civil Code, § 2987,) with a lien dependent upon possession, and upon the reassignment to the plaintiff this lien was terminated, (Civil Code, § 2913.) As the assignment from Lang & Ruggles vested the plaintiff with no new right to the assessment, it may disregarded. He was one of the assignees of the original contractors, and by virtue thereof properly made a party plaintiff herein. If the defendants would rely upon any defect or nonjoinder of parties plaintiff, this objection should have been presented in their answer. The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.

PARTRIDGE et al. v. LUCAS et al. (No. 14,565.)

(Supreme Court of California. Sept. 11, 1893.)

STREET IMPROVEMENTS—RESOLUTION OF INTENTION—ASSESSMENTS—APPEAL.

1. Under a statute making the passage of a resolution of intention the first step to be taken by a town or city in obtaining jurisdiction to let a contract for the improvement of a street, to be paid for by assessment on abutting property, such resolution giving jurisdiction to make only those improvements described therein, a resolution of intention to order a street macadamized gives no authority to include in the contract a provision for rock gutter ways.

2. Under Act March 18, 1885, § 11, providing that no assessment for street improvements shall be held invalid, except on appeal to the city council, for defects therein, as in proceedings prior thereto, where notice of intention to order the work to be done for which the assessment is made has been published, one is not obliged to appeal from an assessment including the cost of work not included in the resolution.

3. An assessment including the cost of work not embraced in a resolution of intention is wholly void.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Partridge and others against Lucas and others on a street assessment. A demurrer to the complaint was sustained, and plaintiffs appeal. Affirmed.

D. H. Whittemore, for appellants. Sidney V. Smith, for respondents.

DE HAVEN, J. This is an action to recover upon a street assessment. In the superior court a demurrer to the complaint was sustained, and judgment thereupon rendered for defendants. Plaintiffs appeal.

1. It is well settled that "the passage and publication of the resolution of intention are acts by which the board acquires jurisdiction, and by those acts they acquire jurisdiction to make only such improvements as they described in the resolution; and they cannot, therefore, lawfully cause work other than that which is described to be performed." *Beaudry v. Valdez*, 32 Cal. 276; *Himmelmänn v. Satterlee*, 50 Cal. 68. The complaint alleges that the board of trustees of the town of San Rafael passed a resolution declaring it to be the intention of such board to order "that B street * * * be macadamized," and thereafter, assuming to act under such resolution of intention, awarded to plaintiffs a contract to macadamize the street mentioned, and also to construct therein rock gutter ways, "formed by laying flat stones even on their upper surfaces, * * * and not more than nine inches square; * * * the stone to be hand laid * * * and securely spawled where openings between the joists occur;" the interstices to be filled "with clean, hard rock, finely broken and screened." It is plain that the work described in the resolution of intention did not include the construction of rock gutter ways in the street to be macadamized; and therefore the board of trustees did not, under the rule above stated, acquire jurisdiction to contract for such gutter ways, and the contract as to these is void. The word "macadamize" has a fixed and definite meaning, and refers, not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid. It means to cover a street or road "by the process introduced by Macadam, which consists of the use of small stones of a uniform size consolidated and leveled by heavy rollers." 13 Amer. & Eng. Enc. Law, p. 1194. The construction of rock gutter ways in the manner described in the contract awarded to plaintiffs is something entirely different from the ordinary work of macadamizing the surface of a street, as thus defined, and, unless expressly named and called for in a contract, the contractor undertaking simply to macadamize a street would not be required to construct such gutter ways, in order to complete his contract; and, although it may be true that in many instances such gutter ways would be of great benefit to streets

paved with macadam, still this fact would not render their construction in such streets any the less a distinct improvement, and one not to be deemed as included in a resolution of intention or a contract to macadamize a street, unless particularly named in such resolution or contract. A resolution of intention to macadamize a street gives no notice of an intention to construct gutter ways therein of any different material than macadam, or to be laid in any different manner, or at a greater cost per foot, than the other portions of the street between the curbing.

The case of *Burk v. Altschul*, 66 Cal. 533, 6 Pac. Rep. 393, cited by the plaintiffs, does not decide that rock gutter ways are included within the general definition of the word "macadamize," or that under a resolution of intention to macadamize a street the authorities of a town or city would have jurisdiction to let a contract for rock gutter ways, also. The contract under consideration in that case was not attacked upon the ground that it was not within the terms of the resolution of intention, but the objection was that the statute did not authorize an assessment upon the abutting property to pay the costs of constructing such gutter ways in a street; and the court simply held, in that case, that the construction of such gutter ways, although not specially named in the statute, might be properly included in the resolution of intention, under the general power which was given the board of supervisors, in the act there construed, "to order any other work to be done which shall be necessary to make and complete the whole or any portion of said street," etc. So, in this case, the board of trustees of San Rafael, under the general power to the same effect given such board by section 2 of the act of March, 1885, (St. 1885, p. 147,) might have included the laying of the gutter ways in its resolution of intention; but, as it did not, there was no authority to enter into any contract for their construction. The case of *McNamara v. Estes*, 22 Iowa, 246, also cited by plaintiffs, is more nearly in point, and yet does not decide the exact question we are now considering. In that case it was decided that under a general power to macadamize streets a town might also construct gutter ways, and we presume, although it is not so stated, rock gutter ways. The court, in effect, there held that the power to construct such gutter ways was fairly embraced in the general power to macadamize, and was incident thereto. The question before us, however, arises under a statute which, while it confers power upon cities and towns to macadamize streets, and construct rock gutter ways therein, also requires the passage and publication of a resolution of intention, describing the work intended to be done, as a condition precedent to the right to enter into a contract therefor. The object of this statute is to give

notice to owners of property who would be affected by the contemplated improvement, in order that they may be heard in opposition thereto, if they desire, (*Emery v. Gas Co.*, 28 Cal. 375;) and, while it is not necessary that the resolution of intention should be as full and minute as specifications contained in a contract, still such resolution must contain a general description of all that is intended to be done; and as rock gutter ways are not necessarily any part of the work of macadamizing a street, and are capable of being easily described as a separate and distinct part of the improvement of a street, when their construction is deemed necessary or proper in connection with the macadamization of a street, they must be mentioned in the resolution of intention in order to justify a contract for their construction. The rule which requires the board of trustees or city council to keep strictly within the resolution of intention is not a harsh one, and a contractor ought certainly to have no difficulty in determining whether the work specified in his contract falls within the general description of that named in the resolution of intention, and which resolution, under the statute, is the first and necessary step to be taken by the town or city, in obtaining jurisdiction to let any contract for the improvement of a street, to be paid for by an assessment upon abutting property.

2. It is claimed by the appellants that, as the cost of the gutter ways could have been separated from the contract price for the macadamizing, the defendants waived their right to object to the assessment made to pay the contract price of both the macadamizing and gutter ways by not appealing to the board of trustees for its correction. But we do not think so. Section 11 of the act of March 18, 1885, before referred to, does not make it incumbent upon the property owner to appeal to the board of trustees or city council for the correction of an assessment made to cover the cost of work not embraced within the description contained in the resolution of intention passed and published by such board or city council. *Perine v. Forbush*, 97 Cal. 305, 32 Pac. Rep. 226. That section provides that "no assessment shall be held invalid except upon appeal to the city council, as provided in this section, for any error, informality, or other defect in any proceedings prior to the assessment, or in the assessment itself, where notice of the intention of the city council to order the work to be done for which the assessment is made has been actually published in the designated newspaper of said city for the length of time prescribed by law before the passage of the resolution ordering the work to be done." In this case, as we have seen, there was no publication of any intention to improve the street by laying rock gutter ways therein, and as a consequence of this the objection to the as-

essment because the cost of such gutter ways was included therein was not waived by the failure of defendants to ask that the assessment be corrected, or to ask for a new assessment to pay only the contract price for the work which was done in macadamizing the street. The assessment sought here to be enforced is an entirety, and must stand or fall as a whole; and as it includes the cost of the gutter ways, which is not legally chargeable upon the property of defendants, plaintiffs are not entitled to maintain the action. *Dyer v. Chase*, 52 Cal. 440; *Donnelly v. Howard*, 60 Cal. 291. Judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

99 Cal. 421

JOSHUA HENDY MACH. WORKS v. PACIFIC CABLE CONST. CO. (No. 15,117.)
(Supreme Court of California. Aug. 31, 1893.)

REFERENCE—WHEN PROPER—ACTION ON ACCOUNT
—GOODS SOLD AND DELIVERED—ADMISSIONS IN
PLEADINGS—EFFECT.

1. In an action at law to recover part of the price of goods sold and delivered, the court has no authority, except by agreement of the parties, to refer the cause to a referee "to state an account between the parties, and report a judgment and findings in said cause."

2. An erroneous order, referring issues to a referee without the consent of the parties, is not a ground for reversal, if no exception was reserved thereto.

3. In an action at law for the recovery of the balance of an account for goods sold and delivered, plaintiff is bound by an admission in the complaint as to the amount paid on the account, not denied by defendant, and cannot recover if such payment is greater than the value of the goods, or the price agreed to be paid therefor.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by the Joshua Hendy Machine Works against the Pacific Cable Construction Company. From a judgment for plaintiff, defendant appeals. Reversed.

T. Z. Blakeman, for appellant. Roger Johnson, for respondent.

DE HAVEN, J. The complaint in this action is in two counts. In the first it is alleged that the defendant is indebted to plaintiff in the sum of \$4,566.55, "the same being the balance of an account for goods, wares, and merchandise * * * sold and delivered by plaintiff to defendant, and for work and labor and services performed thereon and in connection therewith by plaintiff, at defendant's * * * request; * * * that the whole amount and aggregate value of the items of said account is the sum of \$35,744.35, no part of which has been paid except the sum of \$31,177.80, leaving the aforesaid balance of \$4,566.55 still due and unpaid." In the statement of what is termed "a further separate cause of action," the complaint alleges that "plaintiff sold and delivered to

defendant certain goods, wares, and merchandise, and performed work and labor in connection therewith, at defendant's * * * request, all of which were of the reasonable value of, and at the agreed price of, \$35,744.35, which said sum defendant promised and agreed to pay therefor, but that he has refused and failed to pay said sum, or any part thereof, except the sum of \$31,177.80." The prayer of the complaint is for a judgment against defendant for the sum of \$4,566.55, with interest thereon from June 13, 1890. The answer of the defendant joined issue with the allegation of the complaint as to the value and agreed price of the goods sold, and work and services performed, alleging that the whole value thereof and price agreed to be paid therefor did not exceed \$30,000, and further alleged that plaintiff had been fully paid. The plaintiff recovered judgment in the superior court for the sum of \$788.54, with interest thereon from the date of the commencement of the action until the rendition of the judgment, amounting in all to \$892.85 and costs. The defendant appeals.

1. The order made by the court without the consent of the parties, referring the cause to a referee "to state an account between the parties, and report a judgment and findings in said cause," which was, in effect, a reference of the whole case for trial, was not authorized by section 639 of the Code of Civil Procedure. The action is an ordinary action at law for the recovery of an alleged indebtedness, and in such cases the court should not make a reference for the trial of all the issues therein, except upon agreement of the parties. *Seaman v. Mariani*, 1 Cal. 336; *Grim v. Norris*, 19 Cal. 140. But the defendant did not reserve any exception to the order of reference, and, not having done so, cannot now insist upon the error of the court in making the order as a ground for the reversal of the judgment.

2. The defendant further contends that the findings do not support the judgment, and we think this contention must be sustained. The referee found, and upon these findings the court below based its judgment: (1) That there was a balance of \$788.54 due from defendant to plaintiff at the date of the commencement of the action "upon the account for goods, wares, and merchandise theretofore sold and delivered by plaintiff to defendant at the request of the defendant, and for work and labor and services performed thereon and in connection therewith." (2) "That the whole amount and aggregate value of the items of said account is the sum of \$26,857.35; that \$26,068.81 thereof has been paid, and that said sum of \$788.54 * * * is the balance on said account remaining due and unpaid,"—and that plaintiff did not sell and deliver to defendant any goods, wares, and merchandise, or perform any work and labor in connection therewith, other than as thus found.

The value of the goods and merchandise sold, and work and services performed, by plaintiff, or the price agreed to be paid therefor, was a material issue in the case, and the plaintiff is not entitled to recover in this action unless such agreed price or value exceeds the amount admitted by the pleadings to have been paid by defendant on account thereof, and the finding of the court is that such agreed price or value is less than the amount of such admitted payments. The further finding of the court, that defendant has only paid \$26,068.81 on account of the matters alleged in the complaint as constituting plaintiff's cause of action, must be disregarded, because such finding is contrary to the admission contained in the pleadings. The plaintiff alleges in the complaint that defendant has paid to it \$31,177.80 on account of the matters alleged in the complaint, and that fact, not being denied in the answer, is conclusive. *White v. Douglass*, 71 Cal. 115, 11 Pac. Rep. 860; *Hill v. Den*, 54 Cal. 6. But the plaintiff contends that the action is simply one to recover the balance of an account, and that the allegation as to the debit and credit sides of the account is not material. Unquestionably, it is not necessary that there should be such particularity in the statement of a cause of action to recover the general balance alleged to be due upon an account as is found in the complaint here. But it does not follow that such particular allegations, when made, are to be treated as immaterial, and not binding upon the party alleging such facts. On the contrary, we are of the opinion that a statement such as is found in the present complaint, of the amount which defendant has paid on account of the matters therein alleged, is to be treated as an admission of the fact by the plaintiff, and, when not put in issue by the answer, effect must be given to it by the court. The judgment must be reversed, and the cause remanded, and the plaintiff should have leave to amend its complaint. Judgment reversed, and cause remanded for a new trial.

We concur: FITZGERALD, J.; McFARLAND, J.

99 Cal. 486

SHAIN v. PETERSEN. (No. 14,471.)

(Supreme Court of California. Sept. 6, 1893.)

REFERENCE—WAIVER OF OBJECTIONS—IRREGULARITIES IN PROCEDURE.

1. Though a court make an order of reference to take testimony without consent of the parties, which it was authorized to make only with their consent, still, they having appeared before the referee without objection, and never having objected to the order before appeal was taken to the supreme court, objection will be held to have been waived to the reference.

2. A judgment will not be reversed for mere irregularities of procedure, objected to for the first time on appeal.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by Shain against Petersen. Judgment for plaintiff. Defendant appeals. Affirmed.

Nagle & Nagle, for appellant. Vincent Neale, for respondent.

DE HAVEN, J. This action was brought by plaintiff, as assignee of Knowls & Co., to recover \$667.17 for goods, wares, and merchandise alleged to have been sold by said Knowls & Co. to defendant. The plaintiff recovered a judgment for the full amount demanded, and from this judgment, and an order denying his motion for a new trial, the defendant appeals.

The court made an order referring the case to one W. H. Barrows "to take the proof of all material allegations in the complaint, and to report the same to the court." This order does not appear to have been made by consent, and the action was not of such a character that the court was authorized to make the order without the consent of parties. The parties, however, appeared before the referee without objection, and submitted their testimony, and no objection to such order was ever made in the superior court. Under these circumstances, the appellant must be held to have waived all objections to such reference. This court will not undertake to review the action of the trial court in making an order of reference, in the absence of an exception thereto by the party complaining of such ruling. *Joshua Hendy Mach. Works v. Pacific Cable Co.*, 33 Pac. Rep. 1084.

The taking of testimony before the referee was concluded on April 23, 1890; and on the day following, as appears from the bill of exceptions, the court, without consent of defendant, made a further order, referring the case "to W. H. Barrows, Esq., to try all the issues in said action, both of fact and of law, and report a finding and judgment thereon to the court, with all convenient dispatch." No exception seems to have been taken to this order, and thereafter the referee made his report, in which he returned to the court all the evidence taken before him under the first order, together with his finding of facts and conclusion of law that the plaintiff was entitled to a judgment for the amount claimed by him in the complaint; and the plaintiff thereupon moved for judgment "upon all the papers on file in said action, and upon the report, findings, and decree of said referee." Upon the hearing of this motion, defendant appeared, and made specific exceptions to certain of the findings upon the ground that the same were contrary to the evidence. The motion was submitted to the court upon these exceptions. The case may therefore be considered as if it had been submitted to the court for decision upon the evidence taken before the referee, and embodied in his report. The court thereafter entered judgment for the plaintiff in ac-

cordance with the referee's report. The defendant then moved for a new trial, upon which motion the findings of the referee appear to have been treated as findings of the court, and the rulings made by the referee in the admission and exclusion of evidence as rulings of the court. The motion for a new trial was denied. The trial in the court below was irregular, but for that the appellant seems to have been as much responsible as the respondent; and we do not think the judgment should be reversed because of objections to mere matters of procedure, which are urged here for the first time. Upon the issue as to the amount remaining unpaid by appellant upon the account sued upon at the date of the commencement of this action, the evidence introduced by plaintiff was somewhat vague and indefinite, but still we cannot say that the finding of the court upon this point has no evidence upon which to rest for its support. We find no error in the record, of which appellant can complain. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

4 Cal. Unrep. 122

PETERSEN v. SHAIN et al. (No. 14,613.)

MOOSER v. PETERSEN et al.

(Supreme Court of California. Aug. 16, 1893.)

MECHANICS' LIENS — PLEADINGS AND FINDINGS — VARIANCE — JUDGMENT — PAYMENT OF SUBCONTRACTOR — WHAT CONSTITUTES.

1. In consolidated actions to establish mechanics' liens by P., a subcontractor, against the contractor and owner, and by M., a material man, against P. and such contractor and owner, the complaints both alleged that P. was the subcontractor and performed the work, and that M. furnished the materials to P. These allegations were not denied. The court found that P. & Co., a copartnership, made and performed the subcontract; that M. furnished the materials; and that the contractor paid P. & Co., who in turn paid M. *Held*, that a judgment for defendants in the consolidated case was not erroneous, on the ground that such findings were contrary to the admissions of the pleadings, since the acceptance of payment by such firm implies P.'s consent, and must be considered as payment to him.

2. It appeared that the contractor delivered to M. certain checks, payable to the order of P. & Co., to enable him to get his pay, and that they indorsed the checks to him, but the latter applied the money to payment of other indebtedness due him from such firm. *Held*, that a finding that M. was paid was proper, and not inconsistent with other findings.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Two actions, consolidated: One by H. M. Petersen against E. R. Shain and one Drexler, to recover a personal judgment against Shain, as contractor, and to enforce a mechanic's lien for labor done and materials furnished by plaintiff as subcontractor in the construction of a building for Drexler; and the other by C. E. Mooser against H. M.

Petersen, E. R. Shain, and Drexler, to recover of defendant Petersen a sum claimed to be due for materials furnished, and to enforce a mechanic's lien against such building. From judgments in favor of defendants Shain and Drexler in the consolidated action, plaintiffs appeal. Affirmed.

William Rix, for appellants. Vincent Neall, for respondents.

VANCLIEF, C. Action to recover money judgments, and to enforce mechanics' liens for labor done and materials furnished in constructing a brick building known as the "Drexler Building." The two actions were consolidated and tried together. Drexler was the owner of the building, Shain the original contractor, Petersen a subcontractor directly under Shain, and Mooser a subcontractor under Petersen. In the first action, Petersen seeks to recover a personal judgment against Shain for a balance of \$561.70, alleged to be due the former on his subcontract with the latter, and also to enforce a lien therefor upon the building against the owner. In the second action, Mooser seeks to recover from Petersen the sum of \$959.75, alleged to be due him on his subcontract with the latter, for materials furnished, and to enforce a lien therefor upon the same building. The defendants in the first action, Shain and Drexler, denied any indebtedness of the defendant Shain to the plaintiff, Petersen, and alleged full payment by Shain of all sums due Petersen on his subcontract, before Petersen filed his claim of lien. The court found the denial of Shain's indebtedness to Petersen, and the averment that such indebtedness had been fully paid, to be true, and gave judgment for defendants. In the second action, (Mooser v. Petersen, Shain, and Drexler,) Petersen did not answer, but it does not appear that his default was entered. Shain and Drexler answered, denying all alleged indebtedness, and averring payment in full for all materials alleged to have been furnished by plaintiff to Petersen to be used in the construction of said building. The court also found this answer to be true, and adjudged that the plaintiff, Mooser, "take nothing by this action as against the defendants Shain and Drexler;" that plaintiff's claim of lien is void, and is set aside; and that said defendants recover their costs. Both plaintiffs, by a joint notice, appeal from the judgments in the consolidated action, "in favor of said defendants Shain and Drexler." But Mooser, the plaintiff in the second action, has not appealed from the judgment therein, so far as it is in favor of the defendant Petersen, to whom he furnished the materials, and against whom he prayed for a personal judgment; and no point is made here upon the failure of the court to render a personal judgment against Petersen upon his default. The appeals are upon the naked judgment roll in the consolidated action, without any bill of excep-

tions. In both cases Drexler is sued as administrator of George H. Dana, as well as personally, but his character as administrator is immaterial for any purpose of this appeal.

Appellants' counsel contends that the findings are contrary to admissions of the pleadings, and, consequently, that the judgment is erroneous. It is true that it is alleged in both complaints that Petersen was the subcontractor under Shain, and performed the work, and that Mooser furnished the materials to Petersen at his request; and these allegations are not denied. The court found, however, that Petersen & Co. (a copartnership, composed of Petersen and his son) made and performed the subcontract, and that Mooser furnished the materials to Petersen & Co. The judgment, however, does not depend upon these findings, but rests solely upon the finding of payment to Petersen and Mooser. The court found that the total value of the labor and materials done and furnished under the subcontract, including the materials furnished by Mooser, was only \$2,658.75. That Shain drew his checks on the Pacific Bank in favor of Petersen & Co. as follows: March 19, 1889, \$400; March 23, \$200; March 29, \$500; April 20, \$630; April 27, \$60; June 8, \$500; June 14, \$500. That the last two checks, each for \$500, were delivered by Shain to Mooser to enable him to obtain payment from Petersen & Co. for the materials furnished by him, and were indorsed to him by Petersen & Co.; who credited the same to Shain on the subcontract, and that they were paid to Mooser by the bank. That the other five checks were paid to Petersen & Co., who credited them also to Shain on the subcontract. It is thus found that Shain paid to Petersen & Co. \$2,790, with which sum he was credited on account of Petersen's subcontract, which called for only \$2,754.55. I think the payments, thus accepted and credited by Petersen & Co. as payments on Petersen's subcontract, should be considered as payments to Petersen on that contract, since such acceptance and credit implies Petersen's consent. Indeed, he expressly admits in his complaint that he had been paid \$2,192.85, which necessarily included payment for a large portion of the materials furnished by Mooser. Can it be presumed that this payment of \$2,192.85 was, in addition to the payment of \$2,790 to Petersen & Co., by checks on the bank? If so, Shain had paid to Petersen and Petersen & Co. \$4,982.85 on a contract which, according to the complaint, bound him to pay only \$2,754.55, and, according to the finding of the court, only \$2,658.75. The finding that nothing was due or owing from Shain to Petersen is at least a necessary inference from the other facts found and admitted. What was accepted and credited as payment by Petersen & Co. was necessarily so accepted and credited by Petersen.

The only point made on Mooser's appeal

is founded on the eleventh finding, to the effect that, when Mooser drew the money on the two checks drawn by Shain and indorsed by Petersen & Co., he applied the money (\$1,000) to the payment of a prior debt due him from Petersen, according to an agreement between him and Petersen made on May 1, 1889, 39 days before the first of said checks was drawn, and 46 days prior to the date of the second check. As before stated, those checks were delivered to Mooser by Shain to enable him to obtain payment from Petersen & Co. for the materials furnished by him for the Drexler building. Shain, as the original contractor, was bound to clear the building of all liens for labor and materials done and furnished by his subcontractor, Petersen, and therefore was interested in having Petersen's subcontractor, Mooser, paid for all materials furnished by him. Under these circumstances, Shain, with the consent of Petersen, had a right to pay Mooser for the materials furnished by him, and to direct the application of the payment to that purpose; and the court found that Mooser was fully paid by the two checks. This ultimate fact, upon which the judgment in favor of the owner and original contractor rests, is not inconsistent with any other finding. Even the probative facts found tend to prove it. But the sufficiency of the evidence to prove it cannot be questioned on this appeal upon the judgment roll alone.

Counsel for appellants lays some stress upon the finding that, at the time the claims of liens were filed, there remained unpaid to Shain, the original contractor, \$4,188 of the original contract price, and therefore the owner would suffer no injury by being compelled to satisfy the alleged liens of the plaintiffs. This, however, would be small comfort to Shain, the original contractor, who paid Mooser for the purpose of preventing his claim of lien, and thereby enabling himself to obtain from the owner full payment of the original contract price. The case of *Lumber Co. v. Neal*, 91 Cal. 362, 27 Pac. Rep. 743, is not in point for appellants. I think the judgment in each of these causes should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons expressed in the foregoing opinion, the judgment in each of these causes is affirmed.

99 Cal. 299

BIRCH v. HALE. (No. 15,167.)

(Supreme Court of California. Aug. 16, 1893.)

BUILDING CONTRACT—ACTION BY CONTRACTOR—EVIDENCE—ADMISSIONS OF ARCHITECT—WITNESS—IMPEACHMENT.

1. In an action by a contractor to recover for putting an elevator in defendant's building, in which defendant claimed damages for improper construction of certain pipes, it is error to permit plaintiff to testify that defendant's

architect admitted that he gave "instructions to put up the pipes in that manner," where it did not appear that such architect was defendant's agent when the admission was made, nor that it related to a transaction then depending.

2. It is error to admit evidence to impeach the testimony of a witness as to his statements made out of court, when the proper foundation has not been laid by calling the attention of such witness to the time and place at which it is claimed such statements were made, as required by Code Civil Proc. § 2052.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by William H. Birch against Joseph P. Hale to recover a balance due on a contract for the construction of an elevator in defendant's building. From a judgment for plaintiff, and from an order denying his motion for a new trial, defendant appeals. Reversed.

Alex. D. Keyes, for appellant. C. E. K. Royce, for respondent.

BELCHER, C. In March, 1890, Wm. H. Birch & Co. entered into a written contract with the defendant to erect for him in the building situate at the northwest corner of McAllister and Larkin streets, San Francisco, a safety hydraulic passenger elevator, and to furnish the pumps and machinery necessary to be used therewith. The contract provided that the elevator should have attached to it an air brake, which the contractors would test in a certain specified manner, and should be capable of lifting 2,000 pounds at least, and should be put in complete running order, according to the specifications. The contract fixed the price to be paid for the elevator at \$4,200, and the parties verbally agreed that the price of the deep-well pump to be put in the cellar of the building should be \$565. Before the work was completed, Birch & Co. assigned the contract, and all their rights under it, to the plaintiff, and he thereupon proceeded with the work, and finished it about April 1, 1891. While the elevator was being constructed, certain work was done and materials furnished by the contractors, which were not included in the contract, and are described as "extras," amounting to \$158.31. Under the contract, and pursuant to its provisions, the defendant paid to the contractors sums of money aggregating \$4,162, but refused to pay the balance, including the said "extras," claimed to be due. The plaintiff brought this action to recover the sum of \$763.81, balance alleged to be still due and unpaid.

The answer denied that defendant was indebted to plaintiff in the sum named, or in any sum whatever, and alleged payment in full. It then set up the following defenses: (1) That the work upon the elevator and its appurtenances was done in such an unskillful and negligent manner that the defendant was obliged to make sundry repairs and alterations upon and about the same,

and was thereby damaged in the sum of \$829.78; (2) that the plaintiff failed to test the air brake attached to the elevator in the manner provided for in the written contract; (3) that the elevator was guaranteed to be capable of lifting a weight of 2,000 pounds, and that it was in fact only capable of lifting a weight of 1,200; (4) that Birch & Co. for a valuable consideration guaranteed the materials and workmanship of the elevator and pumping machinery, and agreed to keep them in good running order for one year free of expense, but that they were so carelessly and negligently constructed that defendant was obliged to expend, and did expend, a large sum of money in altering and repairing the same; (5) that plaintiff had released the defendant from all liability to him and his assignors.

The case was tried in the court below without a jury, and judgment was rendered in favor of the plaintiff for the amount demanded in his complaint. From this judgment, and an order denying his motion for a new trial, the defendant appeals.

The attorney for appellant admits in his brief "that there was a conflict of evidence on nearly every point in this case," but he says "that the appellant had a decided preponderance of the evidence, both in quality and in quantity. The trial court, however, having found against the appellant on every issue, he is not at liberty to complain that the evidence was insufficient on any point upon which there was any evidence at all." There was evidence bearing upon every material point in the case, and the only questions, therefore, which need be considered, relate to certain errors in law claimed to have been committed by the court in the admission of evidence. The water used to lift and lower the elevator, and for other purposes in the building, was pumped by the deep-well pump in the basement to a tank on the top of the building; and one of the complaints on the part of the defendant was that the pipes leading to the tank were put up in such a "crooked manner" that the pump when at work made a great noise, and caused the building to shake. The plaintiff testified that the noise was caused by the construction of the pipes, and that the pipes were put up in a crooked manner under the direction of the architect, though he said that direction was not given to him personally. He was then asked, "Did the architect admit that he had given instructions to put up the pipes in that manner?" The question was objected to by the defendant, and the objection overruled, and thereupon the witness answered, "Yes, sir." The appellant contends that this ruling was erroneous, and that it operated to his prejudice. That the evidence objected to was material is clear. The architect was the agent of appellant in supervising the construction of the building, and, if the pipes were put up in a crooked manner by his direction,

then appellant could not be heard to complain that by reason of this improper construction the pumping of water through them caused a disturbing noise and vibration in the building. Whether, however, they were so put up or not was a question in dispute. The architect, when subsequently called as a witness for defendant, testified that he gave no instructions to the plaintiff, or to his assignors, concerning the construction of the elevator, and denied that he ever admitted to the plaintiff that the pipes were erected under his direction in the manner in which they were erected. The admission or declaration of an agent binds his principal "only when it is made during the continuance of the agency, in regard to a transaction then pending et dum fervet opus. It is because it is a verbal act, and part of the *res gestae*, that it is admissible at all." Greenl. Ev. § 113. "An agent is empowered to act for the principal, but has no power to make admissions to bind him, unless these admissions constitute a part of the *res gestae*." *Garfield v. Water Co.*, 14 Cal. 36. "The admissions of an agent, not connected with the transaction to which they refer, cannot bind his principal, even though made in explanation of an act previously done by him while in the exercise of his agency.

* * * The declarations of an agent or servant do not in general bind the principal. To be admissible, * * * they must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time." *Beasley v. Fruit Packing Co.*, 92 Cal. 388, 28 Pac. Rep. 485. It does not appear that the architect was still the agent of appellant when the admission sought to be proved was made, if made at all, nor does it appear that it related to a transaction then depending, and was thus a part of the *res gestae*. On the contrary, the question plainly implied that it related to a past transaction. This being so, the objection should have been sustained, and the evidence excluded. Again, when the defendant was introducing his evidence, he called as a witness one J. M. Dooley, who testified that he was the janitor of the building, and had been such since the 1st of March, 1891. On cross-examination the witness was asked if he did not tell Mr. Meagher and Mr. Walter Birch that after certain repairs were made the pump ran finely. He was also asked if he did not tell Mr. Meagher at that time that the pump was working all right. Both questions were answered in the negative. In rebuttal Meagher was called by plaintiff as a witness, and testified that about the 26th of March, 1891, in Mr. Woolf's room, he had a conversation with Mr. Dooley about the noise. He was then asked, "State what the conversation was," and answered, "Mr. Dooley said that the pump was all right if it worked like that all the time." Again he was asked, "Did he say that the pump

was working all right?" and answered, "He did." Both of these questions were objected to by the defendant on the ground that the proposed testimony was incompetent, irrelevant, and immaterial, and on the ground that the time and place of the supposed conversation were not called to the attention of the witness Dooley, at the time of his examination. The court overruled the objections, and the defendant duly excepted. The evident purpose of this testimony elicited from Meagher was to contradict and impeach the testimony of Dooley. Section 2052 of the Code of Civil Procedure provides: "A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony; but, before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements," etc. Here it is not shown that the proper foundation for the impeaching testimony had been laid, and hence we conclude that the court erred in admitting it.

Other similar points are made, but they need not be specially considered.

For the errors above noted, the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

4 Cal. Unrep. 126

SAULQUE v. DURRALDE. (No. 19,121.)

(Supreme Court of California. Aug. 16, 1893.)

FORCIBLE DETAINER—PLAINTIFF'S POSSESSION—SUFFICIENCY.

In forcible detainer, it appeared that plaintiff claimed under a lease of the stubble; that he kept sheep three days on 20 acres not in grain; that 15 days afterwards he put three watering troughs on the land; that 53 days thereafter he returned and demanded possession of defendant, who had taken possession; and that at such time the grain was cut, but on the ground unthreshed. *Held*, that plaintiff did not have such possession as entitled him to recover, under Code Civil Proc. § 1160, subd. 2, which provides that a person is guilty of forcible detainer who, during the absence of the "occupant" of any lands, unlawfully enters thereon, and that "occupant" means one who, within five days preceding such unlawful entry, was in peaceable possession.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Jules Saulque against Buente Durralde for forcible detainer of a certain tract of land. From a judgment of nonsuit, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Barnes & Selby, for appellant. Blackstock & Shepherd, for respondent.

HAYNES, C. The plaintiff appeals from a judgment of nonsuit entered against him, and from an order denying his motion for a new trial. The action is for forcible detainer of a tract of land containing about 400 acres. The complaint was framed under the second subdivision of section 1160, Code Civil Proc.,¹ alleging that at the time of defendant's entry, and for five days prior thereto, the plaintiff was in peaceable and actual possession and occupation, and entitled to the possession, of the whole ranch; that on August 25, 1891, during his temporary absence, defendant unlawfully entered and took possession; and further alleged a demand for possession, and defendant's refusal for five days; that he was damaged, etc. The answer denied these allegations, and pleaded a right to enter and depasture the stubble under a license from the owner of the ranch. One T. W. Dixon occupied and farmed the ranch in question on the shares. On June 19, 1891, he made an agreement with the plaintiff, of which the material part is as follows: "I have rented to Jules Saulque the stubble on the place known as 'the 'Sturgiss Place' which is farmed by me, comprising about 400 acres, at the rate of \$320 for the whole place. I reserve the right to use one well for my exclusive use." Plaintiff testified that on July 15th he went upon a part of the land with a flock of sheep, and kept them there three days, and then took them away; that on August 3d he went back without the sheep, and put some watering troughs upon the land; that on August 26th he again returned, and found that some one had removed his troughs and put them out on the county road, and also found the defendant on the land with his sheep, and made a demand that he surrender possession. At the last-named date the grain had been cut, but was still lying in "dumps," and had not been threshed. The part of the land upon which plaintiff had his sheep for three days in July was not in grain, and embraced about 20 acres, upon which, plaintiff said, Mr. Dixon gave him permission to put his sheep. The defendant took his sheep upon the same part of the land the day preceding plaintiff's demand. Mr. Dixon testified that he was living upon the farm, farming it on shares; that one-half of whatever he got was his; that he gave defendant, who had his sheep upon other land, the right to water them at the well near the house, but that he gave him no other right.

¹ Code Civil Proc. § 1160, provides as follows: "Every person is guilty of a forcible detainer who either * * * (2) in the nighttime, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant. The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands."

I think the plaintiff did not show such possession as would have supported a verdict in his favor, and that the nonsuit was properly granted. The grain not having been removed, the right to enter given by the lease or contract had not accrued, and there was no possession or present right of possession under it. The occupancy of the 20 acres not in grain, for three days in July, and placing three watering troughs upon it on the 3d of August, was not such an occupancy on the 25th of August as the statute contemplates as a basis for so harsh a remedy as that of "forcible detainer."

Some exceptions were taken to the rulings of the court upon questions of evidence. The only exception noticed in appellant's brief relates to the question of damages. As the plaintiff did not show a right to recover in the action, he was not injured by the exclusion of evidence upon that question. An examination of the whole record discloses no prejudicial error. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be affirmed.

99 Cal. 324

BRADFORD et al. v. McAVOY et al. (No. 14,972.)

(Supreme Court of California. Aug. 16, 1893.)

WRITS — SUMMONS — SERVICE BY PUBLICATION — SUFFICIENCY OF AFFIDAVIT — DEFAULT — WHEN SET ASIDE.

1. The affidavit of plaintiff for an order for publication in unlawful detainer stated that, when the action was brought, defendant disappeared, and could not be found in the city or county; that plaintiff made inquiries at various places and of various persons who knew him and would be likely to know his whereabouts, but was unable to find him; that eight new summonses had been issued, and that, since the issuance of the first one, four competent persons had been employed to obtain service; that since the suit defendant has not been in his accustomed resorts, but has left an agent collecting the rents of the premises in dispute from subtenants occupying the same; and that affiant does not know the whereabouts of defendant, and believes he conceals himself to avoid service of such summons. *Held*, that the affidavit was sufficient to justify an order for publication.

2. A default will not be set aside on the affidavit of defendant simply that he did not conceal himself to avoid service, and the affidavit of such agent that plaintiff at no time personally inquired of him as to defendant's whereabouts.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by E. W. Bradford and others against Oliver McAvoy and others for unlawful detainer of real property after default in payment of rent. From an order denying his motion to set aside a default

entered against him, defendant McAvoy appeals. Affirmed.

Nagle & Nagle, for appellants. H. A. Powell, for respondents.

BELCHER, C. This is an appeal from an order refusing to set aside a judgment entered against the defendant Oliver McAvoy by default. The action was for unlawful detainer of property after default in payment of rent. The complaint was filed August 15, 1890, in the superior court of the city and county of San Francisco, and the summons was served on McAvoy by publication in pursuance of an order of the court. His default was entered on December 4, 1890, and judgment that the plaintiffs have possession of the premises was entered against him on the 15th of the same month. On January 26, 1891, he served on plaintiffs' counsel notice that on the 30th of that month he would move the court to set aside the judgment upon the ground that the summons had not been served on him and the court had no jurisdiction to render the judgment. With this notice he also served copies of two affidavits, one made by himself and the other by his agent, William Nicoll. The motion came on regularly for hearing at the time appointed, and the counsel for plaintiffs then objected to the hearing, on the ground that due notice of the motion had not been given as required by law. The motion was thereupon submitted upon the papers in the case, and the affidavits of McAvoy and Nicoll, and denied.

The only question presented for decision by the appellant is as to the sufficiency of the affidavit on which the order for publication was made. It is claimed that the affidavit was insufficient because the facts stated did not show that the defendant could not be found by the exercise of due diligence within the state, or that he concealed himself to avoid the service of summons. Waiving respondents' objection to the hearing of the motion because notice thereof was not given five days before the time appointed for the hearing, as required by section 1005, Code Civil Proc., we think the affidavit for publication must be held sufficient to authorize the order. The Code provides: "When the person upon whom the service is to be made * * * cannot after due diligence be found within the state, or conceals himself to avoid the service of summons, * * * and the fact appears by affidavit to the satisfaction of the court or a judge thereof, * * * such court or judge may make an order that the service be made by publication of the summons." Section 412, *Id.* The affidavit in question was made by one of the plaintiffs, and stated that, at or about the time of the commencement of the action, the defendant McAvoy resided and was in the city and county of San Francisco, and had an office or headquarters at 425 Mont

gomery street; that at or about said time he disappeared from his office, and could not be found in said city and county; that thereafter affiant made inquiries for defendant at various places, including 425 Montgomery street, and of various persons who knew him and would be likely to know of his whereabouts, but was unable to find him; that eight new summonses had been issued in the action; and that, since the issuance of the first summons, four different competent persons had been employed to obtain service upon defendant, but without success, and that ever since such first issuance a continued and constant effort had been made to secure personal service of the summons upon defendant; "that, since the commencement of this suit, defendant McAvoy has not been in his accustomed places and resorts, but has left an agent in this city, who is using persistent efforts to continue to collect the rents of the premises sought to be recovered herein, which premises are occupied by several subtenants; that affiant does not know the whereabouts of defendant McAvoy, and verily believes that he conceals himself to avoid the service of said summons." From this affidavit it evidently appeared to the satisfaction of the judge who made the order for publication that the defendant was concealing himself to avoid the service of summons, and the order so recited. It is true the affidavit does not state that the affiant had made inquiry of defendant's agent, but, in view of the other facts stated, we do not think it can be said that the conclusion reached by the judge was not justified. This being so, the counter affidavits read at the hearing of the motion need not be considered. If considered, however, they would not affect the result. The affidavit of the defendant simply stated that he did not conceal himself for the purpose of avoiding the service of summons on him, but it fails to state where he was during the three or four months that the action was pending, or where or how he could have been found; and the affidavit of Nicoll simply states that he was at the time of the commencement of the action, is now, and for a long time prior thereto had been, the agent of the defendant to collect rents from the tenants of the property in question, and "that at no time did the above-named plaintiff personally inquire of him as to the whereabouts of the above-named defendant, Oliver McAvoy." It does not state that the agent knew at any time where McAvoy could have been found, or that he could or would have given information as to his whereabouts if inquiry had been made of him. We advise that the order appealed from be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

99 Cal. 327

PEOPLE v. SQUIRES. (No. 20,984.)

(Supreme Court of California. Aug. 16, 1893.)

JURORS—OFFER TO TAKE BRIBE—INDICTMENT—EVIDENCE.

1. Under Pen. Code, § 93, making it a felony for a juror to ask for or take a bribe, the indictment need not charge that the offense was committed before the indictment was found, as the statute contains no such requirement, and therefore it is sufficient where the day on which the offense was alleged to have been committed is the same day as that on which the indictment was filed.

2. Pen. Code, § 93, declaring that any juror "who asks, receives, or agrees to receive, any bribe upon any agreement or understanding that his vote * * * shall be influenced thereby," is punishable, makes it an offense merely to ask for a bribe, and it is not essential that there should be an agreement between the juror and the person of whom the bribe is asked.

3. Where the indictment charges that defendant, while a juror, did feloniously ask and agree to receive money from the attorney for defendant in the action on trial, "upon an agreement which he, the said [defendant,] then and there offered to make" with the attorney, that he would vote for defendant, the most material part of the charge is that defendant asked for a bribe, which brings the indictment under section 93, and not under section 96, which makes it an offense for a juror to promise to give a verdict for a particular party.

4. The admission of evidence which at the time appears to be incompetent is harmless error, where it becomes competent at a later stage of the trial, unless it appears that the adverse party was injured by the admission of such evidence at the wrong time.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

J. H. Squires was convicted of asking for a bribe to influence his actions as a juror, and from the judgment of conviction, and from an order denying a motion for a new trial, he appeals. Affirmed.

John Whaley, for appellant. Atty. Gen. Hart, for the People.

TEMPLE, C. The defendant was convicted of a felony in asking for and agreeing to receive a bribe as a juror. He appeals from the judgment, and from an order refusing a new trial. The indictment upon which he was tried was found, presented, and filed June 7, 1892, and charges that on the 7th day of June, 1892, while defendant was a juror in a case on trial in the superior court of San Francisco, the pendency of which is particularly set out and described in the indictment, "said Squires did willfully, unlawfully, corruptly, and feloniously ask and agree to receive of and from one James F. Smith, one of the attorneys for defendants in said civil action, the sum of \$500 in lawful money of the United States, upon an agreement which he, the said J. H. Squires, then and there offered to make and enter into with said James F. Smith, that in consideration of the payment to the said J. H. Squires of the sum of \$500, in lawful money,

of the United States, he, the said J. H. Squires, would cast his vote and render his decision as juror in said civil action in favor of the defendants in said civil action," etc. Defendant was prosecuted under section 93 of the Penal Code, which enacts: "Every * * * juror * * * who asks, receives, or agrees to receive any bribe upon any agreement or understanding that his vote, opinion or decision shall be influenced thereby is punishable," etc. The defendant demurred to the indictment, and, after a verdict against him, moved an arrest of judgment, in both modes raising the questions herein discussed as to the sufficiency of the indictment.

1. The first objection to the indictment is that it does not charge that the offense was committed prior to the finding of the indictment. Our statute does not require that the indictment shall show that the offense was committed on a day prior to the time of filing the indictment, as do the statutes in some of the states, from which authorities are cited by appellant, but the indictment is sufficient if it can be understood therefrom (Pen. Code, § 959, subd. 5) "that the offense was committed at some time prior to the time of finding the indictment." The usual course is to charge the commission of the offense on a named day, which is prior to the day of finding the indictment. The proof need not show that the offense was committed on the day named. It is ordinarily sufficient if both the days named and on which the offense is proven to have been committed are within the statute of limitations and prior to the finding of the indictment. In this case it might have been charged that the offense was committed on the sixth, and proven to have been committed on the seventh, prior to the finding of the indictment. But while courts do not generally take note of fractions of days, they do when necessary. To accuse one of the commission of a crime is to charge that it was committed prior to the accusation. Where the indictment expressly states that an offense was committed on a date subsequent to the day of the accusation, it charges an impossible act. On the face of the indictment, therefore, the accused cannot be guilty. Under a statute like ours, I think this is all there can be in a point of this character. But that is not this case. One may be accused of an offense on the very day of its commission; and, as already said, to accuse is to state that the act charged was prior to the accusation.

2. The second objection to the indictment is that it does not charge that defendant asked for or agreed to receive a bribe upon any agreement or understanding that he would cast his vote, etc. It is said that it does not appear that any agreement or understanding had been made, but only that the accused offered to make an agreement or understanding. Section 93 of the Penal Code

denounces, as liable to punishment, those who ask for a bribe. To complete the offense, it is not necessary that the party approached shall consent to give it. Unless he does so, there could be no agreement or understanding. In such case it cannot be charged that such agreement or understanding exists, but only that the accused was ready to agree or enter into an understanding.

3. The third objection to the indictment is that it is uncertain whether the offense charged is that defined in section 93, or in section 96, of the Penal Code.¹ Possibly, an offense may be committed which might be prosecuted under either section, but in this indictment a fact is stated which is not required to constitute the offense defined in section 96, but may be the most material part of the charge in an offense defined in section 93, to wit, that defendant asked for a bribe. To solicit is not made an offense under section 96. It is not necessary to say whether one who promises his decision or vote for a bribe could be prosecuted under section 93.

4. The fourth point is in regard to a ruling on the admission of evidence. Chickering, a witness for the prosecution, was allowed to state that he consulted Judge Sanderson in regard to the matter before he called at the defendant's store and received, as he states, the offer to be bribed. According to the testimony of the witness, the defendant had already approached him, and had intimated that he was willing to receive a bribe. He was allowed to state, against the objection of defendant, that he then consulted his associates in the case, and laid the matter before the judge who was trying the case, before he called at defendant's store to find out exactly what defendant was trying to accomplish. Further than this he did not state the conversation had with the judge. Of course, the inference was that the judge concurred in the course adopted. The evidence was confessedly introduced to show the good faith of the witness; that is, to add to the force and effect of his testimony. It was plainly not part of the *res gestae*, and the general rule is that a party cannot bolster up his witness until he has been attacked; but if it be admitted, for the purposes of this case, that the evidence was inadmissible at that time, still its admission would not constitute re-

¹ Pen. Code, § 96, is as follows: "Every juror or person drawn or summoned as a juror, or chosen arbitrator or umpire, or appointed referee, who either (1) makes any promise or agreement to give a verdict or decision for or against any party; or (2) willfully and corruptly permits any communication to be made to him, or receives any book, paper, instrument, or information relating to any cause or matter pending before him, except according to the regular course of proceedings,—is punishable by fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years."

versible error if it became relevant afterwards, unless defendant was injured by its being introduced at the wrong time. Subsequently it did appear very plainly that the defense claimed that the witnesses Chickering and Smith were really trying to bribe the defendant, and that he had simply declined to be bribed. Defendant and his wife both testified to that effect. This raised a collateral question, bearing directly upon the main issue. That it was admissible seems to have been held in the case of *People v. Northey*, 77 Cal. 618, 19 Pac. Rep. 865, and 20 Pac. Rep. 129. It is impossible to see how defendant was injured by its introduction at the wrong time, conceding it to have been so. Evidence of that character is admitted in almost every case without objection. The witness is allowed to tell who he is, what positions he has held, and to show that he learned the facts to which he testifies in an honorable way, and to state facts which would tend to rebut any inference that his own conduct in connection with the transaction was improper. It may be difficult to say how far examinations for such purposes should be allowed to go, but I think there was no abuse of discretion in this case.

5. The fifth point involves the same question as to the admissibility of the evidence.

6. The sixth point is that it was not shown that defendant's vote was influenced, or that he made any effort to procure a verdict for the defendants in the civil action; that at most he only showed a willingness to commit an offense, but did nothing whatever. After what has been said as to the nature of the charge, this point requires no discussion.

7. It is contended, as the seventh point, that the evidence does not tend to prove that defendant asked for a bribe to influence his decision or vote, but that he proposed for pay to procure a verdict. He did not, as a matter of fact, propose to be paid for his vote simply. He proposed to take \$500 if he should procure a verdict. The case in which he was a juror was a civil one, and a verdict might have been rendered by a concurrence of nine persons. It would follow that, if he gave his vote for plaintiff, a verdict might still have been rendered for the defendants in the civil suit, in which event defendant would have been entitled to his money had his proposal been accepted. He may contend that he was merely intending to place himself in a position to earn the money in case the verdict went for the defendants, which it might have done without his vote and in spite of his best effort to prevent it. Perhaps, too, by his vote he might have prevented a verdict against the defendants; but in such case, according to his proposal, he would have received nothing. Or perhaps he had or sought a similar agreement with the other party, also, in which case the expectation of a bribe could

not influence his verdict. It was possible, therefore, that he might have voted as a juror and worked against the defendants, and still have been entitled to his money, according to his proposal; or that he could have done all he could to procure a verdict for the defendants, and still not have earned the bribe. All this shows undoubtedly that defendant was to do something more than cast his vote as a juror in favor of the defendants to earn the money, and that, in certain contingencies, he might not be able to earn it at all, even if it did influence his vote; but it also seems to me that he offered to promise that in certain contingencies he would cast his vote as a juror for defendants. If it should happen that his vote would be required to determine the case for defendants, I think, supposing the witnesses for the prosecution told the truth, he must be held to have promised or offered to promise that they should have his vote, and I think this is all that is required to make out the offense under the statute.

8. The eighth point is that the court erred in refusing an instruction, and involves the same points already discussed. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

99 Cal. 262

SMITH v. BOARD OF SUP'RS OF SAN
BERNARDINO COUNTY. (No. 19,122.)
(Supreme Court of California. Aug. 15, 1893.)

CLAIM AGAINST COUNTY—REFUSAL TO ACT ON—
MANDATE.

A contract with a county for building a bridge provided that the price was payable on presentation of a certificate of the superintendent of construction of the bridge in warrants drawn on the first road district fund of the county. A claim under such contract presented to the county board of supervisors, without reference to the fund out of which it was to be paid, and without the superintendent's certificate, was rejected. Afterwards claimant again presented a claim under the contract, asking that it be paid in warrants drawn on the road district fund in question, and the superintendent's certificate and a copy of the contract were attached. The certificate appeared to have been issued after the first claim was presented. *Held*, that the two claims were materially different, and a writ of mandate would lie to compel the county board of supervisors to act on the second claim.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Charles A. Smith against the board of supervisors of San Bernardino county to compel the board to act on plaintiff's claim against the county. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. J. Fording, J. P. Hight, and Harris & Gregg, for appellant. John W. Mitchell, for respondent.

GAROUTTE, J. This is an appeal from a judgment of the superior court of the county of San Bernardino commanding the board of supervisors of said county to take action on the claim of plaintiff, filed on the 27th day of October, 1891, before the said board of supervisors, by approving or rejecting the claim. Plaintiff filed a claim against the county of San Bernardino, based upon the same contract which is relied upon in the present litigation, and the claim was rejected by the board. After six months had expired from the date of such rejection, but within one year from the day when the liability accrued, plaintiff filed a second claim, based upon the same contract. The board of supervisors refused either to reject or approve this claim, upon the ground that the same claim had been previously rejected, and the law did not require further action in the premises, and this proceeding by mandamus followed.

There is no issue of fact in the case. Both claims are before the court, and the only question to be determined is, upon a comparison can it be said that there is a material difference between these claims? We believe they differ in some important respects. The contract for the bridge work provided, among other things, that the contract price was payable upon the presentation of the written certificate of the superintendent of construction of said bridge that said bridge has been erected and completed in every respect in accordance with the terms of the contract. The production of the certificate of the superintendent of construction before the board of supervisors was a necessary condition to the allowance of the claim. This certificate, bearing date October 27, 1892, is attached to the second claim presented, but was not attached to the first; and, viewed in the light furnished by its date, could not have been issued at that time. Again, the contract provides that the contractor shall be paid in warrants drawn upon the fund known as the "First Road District Fund of San Bernardino County." The second claim is presented upon that basis, and asks for warrants upon such fund, but the original claim was against San Bernardino county, and for the sum of \$5,500. There may have been, and very probably was, a material difference in the value of warrants drawn upon the various road district funds of the county. The claim upon its face, if indicating anything in this regard, would suggest that a warrant upon the general fund of the county, rather than upon any special road district fund, was expected and claimed. Upon a careful inspection of the first claim presented, we are not prepared to say that upon its rejection by the board of supervisors it was sufficient upon its face, even aside

from the lack of the certificate of the superintendent of construction, to support an action for the recovery of a judgment of \$5,500 from the county, to be paid in warrants at par drawn from the fund known as the "First Road District Fund of San Bernardino County." Those were the provisions of the contract, and the claim should have been sufficiently full and explicit to form the basis of such an action. The second claim presented appears to cover all these grounds, and, in addition thereto, a copy of the contract is attached. For these reasons we conclude that the claims are materially different. Let the judgment be affirmed.

We concur: HARRISON, J.; PATERSON, J.

4 Cal. Unrep. 130

GRANGERS' BANK OF CALIFORNIA v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (No. 15,323.)

(Supreme Court of California. Aug. 19, 1893.)

WRIT OF PROHIBITION—ACTIONS TO RECOVER REALTY.

Under the constitutional provision that actions for the recovery of real estate shall be commenced in the county in which it is situated, a writ of prohibition will issue to a court entertaining such an action, for real estate outside the county, though an accounting is also asked as to the rents and profits, and though various proceedings had been had in the action, without any question as to the jurisdiction of the court.

In bank.

Application of the Grangers' Bank of California for writ of prohibition to the superior court of the city and county of San Francisco, department 6; William T. Wallace, Judge. Writ granted.

Pillsbury, Blanding & Hayne, for petitioner. Geo. W. Towle, Jr., and H. S. Foote, for respondent.

GAROUTTE, J. This is an application for a writ of prohibition, and the following state of facts is disclosed by the petition: The Grangers' Bank of California was the owner of certain warehouses, situated in the counties of Fresno, Tulare, etc., some of these warehouses being erected upon the lands of the bank, and others on the lands of the railroad company, leased to the bank by that corporation. Upon the 6th day of January, 1890, the bank entered into a contract of sale with one W. G. Ross, wherein it was agreed, among other things, that said Ross should pay the bank \$49,000, at the times and in the manner therein provided, and in consideration thereof the bank agreed to sell and transfer to said Ross these warehouses, together with all scales, platforms, etc., belonging to said warehouse business. It was provided that the title to the warehouses should not vest in Ross until the money was paid as covenanted. It was further understood that the interest of the

bank in and to the ground upon which the warehouses were situated should pass to Ross upon the consummation of the sale. The right of re-entry by the bank upon default upon the part of Ross was also a condition of the contract. Under this agreement Ross entered into the possession of the warehouses, and in the fall of the year 1890, being largely indebted to the bank, made an assignment of all the property referred to in the contract to one Showers, for the purpose of securing his liability to the bank, and Showers thereupon took possession thereof. About January 1, 1891, the bank, claiming that Ross had forfeited his rights under the contract by reason of certain defaults on his part, took possession of the property, claiming to be the true owner, and ever since has had such possession. Thereafter Ross commenced an action in the superior court of the city and county of San Francisco against Showers and the bank, alleging, among other matters, that his indebtedness to the bank is more than offset by the receipts from the rents, issues, and profits of the business; that the contract has not been forfeited, and he has demanded the possession of the warehouses, which has been refused; that the use and occupation are of great value, and he prays for an accounting as to the rents, issues, and profits; that the bank deliver to plaintiff the warehouses, platforms, etc., referred to in the contract; that the bank be declared to be paid in full from such rents and profits; that he be declared to be the owner thereof; and that said contract be held to be in full force and effect. Issue was joined upon the complaint, and during the pendency of the action an application to the trial court for the appointment of a receiver was made, and the defendant bank brought this proceeding to restrain the court from making such appointment, upon the ground that such act would be in excess of jurisdiction. In addition to the foregoing matters, the petitioner alleged that the present status of the case of *Ross v. Showers et al.* is such that the only substantial issues involved relate to the right of possession, recovery of possession of its warehouses, and the rents, issues, and profits thereof. The petitioner further alleged that said warehouses were real estate. The return to the alternative writ is made by Ross, the real party in interest, and consists principally of the affidavit presented by him to the lower court upon his application for the appointment of a receiver. No denial is found anywhere in such return as to the allegations of the petition pertaining to the nature of the issues at present involved in the litigation of *Ross v. Showers et al.*, and neither is there a denial of the allegation of the petition that said warehouses were real estate. Petitioner insists that the writ should issue, in this: That the appointment of a receiver would be an act in excess of the

jurisdiction of the trial court, and that said excess of jurisdiction consists in (1) that a receiver in the case is not authorized by section 564 of the Code of Civil Procedure; (2) that the property involved in the litigation is really situated in Fresno and Tulare counties, and it follows therefrom that the superior court of the city and county of San Francisco has no jurisdiction of the subject-matter of the action.

We have not stated all the facts disclosed by the record bearing upon petitioner's first ground of contention, as we shall not discuss it; being satisfied that the second ground relied upon has sufficient merit to entitle it to the relief demanded. It is to be regretted that counsel opposing the application has not seen fit to attempt to enlighten the court, either in his oral argument or brief, upon the merit of appellant's contention in this regard. His only answer thereto is set out in his return, and appears to partake of the character of a plea of the statute of limitations or of estoppel. It is as follows: "That the suit of William G. Ross vs. Andrew Showers et al., in said writ referred to, has been pending before respondent since, to wit, the 12th day of January, 1891, and jurisdiction of respondent in the matter of said suit has not, during all the times since said 12th day of January, 1891, to and until, to wit, the 17th day of March, 1893, been called in question; that during said time respondent has had submitted to it by the parties to said suit, both plaintiff and defendants, numerous questions of fact and of law, and the same have, when so submitted, been decided by respondent without any objection made to the jurisdiction of respondent in the premises." In answer to the foregoing statement, it is sufficient to say the jurisdiction of the trial court is now directly assailed, and, giving counsel's allegations full credit, they avail nothing in resisting such attack.

The present status of the case of *Ross vs. Showers*, as disclosed by the facts we have stated, indicate it to be an action to recover the possession of real property, and for an accounting as to the rents, issues and profits thereof. It also appears that said real property is not situated in the county where the action was commenced and is now pending. For these reasons the superior court of the city and county of San Francisco, where the action was brought, has no jurisdiction over the subject-matter. This question was directly passed upon, and the law declared, in the case of *Fritts v. Camp*, 94 Cal. 394, 29 Pac. Rep. 867, which decision has been followed in the recent case of *Pacific Yacht Club v. Sausalito Bay Water Co.*, (decision filed June 8, 1893,) 33 Pac. Rep. 322. The fact that an accounting is asked as to the rents, issues, and profits of the warehouses in no way militates against the position that the action is for the recovery of real property. Such

is the usual course in that character of action, and the claim for rents and profits is purely incidental to the main relief sought. In a question of the kind here presented, we are bound by the provisions of the constitution; and the provisions of the Code of Civil Procedure pertaining to the matter of a change of venue and the proper county in which to commence actions avail nothing as against the declaration of the constitution of the state "that all actions for the recovery of the possession of real estate * * * shall be commenced in the county in which the real estate, or any part thereof affected by such action, is situated." As was said in the concurring opinion in the case of *People v. Wong Ark*, 96 Cal. 138, 30 Pac. Rep. 1115, upon the jurisdiction of this court: "As the legislature has no power to grant the court jurisdiction, it has no power to deprive the court of jurisdiction. The jurisdiction of the court came from a source of power above and beyond the legislature of the state, and the court can only be deprived of it by the source from whence it came."

For the foregoing reasons, let the writ issue as prayed for.

We concur: DE HAVEN, J.; HARRISON, J.; McFARLAND, J.

99 Cal. 333

PEOPLE v. NONELLA. (No. 20,959.)

(Supreme Court of California. Aug. 17, 1893.)

IMPEACHMENT OF WITNESS—LAYING FOUNDATION—CRIMINAL LAW.

1. On a prosecution for assault with intent to kill, defendant's wife was asked if she did not tell one B. that defendant had intended to do the shooting some weeks earlier, and that defendant had made her pursue a certain course of action, which statement she denied having made. *Held* that, as such evidence did not bear directly on the shooting, the witness could not be impeached by a question asked of B. as to what she had told B. about the shooting.

2. In examining an impeaching witness, he should be asked the direct question whether the witness sought to be impeached made the alleged contradictory statement at the time and place mentioned.

Department 1. Appeal from superior court, San Luis Obispo county.

Sylvester Nonella was convicted of assault with intent to commit murder, and appeals. Reversed.

Graves & Graves and L. Lamy, for appellant. Atty. Gen. Hart, F. A. Darn, and E. P. Unangst, for the People.

GAROUTTE, J. Defendant was convicted of the crime of an assault with intent to commit murder, and appealed from the judgment and order denying his motion for a new trial. The motion for a new trial should have been granted by reason of error committed by the court in admitting improper evidence before the jury. Mrs. Nonella, wife of the defendant, was an eyewitness to the affray, and testified in behalf of her hus-

band. Upon cross-examination she was asked the following questions, which were answered in the negative: "Didn't you tell Mrs. Bassi the night of the 22d of February, when no one was present but you and Mrs. Bassi, and in the garden near your house, that your husband intended to shoot him some weeks before that? Didn't you tell Mrs. Bassi, at the same time and place, when no one was present but you and Mrs. Bassi, that you didn't want to go out and speak to Firanzi, but your husband made you do it?" Objections were made to these questions upon various grounds, which were overruled, the district attorney stating that his only object in asking them was for the purpose of laying a foundation to impeach the witness. Owing to other matters which will hereafter receive our attention, we do not find it necessary to review the rulings of the court regarding the admissibility of this evidence, especially in view of the fact that the answers were in the negative, and consequently no harm could have resulted to defendant thereby.

In rebuttal, the district attorney, for the purposes of impeachment, placed the witness Mrs. Bassi upon the stand, and she was asked: "What did she tell you about the shooting? Leave out all that outside matter." This question was objected to, upon the ground that it was "irrelevant and incompetent; that no foundation had been laid for the impeachment of Mrs. Nonella; and that no declaration made by Mrs. Nonella to her about the shooting, or any fact connected with the shooting, is binding upon the defendant;" but the objections were overruled. It will be noticed that the question by the district attorney, "What did she tell you about the shooting?" (referring to what defendant's wife had told her,) was hearsay evidence as to the *res gestae* of the offense charged, and, coming from the wife, was well calculated to weigh heavily against the cause of the defendant. Being hearsay evidence, it could only be admitted for the single purpose of impeaching the testimony of Mrs. Nonella, by showing that her previous statements as to the circumstances of the affray were inconsistent with those made by her when upon the witness stand, and it appears to have been offered and admitted for that purpose. The foundation for such a question was not laid when Mrs. Nonella was upon the stand. Upon an inspection of the two questions addressed to her, touching her conversation with Mrs. Bassi, it appears that neither of them in any way referred to the actual shooting of the prosecuting witness. In order that a witness may be impeached in this manner, the statute (section 2052, Code Civil Proc.) demands that the attention of the witness should be drawn with particularity to the circumstances surrounding the making of the statement, and his mind directed to the very statement itself, and, if in writing, such

writing must be shown to the witness. Those requirements are demanded by the statute in order that all the light possible may be cast upon the scene, so that the witness' recollection may be refreshed, and his answer to the interrogatory direct and positive. Such being the fact, the proper course when the impeaching witness is produced is to ask him the direct question, "Did the party make such statement at the time and place mentioned?" In fairness to the witness to be impeached, and in order that the testimony may be of any value for impeachment purposes, such course should be pursued, and for the further reason that such a course will best serve the purpose of keeping from the jury irrelevant and incompetent matter. Beyond all doubt, such should be the rule when opposing counsel object to the question as being too broad and general. The authorities of other states and the text writers upon the law of evidence are not entirely harmonious as to the true rule, but in the case of *People v. Lee Ah Yute*, 60 Cal. 95, the practice of asking a direct question was held to be proper; and we are satisfied, for the reasons here stated, such should be the course adopted. The question, "What did she tell you about the shooting?" was objectionable even under those authorities which hold it improper to ask a leading question. As already indicated, it did not cover or even refer to the subject-matter involved in the questions addressed to Mrs. Nonella. In those questions not a word is found as to the shooting. One inquiry was addressed as to what the defendant determined to do two weeks before the date of the affray, and the other pertained to alleged acts of the defendant, directed towards the witness, his wife. In response to the question addressed to Mrs. Bassi, she proceeded to state, among other things, that Mrs. Nonella told her that "her husband run inside, and got the rifle, and shot the prosecuting witness." Such evidence was prejudicial to defendant, and clearly objectionable, being the purest hearsay. Considered for the purposes of impeachment, it was objectionable, no such inquiry being addressed to Mrs. Nonella when upon the stand, and consequently no foundation existing upon which to base the inquiry. It becomes unnecessary to consider other assignments of error. For the foregoing reasons it is ordered that the judgment and order denying a new trial be reversed and the cause remanded.

We concur: BEATTY, C. J.; HARRISON, J.

99 Cal. 336

FANNING v. FOLEY et al. (No. 15,023.)
(Supreme Court of California. Aug. 17, 1893.)
SERVICE OF PROCESS—VALIDITY—INFANT DEFENDANTS.

1. Where a summons has been returned, it is functus officio, and subsequent service on defendant of a copy made by plaintiff from the files of the court is a nullity.

2. In an action against an infant, service on his guardian alone, without appearance by either defendant or the guardian, will not support a judgment by default.

3. Defendant cannot be served with process 11 years after the filing of the complaint.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by E. Fanning against Thomas Foley and others. From orders setting aside a decree, and dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

J. M. Wood, for appellant. Mastic, Belcher & Mastic and Frank J. French, for respondents.

TEMPLE, C. This action was commenced November 1, 1879, in the district court of the twenty-third judicial district, to foreclose a street assessment, and the summons was issued on the same day. November 4th it was served upon certain named defendants, none of whom, as is now admitted, had or ever had any interest in the premises upon which it is sought to foreclose the lien. It is admitted that Joseph D. Gaven was the sole owner of the premises, and continued to be so up to the time of his death, after which his executor sold the land to one Capurro. Gaven was made a defendant, but was not served with summons. It is averred in the complaint that he was a minor, and Mrs. Sarah Ann English was served as his guardian. She made no appearance, and her default was entered as guardian of Gaven. Of course this was of no consequence, as it bound neither Mrs. English nor her ward. The summons was not returned until August 13, 1889, at which time it was filed. September 25, 1891, plaintiff made a copy of this summons without taking it from the files, and handed such copy to Capurro. An affidavit was made on behalf of plaintiff to the effect that the affiant had duly served the summons on Capurro by handing him a copy thereof. This affidavit does not appear to have been filed, but, as is stated, was attached to the summons which had been previously filed,—pinned to it, as is stated in the notices: whether with or without the knowledge of the custodian of the record does not appear, save from the presumption that plaintiff's counsel would not have done such a thing clandestinely. Capurro was never made a party to the suit in any way, nor was he served as John Doe, although such a person appears to have been a defendant. Furthermore, the suit was dismissed as to John Doe by plaintiff. Capurro did not appear in the case by any pleading.

January 29, 1891, a decree was entered in the superior court before Hon. F. W. Lawler, J., foreclosing plaintiff's lien. The decree does not run against Capurro. On motion of Mrs. Sarah A. English, this decree was set aside and vacated September 21,

1891. Mrs. English then gave notice of a motion to dismiss the action because not prosecuted with reasonable diligence. Capurro also moved to quash the service of summons upon himself, and separately, as successor in interest to Gaven, gave notice of a motion to dismiss the action for want of prosecution. Both motions were granted, and plaintiff appeals from all these orders.

It is obvious that all these orders must be affirmed. The decree was absolutely void, and the court was right in removing it from the record. The owner of the fee had never been brought in by appearance or service, and, had Gaven been alive, he could not have been served at the time of the attempted service upon Capurro. It was 11 years after filing the complaint. The summons, having been returned, was *functus officio*. If the practice adopted by plaintiff can be sustained, it will practically nullify in part sections 406, 408, and 581 of the Code of Civil Procedure. The fact that Capurro purchased the interest of Gaven after suit brought did not *ipso facto* make Capurro a defendant. Gaven had never been served, and had not appeared in the suit, and it was then too late effectually to bring him in, had he been alive. Perhaps, had Gaven been alive, Capurro might, under our Code, have appeared and defended in the name of Gaven, or have had himself substituted as defendant, but plaintiff could not at will, without any action on the part of the court or Capurro, consider and treat him as such. The action was properly dismissed. Under the Code, plaintiff had lost his right to bring in the real defendant, and it was of no benefit to him to keep the suit pending. Capurro, as purchaser from Gaven, had such an interest as would authorize him to make the motion. Capurro appeared for that purpose only after the decree had been vacated. Even if it must be considered as a general appearance in that case, it would not help plaintiff. Capurro was entitled to the relief granted. I advise that the orders appealed from be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from are affirmed.

4 Cal. Unrep. 312

PEOPLE v. ACEVEDO. (No. 20,955.)

(Supreme Court of California. Aug. 16, 1893.)

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Albert Acevedo was convicted of burglary, and appeals. Affirmed.

C. C. Stephens, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The defendant was convicted of burglary, and now appeals from the judgment and order denying his motion for a new trial. Various assignments of error are relied upon to justify a reversal of the judgment, but, upon a careful examination of the record, we find nothing that demands a retrial of the case. Let the judgment and order be affirmed.

99 Cal. 303

HECKMAN v. SWETT et al. (No. 14,999.)

(Supreme Court of California. Aug. 16, 1893.)

BOUNDARIES — NAVIGABLE STREAM — CHANGE OF CHANNEL — FORMATION OF ISLAND — PATENT TO SWAMP LANDS ON EEL RIVER — OWNERSHIP OF ISLAND — FISHING PRIVILEGE — ADVERSE POSSESSION.

1. Act April 28, 1855, to provide for the sale of the swamp and overflowed state lands, (section 18,) limits the provisions of the act to the swamp lands granted to the state by Act Cong. Sept. 28, 1850, under which lands owned by the state by virtue of its sovereignty, including the beds and shores of navigable streams below high-water mark, could not be sold or conveyed. *Held*, that patents of certain surveys of such swamp lands on Eel river, issued after the channel in such river was changed by a freshet, and which described the lands as bounded on such river, conveyed to the grantees the land to high-water mark only, according to the new channel, and did not convey any part of an island formed on the opposite side of such channel by the change, though part of such island is within the lines of the original surveys made prior to such change.

2. Where such island does not consist of part of such original surveys left intact by the change in the channel, but was formed of deposits within the lines of such surveys, the island is the property of the state, under Civil Code, § 1016, which provides that islands and accumulations of land, formed in the beds of navigable streams, belong to the state, if there is no title or prescription to the contrary.

3. St. 1850, p. 298, entitled "An act to regulate salmon fisheries on Eel river in Humboldt county," (section 2,) provides that the owners of land fronting such river shall have exclusive right and privilege of casting, hauling, and landing seines and nets on their own water fronts; and, for the purposes of this act, all bars and the bed of such river lying between the lines of the official survey and extreme low-water mark shall be deemed and held to be the water front of the landowner whose lines border on such river or run nearest thereto. *Held* that, where the bed of such old channel is above low-water mark, but below high-water mark, the owner of the land separated from such island by the old channel has the exclusive right to the fishing privilege on such island.

4. Since the owners of the land separated from the island by the new channel owned no part of the island, they could acquire no right to the fishing privilege by adverse possession of such island, since such privilege is a right which attaches to the ownership of the land on the opposite side of the old channel, and can only be acquired by obtaining title to such land.

5. Under St. 1859, p. 298, § 5, which declares that any person who shall cast, haul, or draw any seine or net, not having the right to do so, shall be deemed a trespasser, and may be convicted of a misdemeanor, a person cannot acquire a fishing privilege by adverse posses-

sion, since the violation of a penal statute, no matter how long continued, cannot confer a legal right.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Ezekiel M. Heckman against John A. Swett and others to quiet title to a fishing privilege and for an injunction. From a judgment for defendants, plaintiff appeals. Reversed.

Horace L. Smith, for appellant. P. F. Hart and E. W. Wilson, for respondents.

HAYNES, C. Action to quiet title to a fishing privilege, and for an injunction. Findings and judgments were in favor of defendants, and the plaintiff appeals from the judgment upon the judgment roll and a bill of exceptions. Plaintiff is the owner of certain lands on the north side of Eel river, known as "Swamp-Land Survey No. 45," patented by the state to plaintiff's grantor in 1882. Defendants are owners, severally, of lots 36 and 42, swamp-land surveys, which lots were surveyed in April, 1858. Lot 36 was patented in 1871, and lot 42 in 1880. At the time of the survey these lots were wholly on the south side of Eel river, a navigable river, in which the tide ebbs and flows, and were described in the surveys and patents as bounded on that river, the courses and distances, including the meander lines on the river and navigable sloughs, and the number of acres, being also given. The court, after finding the foregoing facts, made the following finding: "(4) That Eel river is a navigable stream, and in which the tide ebbs and flows daily; that, at the date of the said several surveys, applications, and purchases as aforesaid, of said lands particularly set forth and described in findings one, two, and three, the said Eel river bounded the said lands of plaintiff particularly described and set forth in said finding one upon the south side thereof, and the said lands of the said defendants particularly described and set forth in said findings two and three upon the north side thereof; that in the winter of 1861 and 1862 there occurred a sudden, unusual, and excessive rise or freshet in the waters of said Eel river, and during which a large portion of the said lands hereinbefore, in findings two and three, particularly described and set forth, with other lands along said river, were submerged or covered with water; that said rise or freshet continued for several days, and during its continuance a very considerable part of the most northern portion of the said lands described and set forth in said findings two and three as aforesaid was cut, washed, and carried away; that such cutting, washing, and carrying away was not slow, gradual, and imperceptible in its progress, but, upon the contrary, the same was rapid, sudden, and perceptible, and its loss could be plainly seen and per-

ceived; that blocks or masses of earth caved off this land, and fell into the river, and were washed and carried away; that houses and outbuildings thereon were also washed and carried away with the land, so rapid was the same done; that said rise or freshet continued for several days; and that, upon the subsidence in the waters of said Eel river, the same was found to have cut for itself a new channel, and the main channel thereof was then running about a quarter of a mile south of the old channel, and through and over the lands of said defendants hereinbefore, in said findings two and three, particularly described and set forth, whereby a portion of said lands thus described were left upon the south bank of Eel river as thus changed, and a portion thereof upon the north bank of said river as thus changed, thereby forming a small island which has grown gradually and imperceptibly, but mostly down stream, until it is now nearly a quarter of a mile wide, and a little more than a quarter of a mile long, and lies between the old or original channel of Eel river and the new channel as thus formed." The court further found that the main body of the water has ever since flowed in the new channel; that the tide ebbs and flows through the old channel; that at high tide there are from 2 to 6 feet of water therein, and a width of 100 to 150 feet; that at low tide the bed of the old channel is dry for a considerable distance between plaintiff's land and the island; that the island is about the level of the lands on either side of the river, and is not covered with water except during freshets; that by reason of the change in the channel plaintiff's lands do not front upon or extend down to the river as thus changed, but since said freshet of 1861-62 are separated from the river by the lands in controversy and by said old channel. The southerly shore of the island is suitable for landing nets, and is valuable for fishing purposes, while the bank on the south side of the present channel is abrupt, and cannot be used for that purpose; and these facts give rise to the present controversy.

An act to regulate salmon fisheries on Eel river in Humboldt county (St. 1859, p. 298) contains the following provisions: "Sec. 2. The owners of land fronting on the above-named river shall have exclusive right and privilege of casting, hauling, and landing seines and nets on their own water front. For the purposes of this act, all bars and the bed of said river lying between the lines of the official survey and extreme low-water mark shall be deemed and held to be the water front of the landowner whose lines border on said river or run nearest thereto. Sec. 3. Where there is a bar or grade suitable for landing seines or nets on one side of the river, and a bold shore and steep, abrupt bank on the other, the owner or owners of the land embracing such bar or grade

shall have the exclusive privilege of using the entire width of the river for fishing purposes at such points or places; provided always that such owner or owners shall in no wise impede or interfere with the navigation of said river. Sec. 4. Whenever on both sides of said river there is a bar or grade suitable for landing seines or nets, the owners of the land on each side of said river embracing such bars or grades shall exercise fishing privileges and rights to the center of the river at low-water mark."

Plaintiff contends that there are no private lands between his land which reaches high-water mark on the north side of the river and low-water mark on the south side of the island, and that, therefore, under the provisions of the statute above quoted, he has the exclusive right of the fishery on the south shore of the island; while defendants claim that, by the change of the channel of the river, the southern shore of the island is within the lines of the original survey of their lots, and covered by their patents; that thereby plaintiff is excluded; and that they have the exclusive right. The island is not used by either party for any other purpose. If defendants have title under their patents, their right is clear. If they have not, plaintiff's right is clear, unless he is barred by adverse possession. We think defendants' patents only conveyed to them the lands lying south of the present channel, and did not convey any part of the island. These lands were surveyed under the act of April 28, 1855, entitled "An act to provide for the sale of the swamp and overflowed lands belonging to this state," (St. 1855, p. 189.) By the eighteenth section the provisions of the act were limited to the swamp lands granted to the state by the act of congress of September 28, 1850, and under that act lands owned by the state by virtue of its sovereignty, including the beds and shores of navigable streams below high-water mark, could not be sold or conveyed. The patents describe the lands conveyed as swamp land granted to the state by said act of congress, and describe defendants' lands (lots 36 and 42) as bounded by the left or southern bank of the river. The fact that the surveys start at a point on a section or quarter-section line back from the river, and give the courses and distances of all the lines, including the meander lines, along navigable sloughs and the bank of the river, does not control the call for the south bank of the stream. Such survey was necessary in order to ascertain the number of acres contained in each lot. Though both these surveys were made, and the patent to lot 36 was issued, before the adoption of the Code, the law in relation to boundaries upon navigable streams was the same as it now is. "A conveyance by the state of lands bounding upon the sea, or upon a bay or navigable stream, would extend to high-water mark." *People v. Morrill*, 26 Cal. 357; *Civil Code*, § 830; *Packer v. Bird*,

71 Cal. 134, 11 Pac. Rep. 873. If defendants' contention can be sustained, it would seem to follow that under their patents they have not only acquired title to the bed of the river, but to the water which covers it. *People v. Canal Appraisers*, 33 N. Y. 464. The courses and distances of the survey undoubtedly include a section of the river lying between the side lines of the survey, and these courses and distances must be resorted to if any part of the island is included. But not only does the call for a navigable river as a boundary control the calls by courses and distances, but the state could not convey under the act for the sale of swamp lands any land lying below ordinary high-water mark on a navigable stream, nor can the state, under any act that the legislature could enact, convey an absolute and unqualified title to the shore or bed of a navigable stream. Such lands are held by the state in trust for the whole people, and cannot be conveyed for any purpose not consistent with and in furtherance of the purposes of the trust. Grants may be made for the erection of wharves, docks, etc., in aid of the use of the water for purposes of navigation and commerce, "but the state cannot abdicate its trust over property in which the whole people are interested." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 453, 13 Sup. Ct. Rep. 110. If the state can vest absolute and unqualified title and ownership of any portion of such lands and waters in a private person, there can be no limit to such disposals until all such lands have been converted into private property, and the trust for the benefit of the public has been utterly destroyed. For these reasons, if no other, respondents' contention that the curative act of March 27, 1872, (St. 1871-72, p. 587,) "vests in the respondents the legal title to the land embraced within their patents," cannot be sustained, if by the language just quoted counsel mean, as they evidently do, the lands embraced within the courses and distances there given. The patents conveyed to high-water mark on the southerly bank of the river as it existed at the date of the patent, or as thereafter changed by washing or cutting away by the action of the water, or by accretions added by the same agency. By apt words in the patents, they might have been made to include a portion of the island above high-water mark, but those words were not used, and we cannot supply them. What would have been the effect of the change in the channel of the river caused by the freshet of 1861-62 if the title had vested in the defendants prior to such change it is not necessary to determine. These surveys were made April 20, 1858. On April 21, 1858, the act of 1855 was repealed, reserving rights accrued thereunder. The act of 1858 made the certificate of purchase issued by the register prima facie evidence of title. The certificates of purchase of lots 36 and 42 were issued, as shown by the patents, January 26,

1871, and April 28, 1880, respectively, and the patents were issued shortly thereafter; and section 7 of the act of 1858 expressly provided "that neither the patent provided for in this section, nor the certificate provided for in the 6th section of this act, shall have any other legal effect or force than as a quitclaim of all right, title, and interest on the part of the state;" but this quitclaim can only operate to transfer title to that which passes by the controlling calls of those instruments. We do not understand the fourth finding to state that a new channel was cut through lots 36 and 42, leaving a part of those lots intact upon the north side of the new channel, but that the channel was changed by cutting away the south bank until it reached its present location; and that part of the finding which states that a portion of these lots was left upon the north bank only means that a portion of the deposit forming the island is within the lines of the survey. If this finding is not to be so understood, it is not justified by the evidence. The island thus formed belongs to the state. Civil Code, § 1016.¹ We conclude, therefore, that plaintiff's southerly line is high-water mark on the north side of the river, which includes the old channel, and defendants' northerly line is high-water mark on the south side of the river; that the island is the property of the state; and that, as the old channel is above low-water mark, the low-water line is on the south side of the island in front of plaintiff's land, while the high-water line on the north side of the old channel is the south line of plaintiff's land, which brings him within the provisions of section 2 of the act regulating fisheries on Eel river. Nor does the plaintiff attack defendants' patents collaterally, as contended by counsel for respondents, nor attack them at all. They are conceded to be valid, and to vest in defendants title to all the land described within their controlling calls. The attack is only upon the construction sought to be placed upon them, viz. that they vested title in the defendants to a portion of the island.

The only remaining question is as to adverse possession. Upon this defense the court found that the defendants had severally occupied and used the south shore of the island for fishing purposes exclusively, openly, and under a claim of title, for more than five years next before the commencement of the action, and that the plaintiff had not been seised or possessed of any right thereon or attached thereto within five years, or at all. Having concluded that defendants owned no part of the island, we think it must follow that they could acquire no right to the fishery by adverse possession under the facts of that possession as found by the

court. The second section of the act of 1859, regulating fisheries on Eel river, grants the exclusive right to the owner of land fronting on the river. It is a right which attaches to the ownership of land as an appurtenance which passes with a conveyance of the land. If defendants had acquired title to plaintiff's land on the north side of the river by adverse possession, they would at the same time and by such acquisition of the land have also acquired the fishery, whether they had used the fishery during the period of adverse possession of the land or not. Navigable streams and the shores to ordinary high-water mark, as we have seen, are held by the state in trust for the public; but qualified rights therein may be granted so far as they are not inconsistent with, or are in aid of, the principal use, viz. for the purposes of navigation. In the absence of the act of 1859, regulating fisheries on Eel river, the right to use the shores between high and low water mark for fishing purposes was common to the people of the state. Aside from that act, there was no statute under which the officers of the state could grant an exclusive right to a fishery of this character; and a title by prescription to the fishing privilege must therefore include the land of plaintiff, as the ownership of the land and the fishing privilege are inseparable. Not only so, but the fifth section of the act declares that any person who shall cast, haul, or draw any seine or net, not having the right so to do, shall be deemed and held to be a trespasser against the person whose rights are by the act fixed and determined, but may, in addition to any civil action had thereon, be convicted of a misdemeanor for every such offense, and be punished by fine or imprisonment, or both. We know of no authority which holds that the violation of a penal statute, no matter how long continued, can confer a legal right or title.

The court further found that the defendants claimed and exercised their rights and interests severally and separately, each to a distinct part of the shore. The question of misjoinder of parties defendant was presented by demurrer and answer. The joinder of the several defendants was proper. They severally claimed rights affecting plaintiff's right appurtenant to his land, and their claim, though under different patents, was from the same source, and the injury to the plaintiff, as well as their defense to the action, depended as to each upon the same facts. Pom. Rem. & Rem. Rights, § 372; *Fisher v. Hepburn*, 48 N. Y. 41-55.

The finding that defendants are the owners of the south part of the island is not justified by the evidence, and is inconsistent with other and controlling facts found by the court, as is also the finding as to adverse possession. The judgment appealed from should be reversed.

We concur: VANCLIEF, C.; SEARLS, C.

¹Civil Code, § 1016, provides as follows: "Islands and accumulations of land, formed in the beds of streams which are navigable, belong to the state, if there is no title or prescription to the contrary."

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed.

99 Cal. 265

HARPER v. HILDRETH et al. (No. 18,079.)
(Supreme Court of California. Aug. 15, 1893.)

APPEAL—NOTICE—NEW TRIAL OF MOTION.

1. An action to dissolve a partnership between plaintiff and defendant H., and to declare certain land claimed by H. to be partnership property, was, on the motion of the other defendants, dismissed, as to the land, and plaintiff's motion to file an amended complaint was denied. Afterwards plaintiff's motion to vacate such rulings was denied, and plaintiff appealed. *Held*, that defendant was within Code Civil Proc. § 940, requiring notice of appeal to be served on the "adverse party," since his rights would be affected by a reversal, and, notice not having been served on him, the appellate court did not acquire jurisdiction of any of the defendants.

2. No appeal lies from an order denying a motion to vacate an order which is not itself appealable.

3. A "new trial" is defined by Code Civil Proc. § 656, as "a re-examination of an issue of fact in the same court after trial and decision." Section 590 defines an "issue of fact" as one arising on the pleadings. *Held*, that a motion which does not ask for a decision on an issue of fact arising on the pleadings is not the subject of a new trial.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Harper against Thomas Hildreth and others to dissolve a partnership, and for other relief. There was a judgment in favor of defendants, and plaintiff appeals. Motion to dismiss. Dismissed.

Henry E. Highton, Milton E. Babb, Fox & Kellogg, and R. S. Gray, for appellant. Walker C. Graves and A. L. Rhodes, for respondents.

HARRISON, J. The plaintiff brought this action in 1884, against Thomas Hildreth, for the purpose of dissolving a partnership between them, and to procure the sale of certain lands described in the complaint, and alleged to be a part of the partnership assets. The other defendants were made parties to the action by reason of their claim to some interest in the lands. In 1891 the defendants, other than Hildreth, moved the court to dismiss the action as against them, and as against the lands described in the complaint; and when this motion came on for hearing the defendant Hildreth moved the court for its dismissal, and the two motions were heard together. The court denied Hildreth's motion, and granted the motion of the other defendants, and ordered that the action be dismissed as against the said defendants and also as against and in regard to the lands described in the complaint, and at the same time denied the motion of plaintiff to file an amended and supplemental complaint, as against the said defendants, and to introduce certain additional evidence. Judgment was entered in accordance with

this order on the 28th day of December, 1891, and on the 15th day of February, 1892, the plaintiff gave notice of his appeal therefrom. January 14, 1892, the plaintiff gave notice of his intention to move for an order vacating and setting aside the foregoing decision of the court, dismissing the action, and also to vacate and set aside the decision of the court denying his motions for leave to file an amended and supplemental complaint, and to introduce certain evidence, at the hearing of the motion to dismiss the cause, and to grant a new trial thereof. May 16, 1892, the court made an order denying these motions, and on the same day the plaintiff gave notice of an appeal from this order denying his motion to vacate the decision dismissing the action, and to vacate the decision denying his motions, and his motion "for a new trial of said cause upon and as to each of said motions." These notices of appeal were each directed to and served upon the attorneys for the defendants, who had made the motion to dismiss the cause, but were neither directed to nor served upon the defendant Hildreth, or his attorney. The respondents now move the court to dismiss the appeals from the orders upon the ground that the said orders are not appealable, and also to dismiss the appeal from the judgment upon the ground that, as the notice of appeal was not served upon the defendant Hildreth, this court has no jurisdiction to entertain the appeal.

1. This court has jurisdiction to entertain an appeal only upon a compliance by the appellant with the procedure prescribed by the legislature for taking the appeal. Section 940, Code Civil Proc., requires that the notice of appeal shall be served on the "adverse party." Unless such service is made this court has no jurisdiction over him, and any order or judgment it might make with reference to the judgment appealed from would be ex parte, and could not affect his rights, or be binding upon him. The "adverse party" referred to in this section is defined in *Senter v. De Bernal*, 38 Cal. 640, to be "every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken." In *Williams v. Association*, 66 Cal. 195, 5 Pac. Rep. 85, it was said: "This court has not jurisdiction to hear an appeal from a judgment unless the appellant shall have served the notice of appeal on all the adverse parties; that is to say, upon all whose rights may be affected by a reversal of the judgment, or, where the appeal is from part of the judgment, by a reversal of the part appealed from." It was held in that case that, when the appeal is from the whole judgment, notice need not be served upon all the parties to the action, if the modification sought can be effected without affecting the rights of those not served. In *Re Castle Dome Mining &*

Smelting Co., 70 Cal. 246, 21 Pac. Rep. 746, the corporation had suffered default, and although it appeared that it would not be affected in any practical manner, however the appeal might be determined, yet it was held to be an "adverse party," inasmuch as the judgment dismissing the action was practically a judgment in its favor, and could not be reversed without depriving it of an apparent advantage, and the appeal was dismissed for the reason that no notice thereof had been served upon it. In *Millikin v. Houghton*, 75 Cal. 540, 17 Pac. Rep. 641, an execution running against several parties was quashed upon the motion of a part of the defendants. The plaintiff appealed from the order, serving his notice only upon those who had made the motion, but it was held that the codefendants who had not joined in the motion were "adverse parties," as the reversal of the judgment would revive the execution against them. The present action was brought for the purpose of dissolving the partnership between the plaintiff and Hildreth, and determining their respective rights in the Hildreth rancho. The ownership of this land is the chief issue presented by the pleadings between the plaintiff and Hildreth, and the plaintiff seeks its sale, and a division of the proceeds, under the judgment of the court. Hildreth admits the existence of the partnership, but denies that the land forms any portion of its assets, or that the plaintiff has any interest therein. The plaintiff and Hildreth are thus adverse to each other upon one of the main issues in the case. The judgment of the court, dismissing the land from the action, has taken this issue out of the case, and left Hildreth free to make such disposition of the land as he may choose, and to render such disposition free from the effect of any judgment or order that may hereafter be made in the action. The court has thereby lost its jurisdiction over the land, for the purposes of this action, as fully as if it had never been brought under its jurisdiction. The reversal of this judgment would have the effect to revive the issue of ownership in the land between the plaintiff and Hildreth, and to restore the land to the control of the court in the action, and deprive Hildreth of the free and unrestrained power of alienation which followed the judgment of dismissal. Thus it is clearly for the interest of Hildreth that the judgment dismissing the land from the action should stand, and he is directly interested in any question involving the right of the superior court to determine its ownership, as between him and the plaintiff, and it is very evident that this court cannot render a judgment that will have this effect unless Hildreth is before it. Whether a party to the action is "adverse" to the appellant must be determined by their relative position on the record, and the averments in their pleadings, rather than from the

manner in which they may manifest their wishes at the trial, or from any presumption to be drawn from their relation to each other, or to the subject-matter of the action, in matters outside of the action. It would hardly be contended that the strength or relevancy of the argument of a party at the hearing in the court below could be conclusive for the purpose of determining whether he was in reality adverse, or in accord with the matter argued. If his position on the record makes him nominally adverse, he must be so considered for the purpose of an appeal from the judgment thereon. The fact that Hildreth made a motion to dismiss the motion of the other defendants did not take away the adverse character which he holds to the plaintiff, and his failure to object to the action of the court in denying that motion, as well as his failure to appeal from the judgment dismissing the lands from the action, indicates that he is satisfied with the action of the court, and does not wish to have its judgment disturbed.

2. Section 963, Code Civil Proc., enumerates the orders from which an appeal can be taken, and when an appeal can be taken from an order a subsequent order denying a motion to vacate that order is not appealable. *Holmes v. McCleary*, 63 Cal. 497; *California S. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 295, 4 Pac. Rep. 13; *Reay v. Butler*, 69 Cal. 572, 11 Pac. Rep. 463; *Tripp v. Railroad Co.*, 69 Cal. 631, 11 Pac. Rep. 219; *Railroad Co. v. McGrath*, 74 Cal. 49, 15 Pac. Rep. 360; *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. Rep. 396; *Goyhinech v. Goyhinech*, 80 Cal. 409, 22 Pac. Rep. 175. An exception to this rule is made when the original order was irregularly issued. *People v. Grant*, 45 Cal. 97; *San Jose v. Fulton*, Id. 319. If the original order was in itself not appealable, a fortiori an order refusing to vacate it is not appealable. *Estate of Keane*, 56 Cal. 409. As neither of the orders dismissing the action, denying leave to file an amended and supplemental complaint, and denying the motion to introduce certain evidence, is appealable, under the provisions of section 963, it follows that the orders denying the plaintiff's motion to vacate those orders are not appealable.

3. Upon a motion to dismiss an appeal from an order, on the ground that it is not an appealable order, the order itself must be examined; and, if it is an order which was not authorized, it does not become appealable by reason of its purporting to do that which the court was not authorized to do. The provision of section 963, authorizing an appeal from an order denying a new trial, is limited to those cases in which a new trial is authorized; and an appeal from an order denying a new trial in a matter wherein a new trial is not authorized will be dismissed upon the ground that the court below had no jurisdiction to entertain the

motion. A "new trial" is defined by section 656, Code Civil Proc., to be "a re-examination of an issue of fact in the same court, after a trial and decision;" and this issue of fact is defined by section 590, Id., to be that arising upon the pleadings. There is no authority in the Code for the new trial of a motion, but if, after the decision of the motion, it is desired to present any new facts for the consideration of the court, the proper practice is to ask for leave to renew the motion. If it is desired to review the action of the court upon an appeal, it is sufficient to present the order in connection with a bill of exceptions containing the matter upon which the court based its action. A motion which does not ask for a decision upon an issue of fact that arises upon the pleadings is not the subject of a new trial, and it needs little reflection to see that if every motion which is made in the courts on a trial, or with reference to an action, could be followed by a motion for a new trial of such motion, the case itself would be inextricably involved in the determination of these motions, and the final judgment in the action indefinitely postponed. It follows that inasmuch as the notice of appeal from the judgment was not served upon the defendant Hildreth, and as the orders appealed from are not appealable, the several appeals must be dismissed, and it is so ordered. Remittitur stayed 30 days.

We concur: GAROUTTE, J.; DE HAVEN, J.

4 Cal. Unrep. 129

WETZEL v. WEBB. (No. 18,115.)

(Supreme Court of California. Aug. 16, 1893.)

MORTGAGED CHATTELS—CONVERSION—ACTION BY MORTGAGEE.

In an action by a chattel mortgagee of growing crops, for conversion thereof, the defense being a justification as purchaser thereof, a finding that at the time of giving the mortgage the mortgagor was the owner and in possession of the crop authorized a judgment for plaintiff.

Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Alois Wetzel against C. C. Webb for conversion of grain. Judgment for plaintiff. Defendant appeals. Affirmed.

Warren & Taylor and T. M. Osmont, for appellant. James Farraher, for respondent.

GAROUTTE, J. Respondent held a chattel mortgage upon a growing crop of grain situate upon the land of one Jones. At a time when said grain was in the stack upon the land, preparatory to threshing, appellant, Webb, took possession of the same, and, on threshing it, converted it to his own use. This action was brought in the nature of conversion, to recover damages in the amount of respondent's lien. Judgment was so awarded, and an appeal from that judgment is now before us.

v.33P.no.19—70

Cal.Rep. 32-34 P.—42

The demurrer was properly overruled. All the facts constituting the cause of action were set out in the complaint, and that is the proper procedure, as declared by the Code. Appellant justified his acts by setting up title to the growing crop under an oral agreement that it should be his, to be applied to the payment of certain interest due from said Jones to him on the purchase price of the land upon which the crop was grown. The question of the title to the grain is the only matter involved in the litigation, and its determination necessarily points the judgment. Among the matters of fact found by the court is the following: "That at the time of the execution of said note and mortgage to plaintiff by the said James T. Jones, and thereafter, and at the time the advances were so made, as alleged in the complaint, by defendant, and under the terms of said mortgage, the said James T. Jones was the owner of, and in possession of, all said grain crop." This finding has ample support in the evidence, and demands that judgment should go in favor of respondent. It is insisted that certain other findings of fact made by the court are not supported by the evidence. Conceding such contention to be true, the validity of the judgment is not affected, for those findings passed upon collateral matters. Especially is this so in view of the finding that the grain was the property of the mortgagor at the time the mortgage was executed. For the foregoing reasons, let the judgment and order be affirmed.

We concur: HARRISON, J.; BEATTY, C. J.

99 Cal. 349
GUNN v. BANK OF CALIFORNIA. (No. 14,248.)

(Supreme Court of California. Aug. 22, 1893.)

REAL-ESTATE BROKERS—RIGHT TO COMMISSIONS—FINDING PURCHASER.

A real-estate broker, having land to sell, made an oral contract with a person able to purchase, whereby the person agreed to purchase, and made a deposit with him as part payment, to be returned if title was defective. The broker, without naming the purchaser, wrote the owner's agent that he had sold the land, specifying the terms, and the agent replied that he approved the sale. The customer objected to the title, and refused to complete the purchase. *Held*, that the broker was not entitled to his commissions, as having found a purchaser, it being necessary either that he introduce the customer to the owner, or that he take a binding contract from him.

Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by one Gunn against the Bank of California for real-estate brokerage commissions. Judgment for plaintiff, and new trial denied. Defendant appeals. Reversed.

Newlands, Allen & Herrin, for appellant. Rhodes & Barstow, for respondent.

DE HAVEN, J. The plaintiff is a real-estate broker, and brought this action to recover from the defendant \$1,000 for commissions alleged to be due him for obtaining a purchaser of certain real estate owned by defendant. Judgment was rendered in the superior court in favor of the plaintiff for the amount demanded, and from this judgment, and an order denying its motion for a new trial, the defendant appeals.

It appears from the record that the plaintiff and defendant entered into a written contract by which the plaintiff was authorized "to sell" the property described therein on or before January 20, 1890, for the sum of \$41,000, or any less sum which might thereafter be fixed by defendant; and in the event of the property being sold by plaintiff within the time named the defendant promised to pay to him a commission of \$1,000 upon any sum which defendant might accept for the same. The court below found that the plaintiff complied with this contract on his part by obtaining within the time fixed in the contract a purchaser who was ready, willing, and able to purchase the property mentioned for the price of \$41,000, "and that plaintiff before said 20th day of January, 1890, notified defendant, in writing, that he had found such purchaser, who was ready, willing, and able to purchase said real estate for said purchase price," and that defendant ratified the sale, and furnished and delivered to the purchaser an abstract of title to said real estate. The defendant contends that the finding of the court to the effect that plaintiff found a purchaser who was able, ready, and willing to purchase the property described in plaintiff's contract of employment is not sustained by the evidence, and this is the only matter necessary to be determined by us. There is no conflict in the evidence upon this point, so that the real question which we are called upon to decide is whether what was done by plaintiff amounted to finding a purchaser, within the meaning of the law which entitles a broker to recover his commissions when he has found a purchaser who is able, ready, and willing to enter into a contract of purchase upon the terms authorized by his principal. The facts upon which this question arises are these: On the 19th of December, 1889, one Keating orally agreed with the plaintiff to purchase the property referred to for the sum of \$41,000, and paid to the plaintiff \$500 on account of such purchase price, taking a receipt therefor, signed by the plaintiff alone, which receipt recited that the purchaser was to have 20 days within which to examine the title to the property, and that the deposit would be returned to him, should the title prove defective. On the same day the plaintiff sent to a Mr. Brown (who seems to have been acting for defendant in the matter) the following letter: "Dear Sir: I beg leave to inform you that I have this day sold the lot and

improvements known as 'The Golden Age Flour Mill Property,' * * * for the sum of forty-one thousand dollars, less \$1,000 commission, and have given purchaser 20 days to examine title to same. Please send me abstract, and approve sale, and oblige." This letter was returned by Brown with this indorsement: "I herewith approve above sale. The Bank of California. Thomas Brown." It is conceded that Keating was financially able to pay the price he orally agreed to pay for the land, but he signed no contract which bound him to complete the purchase in case the title to the land was perfect, and plaintiff did not introduce him to Brown, or inform him who was the purchaser referred to in the above letter, and Brown did not learn his name until about the time the title was rejected by the attorney of such purchaser. Keating refused to complete the sale "because he was informed and advised by his attorney that the title of defendant to said real estate was defective;" and in this connection the court also found that "at the time of the making of the said contract between the plaintiff and defendant the title of defendant to a certain portion of said real estate was defective, and said defect, up to the time said purchaser refused to complete said purchase, had not been cured or remedied."

It is, of course, well settled that when a broker employed simply to negotiate a sale of real estate has found a purchaser able, ready, and willing to purchase upon the vendor's terms, his right to the agreed commission is complete, and does not depend upon the final acceptance by the purchaser of a conveyance of the property sold. This proposition is very clearly stated in the cases of *Middleton v. Findla*, 25 Cal. 76; *Gonzales v. Broad*, 57 Cal. 224; *Duffy v. Hobson*, 40 Cal. 244; *Phelan v. Gardner*, 43 Cal. 311; *Phelps v. Prusch*, 83 Cal. 626, 23 Pac. Rep. 1111,—cited by the plaintiff, and is also declared to be the law in the later case of *Smith v. Schiele*, 93 Cal. 144, 28 Pac. Rep. 857, in which this court construed a broker's contract similar to that under which the plaintiff claims, saying: "Nor was the payment of commissions contingent upon the consummation of the sale, for all that the brokers were required to do, by the terms of their employment, to entitle them to their commissions, was to produce a bona fide purchaser for the property on the vendor's terms; and such is the well-settled meaning, in this state, of a broker's authority to sell." But the question here is, what is "finding" or "producing" a purchaser, within the meaning of the rule of law declared in this and the other cases cited? Is it sufficient for a broker to merely find a person financially able, and who verbally agrees with him to purchase upon the terms of the vendor, and makes a deposit, but who neither signs a binding agreement to purchase upon such terms, nor is produced before the vendor as

a person ready and willing to enter into such a contract? It seems to us very clear that this question must be answered in the negative. The contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect, or if he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agreement. In speaking of the ordinary contract of a broker, the court of appeals of the state of New York, in *Sibbald v. Iron Co.*, 83 N. Y. 378, say: "The duty he undertakes, the obligation he assumes, as the condition of his right to demand commissions, is to bring the buyer and seller to an agreement. In this all the authorities substantially concur, although expressing the idea with many differences of phrase and illustration." In *Hayden v. Grillo*, 35 Mo. App. 647, the court, in a well-considered opinion, say: "This contract on the part of the broker is complete when he delivers or tenders to the owner a valid written contract, containing the terms of the sale agreed on signed by a party able to comply therewith, or to answer in damages if he should fail to perform. This is all the agent can do, and when it is done he is entitled to his commissions. But the necessity of a written contract of sale may be rendered unnecessary if the agent bring the vendor and vendee together, and the latter is able and willing, and offers, to complete the contract, provided the vendor will make the conveyance. In such a case the agent has done all that he can do, and if the vendor, under such circumstances, refused to complete the sale, he nevertheless will be compelled to pay the agent his commissions. * * * The reason of the foregoing rule is very apparent. The object of the vendor is to effect a sale of his property, and, when the real-estate broker produces a contract executed by a solvent purchaser, he is then entitled to pay for his services, whether the trade is finally consummated or not, because, if the vendee refuses to take the property, the vendor holds the contract, which renders the former liable for all damages (including commissions paid by the vendor to the broker) for a failure to comply." So, also, in the case of *Yeager v. Kelsey*, 49 N. W. Rep. 199, it was held by the supreme court of Minnesota that an agent authorized to sell real estate does not earn his commission by procuring a person to proceed so far as paying a part of the agreed price, but who entered into no obligatory contract of purchase. The finding of the court in the present case, that the title of the defendant to the land plaintiff was employed to sell was defective, and was for this reason rejected by Keating, is not material to the question discussed in this opinion. The defendant was not called upon to litigate that question with the plaintiff in this action. The

right of plaintiff to the agreed compensation depends upon the performance of his contract to procure a purchaser, and as he did not do this, and defendant neither waived nor prevented such performance, he has not earned his commission. The case of *Phelps v. Prusch*, 83 Cal. 626, 23 Pac. Rep. 1111, which is cited and relied upon by plaintiff, is not in conflict with the views expressed by us at this time. In that case the judgment really turned upon the fact that the vendor himself prevented a consummation of the sale. He was informed of all that the brokers did in the matter of making the sale, and knew who the purchaser was, and, after being thus fully informed, acquiesced in what they had done, but afterwards became dissatisfied, and exerted himself to and succeeded in preventing the sale. In the case of *Smith v. Schiele*, 93 Cal. 144, 28 Pac. Rep. 857, the proposed purchaser did not sign a binding contract, but he was produced before the vendor as such purchaser, and the vendor fully informed of what the brokers had done, and such purchaser was accepted by the vendor. In effect, it appeared that the vendor was satisfied with the security afforded by the deposit paid, and trusted to the verbal agreement, and it was properly held in that case that the brokers had earned their commissions. The difference between that case and the one we are now considering is apparent. The plaintiff here did not produce before the defendant any purchaser, nor even inform the defendant of the name of the person with whom he was negotiating. It follows from what has been said that the plaintiff is not entitled to recover, upon the facts disclosed by the record before us. Judgment and order reversed.

We concur: McFARLAND, J.; FITZGERALD, J.

99 Cal. 355

MARTEN v. PAUL O. BURNS WINE CO.
et al. (No. 15,068.)

(Supreme Court of California. Aug. 22, 1893.)

CONTRACTS—RESCISSION—ESTOPPEL.

1. Plaintiff cannot rescind a purchase of stock of defendant corporation on the ground that he was induced to take the stock by false and fraudulent representations, where it appears that on the day that he claimed to have discovered the fraud he attended a stockholders' meeting, and voted for an assessment on the stock, and that afterwards, before attempting to rescind, he attended another stockholders' meeting, and voluntarily paid the assessment on the stock.

2. Under Civil Code, § 1691, subd. 2, providing that a party desiring to rescind a contract must return, or offer to return, everything of value received by him under it, a purchaser of corporate stock from the corporation cannot rescind the purchase unless he returns or tenders dividends on the stock received from the corporation.

3. The offer to rescind, in such case, is vitiated by the purchaser's demand for the return to him of the amount of an assessment on the stock voluntarily paid by him after the alleged discovery of the fraud.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by G. A. Marten against the Paul O. Burns Wine Company and others to recover money paid by plaintiff to defendant corporation on the ground that plaintiff was induced to take the stock by false representations. There was a judgment in favor of defendants, and plaintiff appeals. Affirmed.

John H. Yoell, for appellant. S. F. Leib, for respondents.

FITZGERALD, J. This action was brought to recover \$4,000 and interest, paid by plaintiff to the defendant corporation for 5,000 shares of its capital stock. The recovery is sought upon a rescission of the contract of sale, on the ground that plaintiff was induced to make the purchase by the false and fraudulent representations of the defendant as to the profits of its business, and the value of its stock. The stock was purchased in March, 1887, and the alleged discovery of the facts constituting the fraud complained of was made January 20, 1890, and the attempt to rescind was made on April 23, 1890. Defendants had judgment, and plaintiff appeals therefrom, and also from the order denying his motion for a new trial.

Upon the question of rescission, which is the only one necessary to be determined on this appeal, the court, in its decision, found, in effect, that at the time of the purchase of the stock by plaintiff he had full knowledge of the true value thereof, and of the resources, liabilities, assets, and actual condition of the defendant corporation; that the stock, when purchased by plaintiff, was worth the price paid for it, and that he never discovered any fact or facts constituting fraud by defendants; that after plaintiff purchased his stock he received a dividend of \$100 thereon, and on the 20th day of January, 1890, was present at a stockholders' meeting of the defendant corporation, and voted for an assessment of 5 cents per share, or \$250, upon his stock, and on March 19, 1890, he voluntarily paid the same. On April 23, 1890, having prior thereto dealt with and claimed said stock as his own, plaintiff demanded of defendant that it pay to him the \$4,000 paid by him for the stock, and the \$250 paid by him on said assessment, and thereupon offered to return the stock so purchased to defendant, but without deducting, or offering to deduct, or accounting in any way for, the \$100 received by him as dividend thereon. Upon these facts, which must be taken as undisputed, as the findings thereof are not attacked by the specifications, it follows that plaintiff was not in a position to rescind. But conceding, as he alleges, that he did not discover the facts constituting the fraud complained of until the 20th day of January,

1890, it appears that on that day he was present at a stockholders' meeting of the defendant, and voted for the levy of an assessment on the capital stock thereof, and that subsequent to that day he attended another meeting of the stockholders, and afterwards, on March 19th following, he paid the assessment so levied without objection. This was, in effect, an affirmation of the contract, which plaintiff will not be permitted to disaffirm, after having, with full knowledge of the fraud, dealt with the subject-matters thereof under circumstances and to an extent that amount to a ratification. It further appears that he did not offer to rescind until April 23, 1890, more than three months after his alleged discovery of the fraud. Subdivision 1 of section 1691 provides that the party rescinding must do so "promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind." The language of this section, except as to the cases therein enumerated, and in others where a sufficient showing for the delay is made, is mandatory as to promptitude by the defendant upon the discovery of the fraud; and, as the case before us is not embraced within these exceptions, we are of the opinion that plaintiff was too late in making his offer to rescind. But, assuming that he was in time, subdivision 2 of the same section provides "that he must restore to the other party everything of value which he received from him under the contract; or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." It appears that plaintiff, in his offer to rescind, did not then, or at any time thereafter, offer to return or account for the \$100 dividend received by him from the defendant on his stock. This was fatal to the validity of the offer, for the reason that he was bound, upon a rescission of the contract, to restore to the defendant everything of value which he received from it thereunder, so as to place the parties in statu quo, and for him to withhold any part thereof would be "incompatible with rescission," within the meaning of this section. The restoration or offer to restore the dividend received was absolutely indispensable, in order to put the parties in the position they were in before the making of the contract, and anything less than this would not amount to a rescission of the contract in toto, without which plaintiff could not recover in this action.

There is another objection to the offer to rescind which is equally fatal to its validity, and that is plaintiff's demand, as a condition of rescission, that defendant return to him the \$250 assessment which he voted for, and afterwards voluntarily paid, with full knowledge of the alleged fraud.

The errors principally relied upon by ap-

pellant for a reversal of the judgment relative to the rulings of the court in sustaining defendants' objection to evidence offered by plaintiff of conversations had by him with officers of the corporation, with reference to the value of the stock, prior to its purchase by plaintiff, and of striking out, upon defendants' motion, after its admission against its objection, a newspaper article claimed to be an authorized statement by the defendant corporation of its profits for the year ending in March, 1887, and upon which plaintiff alleges he relied in making the purchase. These rulings, admitting them to be erroneous, are not necessary to be considered, as they are harmless, for the reason that they have no bearing upon the question of rescission, upon which, alone, the judgment and order herein are affirmed. So ordered.

We concur: McFARLAND, J.; DE HAVEN, J.

4 Cal. Unrep. 134

CONNOLLY v. CITY AND COUNTY OF
SAN FRANCISCO. (No. 14,397.)

(Supreme Court of California. Aug. 22, 1893.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS
—CONTRACT PAYABLE BY ASSESSMENTS—ABANDONMENT—STATUTE OF LIMITATIONS—AGREEMENT TO EXEMPT CITY.

1. Where a contractor for street improvements, who is to be paid by assessments of benefits, abandons the contract before it is completed because the assessments made were illegal, he is not entitled to any warrant or assessment thereunder.

2. Where a contractor is to be paid for street improvements by assessment of benefits, and the supreme court decides that no legal assessment can be made under the act authorizing the same and the improvements, the personal liability of the city, if any, becomes fixed, and the statute of limitations begins to run not later than the date of such decision, and an action against the city to recover therefor, commenced more than nine years after such decision, is barred.

3. Where a contractor for street improvements is to be paid by assessment of benefits, and he agrees to exempt the city from any liability under his contract, he cannot recover of such city for the improvements, because no legal assessment can be made to pay him therefor.

Department 2. Appeal from superior court, city and county of San Francisco; J. McM. Shafter, Judge.

Action by Peter Connolly against the city and county of San Francisco to recover money alleged to be due on certain contracts for grading streets. From a judgment for defendant, plaintiff appeals. Affirmed.

John J. Coffey, for appellant. Garber, Boalt & Bishop, for respondent.

PER CURIAM. On the 8th day of May, 1867, the plaintiff entered into a written contract with George Cofran, superintendent of streets of the city and county of San Francisco, to grade Market street, in that city, from Valencia street to Castro or Seven-

teenth street. Under the contract the work was to be commenced within 30 days, and completed within 365 days after its date, and the superintendent, "acting in his official capacity," agreed that on its completion "he will duly make and issue an assessment, and attach a warrant thereto, as provided for in the aforesaid acts, (the consolidation act and its amendments,) for the expenses of the work," at a price named per cubic yard. The terms of the contract were further stated as follows: "And it is agreed and expressly understood by the parties to this agreement that in no case, except where it is otherwise provided in the acts aforementioned and referred to, will the said city and county of San Francisco be liable for any portion of the expense of the work aforesaid, nor for any delinquency of the persons or property assessed." The plaintiff commenced work and expended a considerable sum of money pursuant to the terms of his contract, but, before the time for its completion had arrived, he discovered that a portion of the line of the street to be graded was the private property of individuals, who refused to recognize the validity of his contract, or to be bound thereby; and thereupon he petitioned the board of supervisors to take such action as would save him harmless. Five extensions of the time to complete the contract were thereafter granted, aggregating 1,065 days, and extending down to April 18, 1871, but he did not in fact complete the work until November, 1871, about seven months after the expiration of the time extended, and after the contract had become extinguished by his failure. On April 2, 1870, an act was passed by the legislature entitled "An act to authorize the board of supervisors of the city and county of San Francisco to open and grade Market street, in said city, from the intersection of said street with Valencia street to its intersection with Seventeenth street, and to condemn private property for the roadway of said street." St. 1869-70, p. 626. By this act the board was "authorized and required to cause Market street, * * * from its intersection with Valencia street to its intersection with Seventeenth street, to be opened and graded; * * * and wherever the line of said Market street, as now projected upon the official map of said city, between said points of intersection, crosses or passes over land the private property of any person, and which has not heretofore been dedicated to the public as a part of said street, and any portion of such land is necessary to be included within the limits of such street, it shall be the duty of said board of supervisors to proceed as herein directed for the condemnation of said land so included within the limits of such street." The act provides that the board shall, within 20 days after its passage, cause a petition to be filed in the county court of the city, describing the

property necessary to be condemned, and stating the names of the owners. Notice to such owners and a hearing are then provided for, and if, upon such hearing, the court is satisfied that the lands are necessary or proper for the opening of said street, it is to appoint commissioners to ascertain and assess the compensation to be paid for the land condemned, such payment to be made out of the first moneys received under the special assessment provided for by the act; and that, immediately upon the filing of the petition for condemnation, the city and county "shall and may, by its agents, employes, or contractors, enter into and upon" the land, "and proceed to grade and open the same as a public street, as fully, to all intents and purposes, as they might or could do after the confirmation of said commissioners' report, and the actual payment of the compensation therein provided for;" and that "it shall be the duty of the board, * * * within thirty days after the passage of this act, to cause notice of the proposed work to be published, * * * inviting sealed proposals for the work of grading Market street, * * * and the duty of the superintendent of public streets and highways * * * to enter into a contract with the person to whom the contract shall have been awarded." The act defines the district deemed to be benefited by the work, and makes it the duty of the board of supervisors, after the completion of the work, to appoint commissioners to assess such benefits, and also makes it the duty of the said commissioners to determine the value of the work done upon Market street by the plaintiff under the contract of May 8, 1867, and to add thereto the expenses incurred by plaintiff in building railroad tracks, cars, and other appliances that he may have deemed necessary in the performance of his work, and to allow him interest on the whole amount found due at the rate of $1\frac{1}{2}$ per cent. per month from the 8th day of May, 1868, until the filing of the report of the commissioners. The said commissioners were also required to "assess the actual amount due for the work of opening and grading authorized and directed to be done," together with the amounts awarded as compensation for land appropriated and the costs of the proceedings upon the several lots benefited within the district defined, in proportion to the benefit deemed to have accrued to each lot. The act also, in section 22, provides that the tax collector shall, at the end of every 10 days after the receipt by him of said assessment roll, "pay over to the treasurer of said city and county the amount of money collected by him within the preceding ten days upon said assessment; and, as soon as a sufficient sum has been received by said treasurer, he shall pay to the said Connolly the amount of money which may be awarded to him by the commissioners' report as

aforesaid;" and, after paying the other charges as provided for, the said treasurer shall pay over to the superintendent of streets the residue, "and the said superintendent shall immediately pay the same in like gold coin to the person or persons entitled to receive the same, as hereinbefore directed, until the full amount due for said work, as per contract hereinbefore authorized, is paid and discharged."

In November, 1870, proposals for the work to be done under this act of the legislature were advertised for, and upon a bid of plaintiff therefor the contract was awarded to him; and on November 22, 1870, a contract was entered into between plaintiff and M. C. Smith, superintendent of streets. It is recited therein that Connolly has been awarded the contract for the work, under and pursuant to the act of the legislature of April 2, 1870, above referred to; and Connolly agrees with Smith, "as such superintendent, acting under and in pursuance of said act of the legislature, and in conformity therewith, that he will do and perform" the work specified within nine months from the date of the contract, "as provided and conditioned in section 13 of said act." Then follows a provision for Connolly's payment as follows: "And it is agreed and expressly understood by the parties to this agreement that payments for the said work shall be made as provided in section 22 of the said act hereinbefore referred to, and that the said superintendent of the said city and county of San Francisco shall not be otherwise made liable therefor than is provided in and by said act." Pursuant to this contract the plaintiff commenced, and on November 22, 1871, completed, the work to be done thereunder, and the same was accepted by the superintendent of streets. As required by the act, a petition was filed, and proceedings had in the county court, and the said court determined that the lands described in the petition were necessary for the opening of the street, and appointed commissioners, as directed, to ascertain and assess the compensation to be paid to the owners thereof. Subsequently these commissioners made their report as to the ownership and compensation to be paid for said lands. In due course, also, the three commissioners to assess the benefits and to determine the amount to be awarded to the plaintiff under his first contract, and the amount due for his work under his second contract, as required by the act, were appointed and organized as a board. To these commissioners the plaintiff presented his claims under both contracts, and the same were allowed for certain specified sums. The report of the commissioners to the county court was by that court set aside on March 6, 1873, and it was "ordered that no further proceedings be had in the premises, on the ground that no valid assessment could be made under the act." From this order

an appeal was taken to this court, where the order was affirmed in January, 1875. In re Market St., 49 Cal. 546. On March 17, 1884, plaintiff presented to the board of supervisors of defendant his claim for the amounts alleged to be due him under his said contracts, and demanded in writing payment thereof, but the board rejected the claim, and refused to pay the same, or any part thereof. Thereafter, on April 3, 1884, plaintiff commenced this action to recover the amount so claimed to be due, with interest.

The defendant by its answer denied most of the averments of the complaint, and alleged that the causes of action set forth therein were barred by the provisions of sections 337, 338, (subd. 1,) 339, (subd. 1,) and 343, Code Civil Proc., and also by the provisions of section 90 of the consolidation act.

The case was tried by the court without a jury, and, among other things, the court found that the action was barred by the provisions of each of the sections of the Code pleaded, and also by the provisions of the section of the consolidation act pleaded; the findings upon these issues being numbered 12-16. Judgment was accordingly entered that the plaintiff take nothing by his action, from which judgment, and an order denying a new trial, he has appealed.

The only specifications of the particulars in which the evidence is alleged to be insufficient to justify the findings above referred to are as follows: "The defendant having failed to give to the plaintiff the warrant and assessment agreed upon in the first contract, and having failed to pay, or cause to be paid, the sum for the second contract, in this findings 12-15 are not supported by the evidence. There being no evidence, either on the part of the plaintiff or the defendant, that the claim sued upon in this action was one of the class mentioned in section 90 of the consolidation act, finding 16 is not supported by the evidence." Under these specifications the findings and judgment cannot be disturbed. The first contract was never completed by the plaintiff, and he therefore never became entitled to any warrant and assessment thereunder. *Mahoney v. Braverman*, 54 Cal. 570; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. Rep. 427; *Raisch v. City of San Francisco*, 80 Cal. 1, 22 Pac. Rep. 22. The amounts awarded the plaintiff by the commissioners, and due him under the second contract, were to be paid as provided in the act of April 2, 1870. Those amounts became due and payable when the work was completed and accepted by the superintendent of streets in November, 1871, and, if any personal liability on the part of the defendant to pay them thereafter arose, because no valid assessment for their payment was or could be issued, that liability became fixed and certain as early at least as January, 1875, when the decision of this court in the case of *In re Market St.*,

supra, was rendered. The statute of limitations then, if not before, began to run, and the causes of action were barred long before the complaint was filed in 1884.

There is another ground, also, on which the decision of the court below might have been safely rested. By the terms of each of the contracts the plaintiff expressly agreed to the exemption of the defendant from any liability thereunder, and thereby, as against the defendant, waived all legal claims to the money now sought to be recovered. These agreements were made and still are binding on the plaintiff, and he cannot now escape their consequences. *Conlin v. Board*, (decided July 21, 1893,) 33 Pac. Rep. 753.

In view of what has been said, it is not necessary to consider the other points discussed by counsel. The judgment and order must be affirmed, and it is so ordered.

(99 Cal. 359)

PEOPLE v. GLEASON. (No. 21,005.)

(Supreme Court of California. Aug. 23, 1893.)

INCEST—CONSENT—NEW TRIAL.

Where, on a trial for "attempt" to commit incest, the evidence, without any conflict, showed that defendant, both by solicitation and overt acts, attempted to have carnal connection with his daughter; that the attempt proceeded to the extent of contact of sexual organs, lacking only penetration to complete the act; and that it was without the daughter's consent, and against her will and active resistance,—an order granting a new trial on the ground that the crime charged could not have been committed without the consent of the daughter will be reversed on appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

John Gleason was convicted of an attempt to commit incest. From an order granting him a new trial, the people appeal. Reversed.

Atty. Gen. Hart, for the People. Carroll Cook, for respondent.

VANCLIEF, C. The defendant was accused and found guilty of the crime of "an attempt to commit incest" with his daughter, aged 14 years and 7 months. On motion of defendant, the court below granted him a new trial, and this appeal is by the people, from an order granting a new trial. The evidence, without any conflict, shows that the defendant, both by solicitation and overt acts, attempted to have carnal connection with his daughter; that the attempt proceeded to the extent of contact of sexual organs, lacking only penetration to consummate the act; and that it was without her consent, and against her will and active resistance. It appears that the new trial was granted on the ground that the crime charged could not have been committed without the consent of the daughter, and the record shows no other ground upon which the order can be sustained. Conceding that the consent of

both parties to the carnal intercourse is necessary to constitute the crime of incest, it does not follow, as contended by counsel for respondent, that a man may not be guilty of the crime of attempting to commit incest without the consent of the woman with whom he attempts to commit the latter crime. His intent to commit the crime of incest, and his concurrent, overt acts in the use of means adapted to the immediate perpetration and consummation thereof, are sufficient to constitute a criminal attempt to commit the crime of incest, and the failure of such means to effect the purpose intended will not exculpate him. There may be found some conflict of the authorities as to whether mere solicitation to commit incest, adultery, or sodomy is an adequate overt act in the composition of a criminal attempt to commit either of those crimes; but, that such overt acts as were proved in this case are sufficient, there seems to have been no question. This conclusion, I think, is warranted by the text and the authorities cited in chapter 51, Bish. Crim. Law, (8th Ed.) §§ 723-772, especially sections 767 and 768. I think the order should be reversed, and the cause remanded, with directions to the court below to proceed to judgment on the verdict of the jury.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the cause remanded, with directions to the court below to proceed to judgment on the verdict of the jury.

(99 Cal. 360)

Ex parte GOULD. (No. 21,008.)
(Supreme Court of California. Aug. 23, 1893.)
CONTEMPT—POWER TO COMPEL ACCUSED TO TESTIFY.

A proceeding to punish a person for contempt in violating an injunction is criminal in character, and the court has no authority to compel him to be sworn as a witness therein, under Const. art. 1, § 13, which declares that no person shall be compelled, in any criminal case, to be a witness against himself.

In bank.

Application by James C. Gould for a writ of habeas corpus. Writ granted, and applicant discharged from custody.

C. W. Cross and Judge Van Fleet, for petitioner. R. T. Devlin and W. T. Phipps, for respondent.

HARRISON, J. In an action pending in the superior court in and for the county of Yuba, wherein the county of Sacramento is plaintiff, and the petitioner one of the defendants, a writ of injunction was served upon the defendant, requiring him to refrain from doing certain acts therein specified. While this writ was in full force the petitioner was charged before said court with having violated its terms, and was ordered to show

cause why he should not be adjudged guilty of contempt therefor. Upon the hearing of this charge the court required the petitioner to be sworn as a witness, to which he objected upon the ground that he could not be compelled to be a witness against himself in the proceedings, for the reason that they were of a criminal nature. The court, however, overruled his objection, and required him to be sworn as a witness; and he, acting under the advice of his counsel, still declining and refusing to be sworn, for the aforesaid reason, the court adjudged him guilty of contempt, and committed him to the county jail, there to remain until he should purge himself of said contempt by consenting to be sworn as a witness in said case, and to testify therein.

Article 1, § 13, of the constitution of this state, declares that "no person shall be compelled, in any criminal case, to be a witness against himself." Section 1323 of the Penal Code provides that "a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself." Contempt of court is a public offense, and by section 166 of the Penal Code is expressly declared to constitute a misdemeanor, and the refusal of a witness to be sworn is an offense committed in the presence of the court. It is none the less a criminal offense that the statute authorizes it to be punished by indictment or information, as well as by the summary proceedings provided in sections 1209-1222 of the Code of Civil Procedure. By these provisions, the procedure for the investigation of the charge is analogous to the criminal procedure, and the judgment against the person guilty of the offense is visited with fine or imprisonment, or both,—the essential elements of a judgment for a criminal offense. "Contempt of court is a specific criminal offense. It is punished sometimes by indictment and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against an offender is a conviction, and the commitment in consequence is execution." *Passmore Williamson's Case*, 26 Pa. St. 19. "Although the alleged misconduct of the defendants occurred in the progress of a civil action, the proceeding to punish them for such misconduct is no part of the process in the civil action, but is in the nature of a criminal prosecution. Its purpose is not to indemnify the plaintiff for any damages he may have sustained by reason of such misconduct, but to vindicate the dignity and authority of the court. It is a special proceeding, criminal in character, in which the state is the real plaintiff or prosecutor." *Haight v. Lucia*, 36 Wis. 360. In *Ex parte Hollis*, 59 Cal. 408, it was said: "To adjudge a party guilty of contempt of court, for which he is fined and imprisoned, is to adjudge him guilty of a specific criminal offense. The imposition of the fine is a judgment in a criminal case." See, also, *Ex parte Kear-*

ney, 7 Wheat. 38; *Ex parte Crittenden*, 62 Cal. 534; *New Orleans v. Steamship Co.*, 20 Wall. 387; *In re Mullee*, 7 Blatchf. 23; *Rap. Contempts*, § 21. In *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, Justice Bradley has given an exhaustive and interesting historical discussion of the power of a court to compel a defendant in a criminal proceeding to give testimony against himself. In that case an information was filed against certain property for its confiscation under the revenue laws of the United States, and the claimants, having been directed by the court to produce in evidence certain invoices, for the purpose of establishing the claim of the government, objected thereto on the ground that the statute under which the order was made was in violation of the fourth and fifth amendments to the constitution. It was held that, although the proceeding was in rem, and in the nature of a civil proceeding, yet an action for the forfeiture of property for the violation of law is, in effect, a criminal proceeding, and that the owner of the goods, after making his claim, is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense, and cannot be compelled to furnish evidence against himself. Personal liberty is, however, more sacred than mere rights of property, and the reasons for protecting the owner of property against being compelled to give evidence against himself in a proceeding for its forfeiture are in the same degree more cogent when his personal liberty is at stake. It was said by Justice Bradley in the case last cited: "Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be, 'obsta principiis.'" We hold, therefore, that the court was not authorized to direct the petitioner to be sworn as a witness in the proceeding, and that its order adjudging him guilty of contempt for his refusal, and punishing him therefor, was without authority, and that the petitioner should be discharged, and it is so ordered.

We concur: DE HAVEN, J.; McFARLAND, J.; FITZGERALD, J.

4 Cal. Unrep. 141

HILDRETH v. WILLIAMS. (No. 19,125.)
(Supreme Court of California. Aug. 25, 1893.)

PROMISSORY NOTE—ATTORNEY'S FEE—PLEDGE.

1. St. 1873-74, p. 707, providing that "in all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court, * * * any stipulation in said mortgage to the contrary

notwithstanding," relates only to mortgage foreclosures, and does not apply to an action to enforce a pledge.

2. Where a stipulation in a note for an attorney's fee in case the note is sued on does not fix the amount of such fee, a reasonable sum therefor will be allowed.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Hugh R. Hildreth against Henry A. Williams. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Oscar A. Trippet, for appellant. Conklin & Hughes, for respondent.

SEARLS, C. This is an appeal from a judgment in favor of plaintiff for \$350, as an attorney's fee in an action in equity to enforce a pledge upon certain stocks given to secure the payment of a promissory note made by defendant to plaintiff for \$3,500. The case comes up on the judgment roll. The promissory note was in the usual form, with this addition: "And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me, rendered in said suit, as counsel fees, an additional sum of — per centum, in like gold coin, upon the amount of the principal and interest hereof accrued at the time of the entry of such judgment, or if paid before judgment, and after action commenced, then on the amount at the date of payment." The only defense was as to the right of plaintiff to recover the counsel fee claimed in his complaint, and at the trial the amount claimed on the note, less counsel fees, was paid by defendant, and a stipulation filed that such payment should in no wise affect the question of plaintiff's right to recover counsel fees.

The whole right to recover counsel fees, in this state, is founded in statute, or in contract. *Sichel v. Carrillo*, 42 Cal. 508; *Mascarel v. Raffour*, 51 Cal. 242. Section 1 of the act of March 27, 1874, (St. 1873-74, p. 707,) provides that: "In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding." In *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514, the court doubted the right of the court to fix an attorney's fee, under this statute, in a case in which the mortgage failed to provide for a fee, and that the statute operated to limit the fee which the court could allow in a case where the parties had agreed upon a sum to an amount not greater than the sum so fixed; in other words, that the court can scale the agreed sum down, but not up. The reason given in that case for confining the action of the court to cases in which the parties have provided for an attorney's fee is that the title of the act is, "An act to abolish attorneys' fees, and other charges in foreclosure suits;" thus evincing an intention to abolish, rather

than to provide by law for their recovery. The statute, whatever its construction, only treats of attorneys' fees in actions of foreclosure of mortgages, and has no application to this case, which is an action to enforce the lien created by a pledge of personal property.

The question here must turn upon the contract contained in the promissory note. That contract provides that there shall be added to the judgment, or, if paid before judgment, and after action commenced, to the amount due, as counsel fees, "an additional sum of — per centum." In other words, the agreement is for a counsel fee, but the amount thereof is not provided. The contracting parties doubtless had in view the necessity of counsel in the event of proceedings in court to enforce the obligation of the promissory note, and the maker of the note agreed to pay such counsel, in manner and form as quoted. In contracts for services, where the remuneration is not fixed by agreement, a recovery may be had upon a quantum meruit; that is to say, as much as the services are reasonably worth. If the clients of the learned counsel in this case have employed them herein, and agreed to pay them a counsel fee, without specifying the amount to be paid, it will doubtless occur to them that they are entitled to such sum as their services are reasonably worth. In principle, the case at bar does not differ from the example put. The contingency upon which the liability of defendant depended occurred when, at maturity, the note was not paid, and an action was commenced to enforce its collection. The amount of the counsel fee not having been stipulated, the plaintiff, in his complaint, averred that \$500 was a reasonable sum. The court, as was its duty, passed upon the question, and awarded \$350 as a proper amount. The evidence is not brought up, and hence we must conclude that it supported the findings upon this issue, and such findings are ample to support the judgment. *Rickards v. Hutchinson*, 18 Nev. 215, 2 Pac. Rep. 52, and 4 Pac. Rep. 702, was a case almost precisely like the present. The mortgage provided for the allowance of counsel fees "at the rate of — per cent. upon the amount which may be found to be due for principal and interest;" and the court said, "The allowance of counsel fees for the foreclosure was authorized by the terms of the mortgage." *Alden v. Pryal*, 60 Cal. 215, is another case in point, and the ruling was against the contention of appellant here. It is true these last two cases were upon the foreclosure of mortgages, but the decisions turned, not upon that fact, nor upon any statute, but upon the contract which had been entered into by the mortgagors. The judgment appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

(4 Cal. Unrep. 144)

DAW v. NILES et al. (No. 19,140.)¹

(Supreme Court of California. Aug. 25, 1893.)

PAROL EVIDENCE—ILLEGALITY OF CONTRACT.

In an action to foreclose a mortgage given by defendant to secure a note for money loaned to him by plaintiff, defendant may show by parol evidence that at the time of executing the note and mortgage it was agreed, as part of the same transaction, that defendant should pay all taxes levied on the money loaned, or on the mortgage, but that the agreement was purposely omitted from the mortgage, in order to evade Const. art. 13, § 5, which provides that imposing such an obligation on a borrower shall avoid the contract, as to any interest specified therein, as such parol evidence tends to "establish illegality" of the contract, within Code Civil Proc. § 1836, prescribing when such evidence is admissible to affect a writing.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by George W. Daw against William Niles and John B. Niles to foreclose a mortgage. There was a judgment for plaintiff, and defendants appeal. Reversed.

A. W. Hutton and Minor & Woodward, for appellants. Albert M. Stephens, for respondent.

VAN CLIEF, C. Action to foreclose a mortgage executed by defendants to secure their promissory note to plaintiff for \$10,000, with interest at 7 per cent. per annum, and payable 10 years after date; the interest, if not paid annually, to be compounded. The note further provides that, if the interest is not paid annually, "then the whole sum of principal and interest shall become immediately due and payable, at the option of the holder." The note was given for money loaned. The mortgage, of the same date as the note, (July 1, 1887,) contains a copy of the note, and provides that "in case of default in payment of the same, [the note,] or of any installment of the interest thereon, when due, the mortgagee may foreclose this mortgage, and may include in such foreclosure a reasonable counsel fee, to be fixed by the court, together with all payments made by the mortgagee for taxes on said premises, other than the taxes on this mortgage, or the money secured thereby. * * *" The defendants having made default in the payment of interest, the plaintiff exercised his option by electing to consider both principal and interest due, and commenced this action on March 27, 1891. The defendants pleaded as a defense to the action that at the time of the execution of the note and mortgage, and as a part of the same contract and of the same transaction with the making of the note and mort-

¹ Rehearing granted.

gage, it was agreed by and between the plaintiff and defendants that the defendants "should and would pay and discharge all taxes and assessments which might be assessed or levied upon said money so loaned by plaintiff to defendants, and on said mortgage, or on either said money or mortgage, anything in the said promissory note or mortgage to the contrary notwithstanding, and that said agreement was knowingly made and omitted from said mortgage with intent to evade the provisions of section 5 of article 13 of the constitution of this state." And by reason of this agreement defendants deny that any interest ever became due or payable on the note, and, as a conclusion of law, claim that the action was prematurely commenced. The decree was in favor of the plaintiff, foreclosing the mortgage for the full amount of principal, with compound interest. The defendants appeal from the judgment on the judgment roll, containing a bill of exceptions showing that defendants offered to prove the alleged contemporaneous agreement to pay the taxes and assessments on the mortgage by oral evidence, which was rejected by the court on the ground that such agreement could be proved only by written evidence, and the defendants excepted to this ruling of the court. Counsel for appellants contend that the court erred in rejecting the proffered oral evidence to prove the alleged agreement, and this raises the only question that need be considered.

The only substantial difference between this case and the late case in this court of *Burbridge v. Lemmert*, 32 Pac. Rep. 310, is that in that case the concurrent agreement to pay the taxes on the mortgage was in writing. In that case it was held that the written agreement was in contravention of section 5 of article 13 of the constitution of this state, and subjected the mortgagee to the penalty denounced by that section, namely, that the note and mortgage, as to any interest specified therein, "shall be null and void," and, consequently, that no interest ever accrued or became due, and the failure of the mortgagor to pay the interest specified in the note or mortgage was not such a default as entitled the mortgagee to treat the principal as due before the expiration of the term of credit expressed in the note, (in this case, 10 years after the date of the note.) I think the court erred in rejecting evidence of that part of the contract which was oral. The "contract," in the sense of section 5, art. 13, of the constitution, existed as an entirety, independently of any writing, though parts of that contract were evidenced by writing. Indeed, writing is no part of any contract, though it is often made evidence of contracts; and, according to some general rules, certain classes of contracts can be proved only by written evidence, but to all these general rules there are exceptions. As an

example in point here, section 1856 of the Code of Civil Procedure provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore, there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases: '(1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute; but this section does not exclude other evidence * * * to establish illegality or fraud.'" In this case the express and only object of proving that part of the contract which is alleged to have been omitted from the writing for the purpose of evading the constitution was to show the illegality, and consequent nullity, of the note and mortgage, "as to any interest specified therein." See, also, *Whart. Ev.* § 935; *Greenl. Ev.* § 284; *Buffendeau v. Brooks*, 28 Cal. 641. The purpose of section 5 of article 13 of the constitution, so far as it goes, is on a line with the object of the usury laws of other states, and therefore the decisions of other states in respect to attempted evasions of usury laws are more or less applicable to this case. Of these, the following seem very aptly in point: *Clark v. Badgley*, 8 N. J. Law, 233; *Stein v. Swensen*, 46 Minn. 360, 49 N. W. Rep. 55. I think the judgment should be reversed, and the cause remanded for a new trial.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial.

4 Cal. Unrep. 147

DUPUY v. MACLEOD, (No. 19,118.)

(Supreme Court of California. Aug. 25, 1893.)

STATUTE OF FRAUDS—SIGNATURE OF PARTY TO BE CHARGED.

The fact that a contract for the sale of chattels is reduced to writing does not, under the statute of frauds, render necessary the signature of the party to be charged, where the requirement of a writing was obviated by an immediate delivery of the goods sold.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. N. Clark, Judge.

Action by E. Dupuy against Malcolm Macleod to recover for goods sold and delivered. There was a judgment in favor of plaintiff, and defendant appeals. Affirmed.

C. W. Pendleton, for appellant. O'Melveny & Henning, for respondent.

SEARLS, C. This action was brought to recover the sum of \$500, the balance due on a sale of a stock of merchandise and store

fixtures sold and delivered by the plaintiff to defendant, at Los Angeles, May 31, 1890. The real question in issue is this: Plaintiff avers the sale was made for \$1,500, to be paid as follows: \$1,000 in cash, the remaining \$500 to be paid as follows: When \$100 worth of stock was sold, \$20 to be deducted by defendant as commissions, and \$80 paid to plaintiff, and so on until the \$500 was paid. If the stock sold did not amount to sufficient to pay plaintiff \$500, after deducting 20 per cent., plaintiff was to receive the 80 per cent. of proceeds in full payment. He avers the sale of sufficient stock to entitle him to full payment under this agreement, and the evidence sustains him in this last assertion. Defendant avers that the agreement was that the \$1,000 paid in cash was first to be deducted from the proceeds of sales, before any further payments were made, and then payments were to be made as averred by plaintiff; and he avers that \$1,000 had not been realized from sales when the action was brought, and hence that nothing was due. Conceding his theory to be correct, the evidence sustains his position that \$1,000 had not been realized from sales. It is admitted on all hands that the sum of \$1,000 was paid by defendant to plaintiff at the date of the sale, and that the defendant went into possession of the property at once, and has ever since retained the same. Plaintiff had judgment, from which, and from an order denying a new trial, this appeal is prosecuted.

The first error assigned by appellant is that the court did not find upon all the issues made by the pleadings, and (1) that it did not find upon the facts set forth by defendant in his second and separate answer. The facts set up in the separate defense were that the agreement was that defendant was first to appropriate from the proceeds of sales the \$1,000 cash, as before stated, before any proceeds were to go to plaintiff. The finding was quite full on the point, and fully sustained the allegations of the complaint. It was not necessary for the court, after finding that the agreement was that defendant was to keep an accurate account of all sales, and, when the sales amounted to \$100, \$80 thereof was to be paid to plaintiff, and \$20 retained by defendant, etc., to go on, and find, as a negative proposition, that they did not agree as set out by defendant. It was conceded that an agreement was made. Just what that agreement was, was the point submitted to the court, and the finding specifies it distinctly, and passes upon the question.

It is further objected that the court failed to find upon the fourth allegation of the complaint, which was denied by the answer. The substance of this allegation is that the agreement of sale was reduced to writing, and signed, and that the writing was in the possession of defendant. The agreement had been pleaded, and this allegation was evidently inserted for the purpose of

showing, as is often done, that it was out of plaintiff's possession, and as a predicate for an amendment, if it should turn out different from the pleading, and also for the purpose of giving to the defendant notice that it would be relied upon in sustaining plaintiff's cause of action. The important question was, was there a sale, and what were its terms? These questions were fully passed upon, and it was unnecessary to go further. There was a finding upon all the material issues, which is sufficient.

It is next contended that the court erred in admitting in evidence what is termed a "written memorandum of the contract," which is the contract of sale alluded to in the complaint, and is in the following language: "Los Angeles, Cal., May 31, 1890. I have this day sold my entire interest in the seed, feed, produce, commission, and all business of whatever nature, carried on at the store 245 South Main street, Los Angeles, to Malcolm Macleod, on the following terms, viz.: The price to be one thousand cash in hand paid, the receipt of which is hereby acknowledged, and five hundred dollars to be paid in the following manner: A correct account to be kept of all goods sold, and when sales to the amount of (\$100) one hundred dollars are made, after deducting twenty per cent. commission for selling the same, (\$80) eighty dollars to be paid over to E. Dupuy or order, and the same to be done until the full amount of five hundred dollars, net, is paid: provided so much can be sold from the stock now on hand, belonging to said Dupuy; but if there is not enough stock on hand to come to the amount of five hundred dollars, net, then the said Dupuy to accept the amount the stock sells for, as full compensation. The stock and fixtures turned over to M. Macleod is now in the store at 245 South Main street, and is entered on an invoice book, May 13, 1890, which book is marked 'A,' with the exceptions of some that has been sold from the same since that time, which is fully understood by said Macleod. Ed. Dupuy. Witness: J. M. Hixson." The instrument was admissible in evidence. There was evidence that it was drawn by J. M. Hixson, who witnessed it at the store where the sale was made, at the request of the defendant, and at the time of the sale and delivery of the goods; that the consideration of \$1,000, mentioned therein, was paid at the time; and that the bill of sale was left by Dupuy, the vendor, after signing it, on the desk; and that it remained in the possession of defendant until the trial, when, upon notice to him so to do, he produced it. As evidence to avoid the statute of frauds, it was defective, in not being signed by defendant, Macleod, the party to be charged thereby. The statute of frauds, however, was not pleaded, and, if it had been, the plea would have been of no avail, under section 1973 of the Code of Civil Procedure, because there was an immediate delivery of all

the goods sold to the purchaser, who thereafter retained possession, and a payment of \$1,000, being part of the purchase price, to plaintiff. A writing to satisfy the statute of frauds is one thing. A writing which is admissible in evidence as to some of the facts of a sale is, or may be, quite a different thing. Beyond determining what shall be a sufficient compliance with the statute, the legislature has not attempted to change the principles of the law of evidence relating to written contracts. "Parties entering into any contract may either reduce its terms to writing, or may refer to some other writing, already in existence, as containing the terms of their agreement; and when they do so they are bound by what is written, whether signed by them or not." Benj. Sales, § 201. This, of course, assumes that the parties assent to the contract as written. Had plaintiff made an oral statement to defendant, precisely as contained in the writing, it would have been admissible in evidence. The fact that he made it in writing, and gave it to, or left it with, defendant, does not render it less admissible. There was sufficient evidence of assent on the part of defendant to entitle the instrument to admission in evidence. There was also evidence upon the part of defendant tending to show that he never assented to the agreement, as set out. Not having been signed by him, this was proper; and it remained for the court to pass upon the issue thus raised, which it seems to have done to the exclusion of the defendant's theory. There was a substantial conflict in the evidence, and evidence sufficient to support all the findings of the court, and the judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

4 Cal. Unrep. 151

BITUMINOUS LIME ROCK PAVING & IMP. CO. v. FULTON et al. (No. 14,907.)

(Supreme Court of California. Aug. 25, 1893.)

JUDICIAL NOTICE—EXISTENCE OF CITY—STREET ASSESSMENTS—ENFORCING LIEN.

1. The courts will take judicial notice that the city of Los Angeles is a municipal corporation, by virtue of the several statutes organizing it into such corporation, and extending its limits, and adding to and changing the powers of its officers.

2. An averment that "the city council of the city of Los Angeles * * * passed a resolution of intention * * * that New High street, in said city, * * * be paved," is a sufficient averment that such street is an open public street; St. 1885, p. 147, § 1, providing that "all streets * * * in the municipalities of this state now opened or dedicated, or which may hereafter be opened or dedicated, shall be deemed and held to be open public streets, * * * and the city council of each municipality is hereby * * * invested with jurisdiction to or-

der to be done thereon any of the work mentioned in" the act.

3. Code Civil Proc. § 456, provides that in pleading the determination of a board or officer the facts conferring jurisdiction need not be stated, but such determination may be stated to have been duly given or made. *Held* that, in an action to enforce the lien of a street-paving assessment, an averment "that all the several acts required to be done by said city council, said superintendent of streets, and this plaintiff have been duly done, made, and performed by it and them, in the manner and at the times and in the form required by law," is sufficient on general demurrer.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Bituminous Lime Rock Paving & Improvement Company against J. E. Fulton and others to enforce a lien for street assessments. There was a judgment in favor of defendant Henderson, and plaintiff appeals. Reversed.

Jay E. Hunter, for appellant. Jones & Carlton, for respondents.

SEARLS, C. The plaintiff in this cause appeals from a final judgment entered in favor of defendants. The action was instituted in the superior court in and for the county of Los Angeles to enforce a lien against certain property of the defendants, described in the complaint, which lien was created by an assessment made by the street superintendent of the city of Los Angeles, to obtain payment for certain work done under an act entitled "An act to provide for work upon streets," etc., "within municipalities," approved March 18, 1885, as amended March 14, 1889, and known and designated as the "Vrooman Act." St. 1885, p. 147; St. 1889, p. 157. A demurrer was interposed to the complaint, which demurrer was sustained by the court, and, plaintiff declining to amend, final judgment was entered in favor of the defendant Charles Henderson. The demurrer was general, and averred that plaintiff's complaint "fails to state facts sufficient to constitute a cause of action against these defendants." The particular reasons moving the court below to sustain the demurrer do not appear in the record, and we can only divine them by a perusal of the complaint, aided by the suggestion of causes therefor contained in the briefs of counsel.

It is urged by respondents that the complaint fails to aver that the city of Los Angeles is a municipal corporation, or that New High street is an open public street. The allegation of the complaint is "that * * * the city council of the city of Los Angeles, state and county aforesaid, passed a resolution of intention * * * that New High street, in said city, from the north line of Franklin street to the south line of Temple street, * * * be paved and curbed," etc. The court will take judicial notice that the city of Los Angeles is a municipal corporation under and by virtue of several statutes of this state, duly passed for the pur-

pose of organizing it into such corporation, and extending its limits, adding to and changing the powers of its municipal officers, etc. Code Civil Proc. § 1875.

A street is a "public thoroughfare or highway in a city or village." Black, Law Dict. tit. "Street." A street is something more than a highway, for, besides its use as a highway for travel, it may be used for the accommodation of drains, sewers, aqueducts, water and gas pipes, and for other purposes conducive to the general police, sanitary, and business interests of a city. Bouv. Law Dict. It is a public highway of a city or village, over which all the citizens of the land have a right to pass and repass at pleasure. *State v. Moriarty*, 74 Ind. 104; *Perrin v. Railroad Co.*, 36 N. Y. 126; *Kelsey v. King*, 33 How. Pr. 43; *City of Quincy v. Jones*, 76 Ill. 244. Section 1 of the act of 1885, (St. 1885, p. 147) provides that "all streets * * * in the municipalities of this state now open or dedicated, or which may hereafter be opened or dedicated, shall be deemed and held to be open public streets * * * for the purposes of this act, and the city council of each municipality is hereby * * * invested with jurisdiction to order to be done thereon any of the work mentioned in section two of this act." Section 2 of the act, as amended in 1889, (St. 1889, p. 157,) authorizes the city council to order work done upon the streets, of the character in question in this case. The evident object of the first section of the statute of 1885 was to enlarge the term "street" so as to include, not only those that had been opened, but those also dedicated to street purposes, although not formally or officially accepted or opened as such. The effect was simply to make streets of a class which might not otherwise come within that category. When plaintiff, in its complaint, averred the passage of a resolution to pave and curb New High street, in said city, it was as comprehensive as the definition of the term "street," and was tantamount to an averment that it was an open public street in said city.

The complaint, critically considered, is defective, in this: that many of its statements of facts are not full and explicit, but the demurrer is general. Where a complaint fails to state facts essential to a recovery, the defect may be reached by a general demurrer. Where, however, it states all the essential facts, but states them defectively, the error can only be reached by a special demurrer. Again, several of the apparent defects in regard to publication of notices, etc., are cured by the twelfth paragraph of the complaint, which avers "that all the several acts required to be done by said city council, said superintendent of streets, and this plaintiff have been duly done, made, and performed by it and them, in the manner and at the times and in the form required by law," etc. Section 456 of the Code of Civil Procedure

provides that, in pleading a determination of a board or officer, it is not necessary to state the facts conferring jurisdiction, but such determination may be stated to have been duly given or made, etc. *Babcock v. Goodrich*, 47 Cal. 512; *City of Los Angeles v. Waldron*, 65 Cal. 283, 3 Pac. Rep. 890; *Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. Rep. 625. Applying this rule to the jurisdictional facts, so far as the city council and street superintendent are concerned, and the complaint, although far from perfect, was impervious to the general attack made upon it. To mention the several objections of respondent in detail would subserve no useful purpose. The judgment appealed from should be reversed, and the court below directed to overrule the demurrer to the complaint, with leave to defendant to answer.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed, and the court below is directed to overrule the demurrer to the complaint, with leave to defendant to answer.

4 Cal. Unrep. 155

PERKINS v. WEST COAST LUMBER CO.
(No. 19,124.)

(Supreme Court of California. Aug. 25, 1893.)

PLEADINGS—FINDINGS AS TO MATTERS NOT IN ISSUE—AMENDMENT ON APPEAL.

1. In an action for services as an attorney between certain dates, a finding of damages for defendant because of negligent advice given defendant at a time prior thereto must be disregarded, such negligence not having been pleaded.

2. Where the value of services sued for is found to be more than alleged in the complaint, the latter cannot be amended on appeal to conform to the findings.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by C. J. Perkins against the West Coast Lumber Company for attorneys' fees. From a judgment for defendant, plaintiff appeals. Reversed.

Paris & Fox and Rolfe & Freeman, for appellant. Harris & Gregg, for respondent.

TEMPLE, C. Plaintiff appeals upon the judgment roll. The points presented arise upon the pleadings and the findings of the court. Plaintiff sues for services as an attorney and counselor at law. His complaint states three causes of action. In the first it is alleged that defendant contracted with him June 1, 1888, for his services, agreeing to give him \$35 per month as a general retainer, and as compensation for writing letters, adjusting claims, and for advice, and agreed to pay a reasonable compensation for services in prosecuting and defending suits; that he performed the general services until March 1, 1890, which

were worth \$735, and also performed other services during the same period in prosecuting and defending suits and drafting instruments for defendant worth \$3,044.75; that he has been paid on account of such services \$1,865.15. The second cause of action is for \$116.20, money laid out and expended for defendant. The third count is a quantum meruit to recover for services alleged to have been rendered between June 1, 1888, and April 1, 1890, worth \$4,079.75, and admitting a payment on account thereof of \$1,865.15. Plaintiff demands judgment for \$1,981.35. The answer consists of (1) a general denial; (2) an averment of a contract different from that alleged by plaintiff, with a plea of payment; (3) another statement of the contract between the parties, with a claim of full performance on the part of defendant; and (4) a counterclaim for goods sold plaintiff amounting to \$2,867.10, of which \$1,574.60 has not been paid. Defendant demands judgment in the sum of \$1,574.60. The court finds the contract as it is averred by plaintiff. It also finds the value of the services on the general retainer to be \$735, and for the other services \$3,228.53, and that plaintiff laid out and expended for defendant the sum of \$116.20; total, \$4,079.73. It also finds that plaintiff is indebted to defendant for goods sold in the sum of \$1,332.28. Plaintiff admits in his complaint payment of the sum of \$1,865.15. There is no finding in regard to this matter. The court did find, however, that on the 17th day of April, 1888, which was prior to the employment alleged in the complaint, to which the other findings refer, plaintiff was employed by defendant in regard to its claim against one Newman, and in such employment so negligently advised the defendant in regard to the said demand that defendant lost the sum of \$3,408.77, which sum it finds is justly due defendant as damages, and thereupon, as a conclusion of law, finds that defendant is entitled to judgment against the plaintiff in the sum of \$661.40, for which, with costs, judgment was entered.

The appellant contends here that the finding in regard to the damages resulting to defendant through the alleged negligence of the plaintiff must be disregarded, because it is not responsive to any issue in the case, and that plaintiff should be permitted to so amend his complaint that it will sustain a judgment for the sum of \$2,747.47, which the findings show is due plaintiff, if the finding in regard to the alleged damage be stricken out. The first part of this contention I think must be sustained. There is no allusion to the alleged negligence in any pleading, and there is therefore nothing to support the finding of the damage as a counterclaim. The alleged negligence was not in the performance of any part of the services for which suit is brought, and therefore, if the contention was well founded, did not

affect the value of those services. Even if it were conceded that the claim for such damage by defendant is a cross demand, within the meaning of section 440 of the Code of Civil Procedure, it would still be necessary to plead it under the circumstances of this case. It cannot be considered the debit side of the account sued on. It is an unliquidated demand for damages. But it does not follow that plaintiff is entitled to judgment on the findings for the balance that will then appear to be due. Leave might as well be granted the defendant to amend its pleading to cover the judgment already entered. I think the fairest thing will be to remand the case for a new trial, when the trial court can allow such amendments to be made to the pleadings as will be conducive to justice.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial, with leave to the parties to amend their pleadings as they may be advised.

4 Cal. Unrep. 157

CHARLTON v. SOUTHERN PAC. R. CO.
(No. 14,921.)

(Supreme Court of California. Aug. 25, 1893.)

QUIETING TITLE—POSSESSION.

Mere possession of land within the limits of a grant to a railroad company, which had complied with the terms of the grant, but had not received a patent from the United States, will not enable such person to maintain an action to quiet title against the railroad company, where he does not show that he was qualified to take land under the pre-emption or homestead laws, or that he settled on it with the intention of filing a pre-emption or homestead claim.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by G. G. Charlton against the Southern Pacific Railroad Company to quiet title. There was a judgment in favor of defendant, and plaintiff appeals. Affirmed.

Conklin & Dunlap, for appellant. Jos. D. Redding and J. D. Bicknell, for respondent.

BELCHER, C. The plaintiff commenced this action on September 30, 1890, to quiet his title as against the defendant to a tract of land in Los Angeles county, described as "fractional section 7, in township 2 north, range 16 west, San Bernardino base and meridian." The complaint alleged "that the plaintiff is now, and for a long time hitherto has been, in the possession of and is the owner (subject only to the paramount title of the United States) of that certain real property situate," etc. The answer denied the plaintiff's possession or ownership of the land described, subject only to the paramount

title of the United States, admitted that defendant claimed an interest in and to said property adverse to the plaintiff, and denied that its claim was without right. It then alleged, in substance, that the land in controversy was granted to defendant by act of congress of March 3, 1871; that a map of definite location of the grant, including the land in controversy, and showing the same to be within the 20-mile limit of the grant, was filed by defendant in the office of the commissioner of the general land office on April 3, 1891, and that defendant completed its railroad opposite to the said land in 1876; "that by reason of the aforesaid acts this defendant is the owner of the land in controversy, and is entitled to the patent therefor;" "that the said lands and premises have never been finally and completely surveyed by the proper officers of the United States, so that a patent therefor could issue, but this defendant is informed and believes, and so states the fact to be, that, when the proper returns of the survey of said lands are made, a patent will forthwith issue for the said lands and premises to this defendant." The case was tried without a jury, and the court found: "(1) The plaintiff was not at the time of filing the complaint herein, or for any length of time prior thereto, and is not now, the owner or in possession, subject to the paramount title of the United States, of the land described in the complaint, or any portion thereof. (2) The land described in the complaint is unsurveyed government land, and within the twenty-mile or granted limits of the grant to the Southern Pacific Railroad Company, the defendant herein, made by congress of the United States, on March 3, 1871; that said grant was duly located by a map of definite location, which was filed by the defendant in the office of the commissioner of the general land office on April 3, 1871; that said map of definite location included the land in controversy, and showed the same to be within the granted limits of said grant to the defendant herein; that the defendant completed its railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to Fort Yuma, opposite the land in controversy, in the year 1876, and had its road fully equipped and in running order in the said year, and has continued to have its road in such condition ever since." Judgment followed in favor of defendant, from which, and from an order denying a new trial, the plaintiff appeals.

In support of the appeal it is contended that the findings do not respond to or cover all the issues raised by the pleadings, and that the first finding, if construed to mean that the plaintiff was not in possession of the premises in controversy at the time the action was commenced, is not sustained by the evidence, and hence that the judgment and order should be reversed. The second finding is not assailed on the

ground that the evidence was insufficient to justify it. The only evidence brought up in the record is that of the plaintiff. He testified: "I reside upon fractional section seven," etc. "At the time the complaint in this action was filed, I was in possession of all the premises described therein. I have been in possession of it ever since October, 1889. I am cultivating the land, and raising bees. * * * I know that this land is a part of section seven, for the reason that it has been surveyed, and there is a section corner stake at the southwest part of the land. It is along the border of the San Fernando grant. I believe the survey has been returned, but do not know of my own knowledge. An officer at Washington informed me so." The case then seems to be this: The plaintiff took possession of the land in controversy, and when he had occupied it for less than a year commenced this action to have his title to it quieted. It does not appear that he had the qualifications necessary to enable him to take up any land under the pre-emption or homestead laws, or that he settled upon this land with any intention to ever file a pre-emption or homestead claim on any part of it. He is in no way in privity with the title, but relies only on his naked possession. Prior to the time of the trial the section had probably been surveyed in the field, but the plat of the survey had not been returned, approved, and filed. The defendant has a grant from the government of all the odd-numbered sections, with certain specified exceptions, within the limits of 20 miles on each side of its railroad. The section in controversy is within the 20-mile limit, and not, so far as appears, within any of the exceptions. The grant was one in praesenti, and a complete title to the granted sections vested in the grantee as soon as the line of its road was definitely located, and the sections identified by government survey. *Forrester v. Scott*, 92 Cal. 398, 28 Pac. Rep. 575; *Jatunn v. Smith*, 95 Cal. 154, 30 Pac. Rep. 200, and cases cited. The line of the road opposite this land was definitely located in 1871, and the road was fully constructed and put in running order in 1876. Counsel for appellant say in their brief: "Plaintiff, being in possession of the land in controversy, brought this action for the purpose of determining whether the government or defendant was the owner of the fee." The case was evidently tried upon the theory on both sides that the land in controversy was then, or would be when fully surveyed, an odd-numbered section, and we shall therefore so regard it. This being so, it was immaterial for the purposes of the case whether the fee still remained in the government or had passed to the defendant. Unquestionably the defendant had an estate or interest in the land, which was superior and paramount to any right the plaintiff had by reason of his mere possession. The first finding was, in effect, that

the plaintiff was not the owner or in possession of the land, subject only to the paramount title of the United States; and this finding was, in our opinion, fully justified. We advise, therefore, that the judgment and order be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

99 Cal. 380

PENNEY et al. v. SIMMONS. (No. 14,661.)
(Supreme Court of California. Aug. 26, 1893.)

MORTGAGE—WHAT CONSTITUTES—EVIDENCE.

A deed absolute on its face will not be declared a mortgage, unless the evidence that it was so intended is plain and convincing, and the sufficiency of the evidence is a question for the trial court.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Action by Penney and others against Simmons to declare a deed absolute on its face a mortgage. There was a judgment in favor of defendant, and plaintiffs appeal. Affirmed.

Carroll Cook and J. E. Foulds, for appellants. Blake, Williams & Harrison, for respondent.

DE HAVEN, J. The plaintiffs brought this action to have a certain deed, absolute upon its face, declared to be a mortgage, and for a judgment directing the defendant, the grantee named in such deed, to execute to plaintiffs a reconveyance of the property described in the deed, upon the payment of the debt alleged to have been secured by the deed in question. The action was tried by the court without a jury, and the court found that the deed referred to in the complaint was not intended as a mortgage, or as security for any debt. The main contention of appellants upon this appeal is that this finding is not sustained by the evidence. In the late case of Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. Rep. 1020, this court, in discussing the nature of the proof required upon the part of the plaintiff in this class of actions, said that the "presumption of law, independent of proof, is that the instrument is what on its face it purports to be,—an absolute conveyance; and that this presumption should be allowed to prevail, unless the evidence offered to show that the deed was in fact intended as a mortgage is entirely plain and convincing." And it was further said that "unless the evidence is such as to leave in the mind of the trial judge a clear and satisfactory conviction that the instrument, which in form is a deed, was intended by all the parties as a mortgage, the finding should be against the plaintiff." Whether, in any case, the evidence is sufficiently strong and clear

to produce this conviction, is, like all other questions of fact arising in the trial, a matter for the trial court to determine, (Brisson v. Brisson, 90 Cal. 327, 27 Pac. Rep. 186; Ensign v. Ensign, 120 N. Y. 656, 24 N. E. Rep. 942;) and the finding of the trial court that the deed was not intended as a mortgage will not be set aside in this court, when there is a substantial conflict in the evidence. We think this case presents such a conflict upon the point whether the deed mentioned in the complaint was intended by all the parties thereto as a mortgage, and for this reason the finding of the superior court cannot be disturbed by us.

The other questions discussed in the brief of counsel for appellants require no special consideration. It is sufficient to say that we discover no material error in the record. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

4 Cal. Unrep. 161

SULLIVAN v. HUME. (No. 15,104.)

(Supreme Court of California. Aug. 26, 1893.)

JUDGMENT—VACATION—WRITTEN FINDINGS—FAILURE OF CLERK TO ENTER WAIVER—APPEAL—CONFLICTING EVIDENCE.

1. Where the clerk of the trial court, through inadvertence, failed to enter on the minutes the fact that the parties, by oral consent, in open court, waived written findings, the court properly directed that the minutes be corrected and amended nunc pro tunc as of the day of the waiver, and denied a motion to set aside the judgment on the alleged ground that written findings had not been waived.

2. Where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed, on appeal, on the ground of insufficiency of evidence to support them.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Daniel T. Sullivan against one Hume for professional services as attorney at law. From a judgment for plaintiff, defendant appeals. Affirmed.

Estee, Fitzgerald & Miller, for appellant. Daniel T. Sullivan, in pro. per.

DE HAVEN, J. This action was brought to recover a balance of \$850 claimed to be due from the defendant for professional services rendered to him by the plaintiff in his capacity as an attorney at law. The plaintiff obtained a judgment in the superior court for \$500, and the defendant appeals.

1. There were no written findings, and the defendant moved the court to set aside its judgment upon the alleged ground that such findings had not been waived. The motion was denied. The record shows that findings of fact were expressly waived by the oral consent of the parties, given in open court at the time of the submission of the case, but the clerk, through inadvertence, failed to enter the fact of such waiver upon the min-

utes of the court at the time. This appearing, the court did not err in denying the motion of defendant, and in directing that the minutes of the court be corrected and amended *nunc pro tunc* as of the day of such waiver, so as to show the real facts in relation thereto. The court had an undoubted right to correct its minutes so as to make them state the truth in relation to the matter, and when this was done the minutes showed a waiver of findings in one of the modes prescribed by section 634 of the Code of Civil Procedure, to wit: "By oral consent in open court, entered in the minutes."

2. Nor can we disturb the judgment upon the ground of the insufficiency of the evidence to sustain the implied finding of the court to the effect that the plaintiff was employed by defendant to act as his attorney in the trial of the case referred to in the complaint. This case comes squarely within the settled rule of this court that, where there is a substantial conflict in the evidence, the finding of the trial court or jury upon the disputed fact is conclusive here. The court below evidently gave credit to the testimony of the plaintiff, and that evidence was certainly sufficient to justify the judgment appealed from. Judgment and order affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.

4 Cal. Unrep. 162

MOWRY v. NUNEZ. (No. 14,533.)
(Supreme Court of California. Aug. 26, 1893.)

JUDGMENT BY DEFAULT—VACATION.

Where, in ejectment, default and judgment were taken and rendered against a tenant without the knowledge of his landlord, a motion to set aside the default and vacate the judgment was properly granted.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Ejectment by George B. Mowry against Joseph S. Nunez. There was judgment by default for plaintiff. From an order setting aside the default, and vacating the judgment, plaintiff appeals. Affirmed.

R. Percy Wright, for appellant. J. E. Simmons and A. A. Moore, for respondent.

McFARLAND, J. This is an appeal by plaintiff from an order made December 1, 1890, setting aside the default of defendant, and vacating a judgment theretofore entered against him. The motion of respondent to open the default was upon the grounds "that said judgment and the said default were taken against him by and through the mistake, inadvertence, and excusable neglect of said Nunez." Afterwards, at the suggestion of the court, another ground was added, viz. irregularity of process, consisting of the issuance of the second summons upon an amended complaint without an order of court allowing it, and the court based its order vacating the judgment upon this latter

ground. But the affidavits showing mistake, excusable neglect, etc., were such that the court should have opened the default on that ground, and therefore it is not necessary to discuss the question about the invalidity of the process. This is a case where, in an action of ejectment, default and judgment were taken and rendered against a tenant without the knowledge of his landlord, and in such a case an order vacating a judgment will rarely be disturbed. The order appealed from is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

99 Cal. 374

In re JAMES' ESTATE. (No. 15,152.)
(Supreme Court of California. Aug. 26, 1893.)
DIVORCE—DECREE OF OTHER STATE—COLLATERAL ATTACK—COMPLAINT—JURISDICTIONAL GROUNDS—PROCESS—REVIEW OF EVIDENCE.

1. A decree of divorce, rendered by a court having general jurisdiction, cannot be collaterally attacked on the ground that the complaint in the action does not state facts entitling the plaintiff to the relief demanded and awarded.

2. A decree of divorce of another state can be impeached on the ground that the court had not jurisdiction thereof, by reason of plaintiff's not having been a resident of the state for the period prescribed by statute before bringing the action.

3. An implied finding on a point as to which there was a substantial conflict of evidence will not be disturbed on appeal.

4. On collateral attack of a judgment by default, rendered on process served by publication, the process will be held to have given the court jurisdiction, where the published order for defendant to appear was in every way formal, and the only defect in the process was the failure of the clerk, on entering the original order in the records, to sign his name to it.

5. Where one has obtained a valid divorce in one state, the fact that his wife afterwards brings an action in another state for divorce from bed and board, and for support, and obtains judgment therefor, he not pleading his decree of divorce, will not change his status of a single man.

Department 2. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Petition by Sarah M. James for revocation of letters of administration issued to Leonora A. James on the estate of William E. James, deceased, and for grant of such letters to petitioner. Petition denied, and petitioner appeals. Affirmed.

Horace W. Philbrook, for appellant. Z. N. Goldsby and Joseph H. Skirm, for respondent.

DE HAVEN, J. This proceeding was commenced in the superior court of Santa Cruz county under the provisions of section 1383 of the Code of Civil Procedure, and the petitioner therein, Sarah M. James, appeals from an order of that court refusing to revoke letters of administration theretofore issued to the respondent, Leonora A. James, upon the estate of William E. James, deceased,

and also refusing to grant letters of administration upon the said estate to the petitioner. The petitioner and the respondent each claims to be the widow of the deceased, and these conflicting claims present the general question which the court is required to determine at this time.

The petitioner, Sarah M. James, was married to the deceased, in the state of New York, in the year 1859, and they lived together in that relation until 1871, when they separated. Thereafter, James went to Missouri, and on May 18, 1874, commenced, in one of the circuit courts of that state, an action against petitioner for a divorce, and on July 3, 1874, obtained a decree purporting to dissolve the bonds of matrimony theretofore existing between himself and the petitioner. The petitioner here was, during all the times of the pendency of the divorce proceedings, a resident of the state of New York, and had no actual knowledge of the pendency of that action, the process therein having been served by publication only. James subsequently became a resident of this state, and in February, 1883, married the respondent, then Leonora A. King, in the county of Santa Cruz, in this state. The marriage ceremony was performed by a minister of the Baptist church, at the home of the parents of respondent, and was witnessed by them, and others invited for that purpose. After their marriage, he and respondent lived together as husband and wife until or about the time of his death, which occurred in April, 1887. It will be seen from the foregoing statement that the decision of this case must turn upon the question of the validity of the decree of divorce which the deceased obtained in the state of Missouri. While there is some conflict in the decisions upon this point, we entertain no doubt that a decree of divorce which has been regularly obtained in one state, by a citizen thereof, against a nonresident defendant, constructively served with process in the action, and without other notice, and which is valid and effectual in the state in which such decree is rendered, is equally valid in a sister state. *Ditson v. Ditson*, 4 R. I. 87; *Leith v. Leith*, 39 N. H. 20; *Gould v. Crow*, 57 Mo. 200; 2 Bish. Mar. & Div. (6th Ed.) §§ 156, 157, 199e. See, also, *Pennoyer v. Neff*, 95 U. S. 734, 735; *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. Rep. 328. We do not understand the appellant to question this proposition, but her contention is that the decree referred to is absolutely void (1) because the complaint in the action in which the decree was given did not state sufficient facts to entitle the plaintiff therein to a divorce; (2) that the court did not have jurisdiction to render it, for the reason that the deceased was not a resident of the state of Missouri for one year next before the commencement of the action resulting in the decree,—such residence being necessary, under the laws of

that state, in order to give its courts jurisdiction in actions for divorce; and (3) because no process was ever issued in the action. These objections will be noticed in their order:

1. The attack here made upon the judgment in *James v. James* is collateral, and it is well settled that the judgment of a court having general jurisdiction of the subject-matter involved in the judgment cannot be successfully attacked in a collateral proceeding because of an imperfect or defective complaint in the action in which it was rendered. If the facts stated in the complaint are not sufficient to entitle the plaintiff to the relief demanded therein, and awarded by the judgment, the action of the court in deciding otherwise, and rendering its judgment in accordance with the prayer of the complaint, can be nothing more than error. *Head v. Daniels*, 38 Kan. 1, 15 Pac. Rep. 911; *Rowe v. Palmer*, 29 Kan. 337; *Frankfurth v. Anderson*, 61 Wis. 107, 20 N. W. Rep. 662; *Van Fleet, Collat. Attack*, § 61. See, also, *Blondeau v. Snyder*, 95 Cal. 521, 31 Pac. Rep. 591. The complaint in *James v. James* was sufficient to inform the court and the defendant therein of the relief which the plaintiff demanded, and of the facts upon which he based his right to the relief sought, and this was all that was necessary, in the way of a statement of facts, to give the court jurisdiction of the subject-matter of the action.

2. In regard to the second ground of objection to the decree in *James v. James*, we agree with appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed, did not exist, and this is true although the record sought to be impeached may redite the existence of such jurisdictional facts. *Thompson v. Whitman*, 18 Wall. 457; *Machine Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. Rep. 92; *Starbuck v. Murray*, 5 Wend. 148; *Eager v. Stover*, 59 Mo. 87. But in this case there was a substantial conflict in the evidence as to whether or not the deceased was a bona fide resident of the state of Missouri at the time and for one year prior to the commencement of the divorce proceeding there, and, this being so, we cannot disturb the implied finding of the court below to the effect that he was such a resident, and had resided in the state for the length of time alleged in his complaint in that action.

3. The laws of the state of Missouri in regard to the constructive service of process upon nonresident defendants in actions for divorce was introduced in evidence, from which it appears that the process prescribed in such cases is an order made by "the clerk or court in vacation * * * directed to the nonresidents or absentees, notifying them of the commencement of the action; and

stating briefly the object and general nature of the petition," etc.; such order to be published for four weeks "in some newspaper, * * * which the court, judge or clerk making the order may designate as most likely to give notice to the person to be notified." The order directing the defendant to appear in the divorce proceedings of *James v. James* was made by the clerk of the court in vacation. In form and contents, it complied with the statute, and was entered by him in the proper book of record kept in his office, but the name of the clerk was not signed to such entry. The copy of the order, as published, purported to be attested by the clerk, with the seal of the court, and was published in the paper named in the order for the length of time required by the order, and the laws of the state of Missouri. Upon this state of facts the appellant contends that no process was ever issued in the action of *James v. James*, and that the order notifying the petitioner here to appear as defendant therein was absolutely void, because of the failure of the clerk to sign the same as entered by him in the records of the court, and that the default judgment taken against the petitioner here, as defendant in that action, was and is, for this reason, void, in the broadest sense of that word, and must be so held in this collateral attack upon that judgment. But we do not think so. In the cases of *Wilson v. Owens*, 45 Ala. 451; *Costley v. Driver*, Id. 230; *Winnemore v. Mathews*, Id. 449,—cited by appellant, and also in *Sheppard v. Powers*, 50 Ala. 377, it was held that a summons not signed by the clerk issuing it is invalid, and will not support a judgment by default. But the question arose in each of these cases upon a direct appeal from the judgment based upon such defective summons, and not in a collateral attack upon the judgment, as in the case at bar; and, as the rule in relation to the effect of errors or irregularities of practice in obtaining a judgment is not the same in the case of a direct appeal from the judgment as when the judgment is collaterally assailed upon the same grounds, we do not regard the cases just referred to as any authority for the proposition that a judgment regular in all other respects must be held void, when collaterally brought under review, because of such an infirmity in the process upon which it is based. There is a clear distinction between the entire want of jurisdiction, and an irregularity in some one of the steps taken in obtaining jurisdiction. In the former case the judgment is absolutely void at all times, and whenever brought forward or called in question, but in the latter case the judgment is valid until reversed or set aside. "No principle of law," says Mr. Black in his work on Judgments, "is more firmly settled than that a judgment of a court of competent jurisdiction, so long as it stands in full force and unreversed, cannot be impeached in any collateral proceeding on account of mere er-

rors or irregularities not going to the jurisdiction." Black, Judgm. § 261. See, also, 1 Freeman Judgm. (4th Ed.) § 126. In the case of *Ambler v. Leach*, 15 W. Va. 677, the court, in a careful opinion reviewing many cases, reached the conclusion that a summons otherwise regular is not absolutely null and void because not signed by the clerk, and that a judgment by default, based thereon, should not be held invalid upon a collateral attack. It is true that in the judgment held good in the case just mentioned the defective summons was personally served upon the defendant, while in the judgment now under consideration the service was by publication, but we do not regard this difference as material to the question we are now discussing. The order, as actually published in the case of *James v. James*, was full and complete, and purported to have been signed by the proper officer, and we think that the neglect of the clerk to sign his name at the foot of the order entered by him in the proper book kept for the entry of such orders should be treated, in this collateral attack upon the judgment based on such order, as a mere clerical omission in a matter more of form than substance, and such as was certainly cured by the entry of the judgment. The order was in fact made when it was entered in the records of the court, and, while it would have been more regular to have authenticated it with the signature of the clerk, the irregularity was not of such vital character as to deprive the court of jurisdiction to enter the judgment which it did, based upon the constructive service of process, of which that order was a material part.

4. It also appears from the record before us that, after the rendition of the decree of divorce, *James* returned to the state of New York, and the petitioner here brought an action against him to obtain a divorce from bed and board, and in October, 1874, obtained such a judgment against him; and it was also further adjudged in that action that he pay to her, for the support of herself and children, \$25 per week, and costs of the action. The validity of the decree of divorce obtained by *James* in the state of Missouri was not directly put in issue in that action, and there is nothing in the record to indicate that it was ever brought to the attention of the court in New York rendering this latter judgment. We do not think that the judgment just referred to is a bar to the right of the respondent to assert in this proceeding the binding force of the former decree of divorce rendered in the state of Missouri in the case of *James v. James*, and the lawfulness of her subsequent marriage to the deceased in this state. The decree of divorce obtained by the deceased in Missouri was valid, and established the status of the deceased as an unmarried man, leaving him free to again enter into the marriage relation with any other person consenting thereto. His failure to plead the judgment of divorce

in bar of the subsequent action brought by the petitioner for the separation from bed and board, and the judgment of the court in New York decreeing such separation, did not have the effect to change the status of deceased from that which was given him by the decree of divorce rendered in the state of Missouri. After that decree, and until reversed or vacated by some appropriate proceeding, his status as a single man could not be changed without his consent. Judgment and order affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

99 Cal. 383

KREISS v. HOTALING. (No. 15,088.)
(Supreme Court of California. Aug. 29, 1893.)

DISMISSAL OF ACTION—DELAY IN SERVING SUMMONS—DISCRETION OF COURT.

1. On a motion to dismiss an action for unreasonable delay in serving the summons, it appeared that the summons was issued on November 11, 1889, and was served on October 12, 1891; that defendant's place of business was well known; and that he could have been found at any time, except on three occasions, when he was out of the city. Plaintiff's counter affidavit stated that the delay was to avoid putting defendant to the expense of a trial; that the matter involved in the action had been the subject of arbitration between the parties; that a judgment on an award in defendant's favor had been set aside, and defendant had appealed; that it would have been a useless expense to proceed with the action during the pendency of the appeal, which was decided only a few days before the motion to dismiss was made; and that the action was brought to avoid any plea of the statute of limitations. *Held*, that an order dismissing the action would not be disturbed on appeal on the ground that the trial court abused its discretion.

2. Code Civil Proc. § 581, as amended in 1889, which provides that any action shall be dismissed by the court on its own motion, or on the motion of any party interested, unless summons shall have been issued within one year, and served within three years, after commencement of the action, or unless defendant has appeared within said three years, is not a legislative declaration that three years is a reasonable time within which to serve summons.

Department 1. Appeal from superior court, city and county of San Francisco; Walter N. Levy, Judge.

Action by Kreiss against Hotaling. The action was dismissed, and plaintiff appeals. Affirmed.

Henry E. Highton, for appellant. A. N. Drown, for respondent.

PATERSON, J. The appeal in this case is from a judgment dismissing the action, on motion of plaintiff, on the ground that there had been an unreasonable delay in service of the summons. The action was commenced November 11, 1889, and summons was issued on the same day, but was not served on defendant until October 12, 1891. Upon the hearing of the motion it was shown that the defendant's places of

business and residence were well known, and that he could have been found at any time, except on three occasions, when he was temporarily away from the city; that he had repeatedly conversed with the attorney for the plaintiff after the commencement of the action. The counter affidavits of plaintiff show that the plaintiff delayed the service of the summons because he desired not to put the defendant to the expense and annoyance of a trial, or even answering in the case; that all the matters involved in this action had been the subject of arbitration between the parties, which had resulted in an award and judgment in favor of the defendant; that if said award should stand it would finally dispose of all the matters in dispute between the parties, but on motion of the plaintiff it had been held to be invalid as a judgment of the court; that the defendant had appealed from the decision of the court holding that it was not good as a statutory award and judgment; and that it would be a useless expense to proceed with the trial of this action during the pendency of said appeal. It appears from the affidavit of counsel for plaintiff that "on or about November 11, 1889, when this action was commenced by filing the complaint and issuing the summons thereon, the situation of the controversy between the plaintiff and the defendant was such that it was deemed necessary to file the said complaint, so as to avoid any possible plea of the statute of limitations." The appeal referred to was taken in May, 1889. The matter was argued in this court in August, 1891, but was not determined until a few days before the motion was made in the court below to dismiss the action. 28 Pac. Rep. 806. At the conclusion of his affidavit the defendant stated that counsel for the plaintiff visited his house to examine the work done and materials furnished by the plaintiff, compensation for which forms the basis of this action, and said to defendant, as he left the latter's residence: "You have been wronged, and I can see it, and I will never serve those papers." Upon this showing, we cannot say that the court below abused its discretion in granting the motion to dismiss. It is probable that if the motion had been denied, and the defendant had appealed, we would have said that the court did not abuse its discretion in denying the motion. "To say that the law allows no latitude for the exercise of discretionary power is to deny that the power is discretionary. The only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused." Clavey v. Lord, 87 Cal. 419, 25 Pac. Rep. 493. It was for the court, in the exercise of its discretion, after hearing the statements of the parties, to say whether the plaintiff was acting in good faith, and had exercised reasonable diligence. The facts that the stat-

ute of limitations would have run against plaintiff's cause of action unless the suit had been commenced in November, 1889, and that the appeal from the order of the court below granting a perpetual stay of execution on the judgment proceeding was pending, are immaterial. *Simmons v. Keller*, 50 Cal. 38.

We think counsel for appellant puts an erroneous construction upon section 581, Code Civil Proc., as amended in 1889. That amendment provided that no action shall be further prosecuted, and no further proceedings had therein, and that all actions theretofore or hereafter commenced shall be dismissed by the court on its own motion, or on the motion of any party interested, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and served within three years, after the commencement of the action, or unless an appearance has been made by the defendant within said three years; and it is claimed that the amendment is, in effect, a legislative declaration that three years is a reasonable time within which to make service of the summons. Prior to the adoption of that amendment the court had no power,—at least there was a question whether the court had power,—on its own motion, to dismiss an action which had been pending for a long time without service of the summons. In the various superior courts of the state, numerous cases, chiefly tax and street assessment cases, were pending, which affected the title to real estate, and which could not be disposed of, because of the death or removal of parties, and the fact that there was no one entitled to give or receive notice. It was to meet the objection found in *Soule v. Billings*, 42 Cal. 285, and to enable the courts to avoid this difficulty, and rid their calendars of dead cases, that this amendment was passed by the legislature. This new provision is in no sense prohibitory. It does not limit the power of the court, but enlarges the same. It provides what must be done under certain circumstances. The discretion of the court to determine whether there has been an inexcusable delay within the term of three years still remains, and each case must be determined upon its own peculiar circumstances. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

99 Cal. 397

TOWLE v. CARMELO LAND & COAL CO.
(No. 15,025.)

(Supreme Court of California. Aug. 30, 1893.)

SPECIFIC PERFORMANCE — DESCRIPTION OF PROPERTY — PARTIES.

1. An agreement stated that the parties of the first part, on confirmation of the title to a designated rancho, would convey to the parties of the second part "the land within the limits

of said rancho, and in the occupation of each of said parties on the first day of July, 1881, in severalty, at the rate of \$1.25 per acre: provided, that coal lands, and also lands within a mile of the bay or landing known as the 'E. Landing,' are not included in this agreement." Held, that the description of the land was sufficient to withstand a demurrer in an action for specific performance, as it did not appear on the face of the agreement that the exact location and particular boundaries of the land intended could not be shown by parol evidence.

2. Nor was the complaint demurrable for a defect of parties defendant, in that all the persons named in the contract were not joined, since the contract showed that it was made separately with each person named as a grantor, who was to be entitled to a separate parcel, of which he was to be in possession on July 1, 1881, and the complaint did not show that either of the parties to the contract, not sued, were on that day in possession of any part of the land, or claimed any interest in it.

Department 2. Appeal from superior court, Monterey county; John K. Alexander, Judge.

Action by Towle against the Carmelo Land & Coal Company for specific performance of a contract to convey land. There was a judgment in favor of plaintiff, and defendant appeals. Affirmed.

W. T. Baggett, for appellant. W. A. Kearney and N. A. Dorn, for respondent.

DE HAVEN, J. Action to enforce the specific performance of an agreement for the conveyance of land forming a part of the Rancho San Jose y Sur Chiquito. The superior court gave judgment in favor of plaintiff, in accordance with the prayer of the complaint, and the defendant appeals. The appeal is upon the judgment roll alone, and this contains no bill of exceptions. The only grounds urged for a reversal of the judgment, which we deem necessary to notice in this opinion, arise upon the face of the complaint.

1. The contract which is the subject of this action was entered into between the grantors of defendant, as parties of the first part, and the plaintiff and several other named persons, parties of the second part, and, so far as necessary to be here stated, is as follows: "This memorandum of agreement * * * witnesseth that the parties of the first part covenant and agree with all of the parties of the second part that, upon the confirmation of the title to said rancho, they will convey to the said several parties of the second part the land within the limits of said rancho, and in occupation and possession of each of said parties on the first day of July, 1881, in severalty, at the rate of one dollar and a quarter per acre: provided, * * * that coal lands, and also lands within a mile of the bay or landing known as the 'Emery and Bassett' or 'Stone Quarry' landing, are not included in this agreement." It is claimed by the defendant that the description of the land agreed to be conveyed is so uncertain that the contract is not one which can be specifically enforced by a court of equity.

The rule is, of course, a familiar one, that the subject-matter—the particular land to be conveyed—is an essential term in every agreement for the sale of land, and unless this subject-matter is so described that it can be identified a court of equity will not undertake to enforce it; but, while this is so, it is equally well settled that the description need not be so clear and precise as to make a resort to extrinsic evidence unnecessary. Pom. Cont. § 90. This learned author, in the section just cited, says: "The subject-matter of the agreement must all be included in the memorandum, and must be described with sufficient exactness to render its identity certain, upon the introduction of extrinsic evidence simply disclosing the situation of the parties at and immediately before the time of making the contract." If, upon reading the contract in the light of the facts shown by such extrinsic evidence, it appears clear what land the vendor intended to convey, and the vendee intended to purchase, the description will be deemed sufficiently certain. This proposition is forcibly illustrated in the cases of *Preble v. Abrahams*, 88 Cal. 245, 26 Pac. Rep. 99, and *Mead v. Parker*, 115 Mass. 413, and many others might be cited to sustain it. In *Preble v. Abrahams* the land mentioned in the agreement to convey was described simply as "forty acres of the eighty-acre tract at Biggs." The court held this description sufficiently definite, aided, as it was in that case, by parol evidence showing the situation of the parties at the time of making the contract, and other surrounding circumstances, in view of which the contract was made. In its opinion, delivered by the late Mr. Justice Sharpstein, the court in that case said: "We think the evidence makes the subject-matter sufficiently certain, and that is all that is necessary. Prof. Pomeroy says: 'It is not strictly accurate to say that the subject-matter must be absolutely certain from the writing itself, or by reference to some other writing. The true rule is that the situation of the parties and the surrounding circumstances when the contract was made can be shown by parol evidence, so that the court may be placed in the position of the parties themselves, and if then the subject-matter is identified, and the terms appear reasonably certain, it is enough.' Pom. Cont. p. 227, note." In *Mead v. Parker*, 115 Mass. 413, the court held the following writing sufficiently definite in its description of the property agreed to be conveyed, when read in connection with the parol evidence, received upon the trial of that case: "Boston, December 17, 1872. This is to certify that I, Jonas Parker, have sold to Franklin Mead a house on Church street for the sum of fifty-five hundred dollars; and in payment said Mead assumes the mortgage of twenty-nine hundred dollars, and pays cash one hundred dollars; balance, bill of sale of a steam en-

gine and crushing machine, and trucks and railway, and all the implements in the building; and also the building in which the said machinery and tools now with the same; and papers necessary to convey above to be made and passed on or before 25th December, 1872." In passing upon the objection that this contract was void because of uncertainty in the description of its subject-matter, the court said: "The most specific and precise description of the property intended requires some parol proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties, and of their relation to each other and to the property, as they were when the negotiations took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it, as a sufficient written contract or memorandum of their agreement. That parol evidence is competent to furnish these means of interpreting and applying written agreements is settled by the uniform current of authorities." In the contract set out in the complaint in this action, the defendant's grantors agreed to convey to plaintiff all that portion of the San Jose y Sur Chiquito Rancho in his occupation and possession on the 1st day of July, 1881. Upon the face of this agreement, there is no uncertainty as to what land is to be conveyed, and nothing to suggest that there could be any difficulty in showing by parol evidence the exact location and particular boundaries of the land in the occupation and possession of plaintiff on the day mentioned. This general description is therefore sufficient, and it was competent for the plaintiff in the action for the specific performance of such agreement to allege, as he did, in his complaint, and prove by extrinsic evidence, the particular boundaries of the land thus generally described, and that no portion of the land within such boundaries was excepted from the agreement by reason of being coal land, or within a mile of the bay or landing known as the "Emery and Bassett" or "Stone Quarry" landing.

2. The defendant further contends that there was a defect of parties defendant, because all the parties named in the contract upon which plaintiff sues were not made parties to the action, and this was one of the grounds upon which defendant demurred to the complaint. There was no error in overruling the demurrer thus interposed. The contract, which is the foundation of this action, shows upon its face that it was, as between defendant's grantors, and each of the other persons signing it, a separate and distinct contract. Each party was to be entitled to the particular tract of which he was in occupation on July 1, 1881, and it does not appear from anything which is

alleged in the complaint to suggest that either of the other persons who signed the contract sued upon were on that date in possession of any part of the particular tract now claimed by plaintiff in this action, or that either of them asserts any right under that contract to a conveyance of any portion of such land; and, this being so, it cannot be said that the complaint shows upon its face any defect of parties defendant.

There are other points made in the brief of counsel, but we do not deem it necessary to particularly discuss them. Judgment affirmed.

We concur: **McFARLAND, J.; FITZGERALD, J.**

(4 Cal. Unrep. 181)

In re **IRVINE'S ESTATE.** (No. 14,988.)¹
(Supreme Court of California. Aug. 30, 1893.)

APPEAL—WEIGHT OF EVIDENCE.

A verdict rendered on conflicting evidence will not be disturbed on appeal, though the preponderance is apparently in favor of appellant.

Department 1. Appeal from superior court, city and county of San Francisco; **J. V. Coffey**, Judge.

Proceeding by **Endora V. Smith** to recover a claim against the estate of **William Irvine**, deceased. There was a judgment in favor of petitioner, and the administrator appeals. Affirmed.

J. M. Seawell and **J. B. Reinstein**, for appellant. **H. N. Clement** and **G. W. Haight**, for respondent.

GAROUTTE, J. This is an appeal by the administrator of the estate of **William Irvine**, deceased, from a decree requiring him to pay to **Endora V. Smith** the sum of \$500. Petitioner, having a claim against the estate of said deceased, alleges that by reason of certain false representations made to her by the administrator and his attorney, and upon which representations she relied, she compromised her claim against said estate for \$500 less than the amount that was legally due her, and this proceeding was brought against the administrator to recover that sum. The main contention of appellant's counsel is that the evidence does not support the findings. After a careful examination of the record, we cannot say but that a substantial conflict in the evidence arises upon all material matters. While the preponderance is apparently favorable to appellant, yet the only safe rule, and therefore the only wise rule, for this court to follow, where a substantial conflict does arise, is to affirm the action of the trial court. This principle is settled law. The findings are sufficient to support the decree. Let the judgment and order be affirmed.

We concur: **DE HAVEN, J.; McFARLAND, J.; FITZGERALD, J.**

¹ Reversed in banc. See 36 Pac. 1013, 102 Cal. 606.

(99 Cal. 412)

LEWIS v. WIDBER, Treasurer. (No. 15,452.)
(Supreme Court of California. Aug. 30, 1893.)
MUNICIPAL INDEBTEDNESS—SALARY OF OFFICER—CONSTITUTIONAL LAW.

1. Const. art. 11, § 18, which provides that no city shall incur any liability exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified voters of said city, has no application to the liability of a city for the salary of a municipal officer, whose office has been created, and whose salary has been fixed, by statute, as such liability, in that it is established by the legislature, cannot be said to be incurred by the city. **Shaw v. Statler**, 15 Pac. Rep. 833, 74 Cal. 258; **Schwartz v. Wilson**, 17 Pac. Rep. 449, 75 Cal. 502,—distinguished.

2. Under Consolidation Act, (Charter San Francisco County and City,) § 95, providing that the fixed salaries of officers shall be paid out of the general fund, the salary of the chief clerk of the registrar of voters, the amount of which is fixed by the legislature, is payable out of such fund.

In bank.

Application by **George E. Lewis** for a writ of mandate to compel **J. H. Widber**, treasurer of the city and county of San Francisco, to pay an audited claim of applicant for salary as chief clerk in the office of registrar of voters. Granted.

S. C. Denson, for petitioner. **T. C. Van Ness**, for respondent.

McFARLAND, J. This is an original application here for a writ of mandate requiring the respondent, who is treasurer of the city and county of San Francisco, to pay an audited claim of petitioner for his salary as chief clerk in the office of registrar of voters for the month of June, 1893. The facts are that the office of petitioner was established, and his salary fixed at \$150 per month, by a statute of the state legislature; that when on August 3, 1893, he made demand on the respondent for the payment of his claim for salary for the month of June preceding, there was plenty of money in the general fund of said city and county to pay the same, but that there was no money in said fund which had been derived from the revenues of the city for the fiscal year ending June 30, 1893. The charter of said city and county, commonly called the "Consolidation Act," provides that the fixed salaries of officers shall be paid out of the general fund, and that, in case of a deficiency in the fund, demands for salaries shall be registered and paid out of any moneys afterwards coming into the fund. Sections 95, 96. It nowhere limits the payment of such salaries to the revenue of any particular year. The respondent contends—or, rather, he suggests that somebody else might give him trouble by contending—that he should not pay petitioner's salary on account of section 18 of article 11 of the state constitution, which reads as follows: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner, or for any purpose, ex-

ceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified voters," etc. It is quite apparent, however, that this clause of the constitution refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred; that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality. Such is the plain meaning of the language used. The clear intent expressed in the said clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur, or not to incur. But the stated salary of a public officer, fixed by statute, is a matter over which the municipality has no control, and with respect to which it has no discretion, and the payment of his salary is a liability established by the legislature at the date of the creation of the office. It therefore is not an indebtedness or liability incurred by the municipality, within the meaning of said clause of the constitution. Counsel for respondent does not very strenuously contend that the foregoing construction would not be the correct one if the question were *res integra*; but he contends that this court has decided otherwise in the cases of *Gas Co. v. Brickwedel*, 62 Cal. 641; *Shaw v. Statler*, 74 Cal. 258, 15 Pac. Rep. 833; and *Schwartz v. Wilson*, 75 Cal. 502, 17 Pac. Rep. 449. But the point under discussion here was not involved in either of those cases, and therefore could not possibly have been there decided. In neither of those cases was the subject of the litigation the payment of the fixed salary of a public officer prescribed by law. In each case there was involved only an ordinary debt created by the municipality itself,—an indebtedness which it had incurred; and we agree with the decision of the court in those cases that debts and liabilities of that kind must be paid out of the revenue of the year in which such indebtedness or liability was incurred by the municipality. In the *Brickwedel* Case the matter involved grew out of a contract made by the city about the purchase of gas; in *Shaw v. Statler*, out of the hiring of a man as boss of the chain gang; and, in *Schwartz v. Wilson*, out of a sale to the county of certain goods, wares, and merchandise. Those cases were therefore properly decided; but, of course, general language used by a judge when delivering the opinion of the court must be considered with reference to points before the court, and the matters involved in the case. And the general language used by Mr Justice Ross in the *Brickwedel* Case,—upon which the fears of respondent are based,—even if taken in the abstract, does not warrant the construction put upon it. The words, "no such indebtedness or liability should be incurred exceeding," etc., means incurred by the municipal-

ity; and in speaking of the object of the provision he refers to a system previously prevailing in some of the municipalities, "by which liability and indebtedness were incurred by them far in excess," etc. And in speaking of the result of the enforcement of the constitutional provision, after referring to the principle that all are presumed to know the powers of a municipality, he says that "those who contract with it, or furnish it with supplies, do so with reference to the law." And, of course, when taken with reference to the point then before the court, there is nothing in the opinion which conflicts with the conclusion at which we have arrived in the case at bar. The cases cited by respondent, of *People v. May*, 12 Pac. Rep. 838, decided by the supreme court of Colorado, and *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651, are not in point. Those cases dealt with a constitutional provision very different from the one invoked in the case at bar,—a provision which limited the amount of "debt by loan" which a county could contract, and the "aggregate amount of indebtedness" which it could incur. On the other hand, the cases of *Cashin v. Dunn*, 58 Cal. 581, and *Welch v. Strother*, 74 Cal. 413, 16 Pac. Rep. 22, are strongly in point, for while the "one-twelfth act," and not the said constitutional provision, was involved in those cases, still the same rule was applied there which we apply here. In the former case the court said that the said act "has no application whatever to the auditing and payment of demands for salaries of officers whose appointment is provided for and salaries fixed by law," and in the latter case this court said as follows: "Salaries are not liabilities against the treasury, which rest upon any authorization or contract by the board of supervisors, or any other officer. They are fixed by law, and are not subject to the control of such officers. They are payable out of the general fund, and are not limited to any particular part of that fund which the board may choose to set apart for their payment." Our conclusion is that the payment of the salary of a public officer, whose office has been created and salary fixed by law, either statutory or constitutional, is not within the provision of said section 18 of article 11 of the constitution; that his salary is to be paid out of said general fund when there is sufficient money therein, without regard to revenues of separate years; and that it was a duty specially enjoined by law upon respondent to pay the said audited demand of petitioner when it was presented, on said 3d day of July. Let a peremptory writ of mandate issue, as prayed for in the petition.

We concur: FITZGERALD, J.; GAROUTTE, J.; DE HAVEN, J.; HARRISON, J.

BEATTY, C. J., did not participate in the decision of the above cause.

4 Cal. Unrep. 173

**HIMMELEIN v. SUPREME COUNCIL
AMERICAN LEGION OF HONOR.** (No.
14,951.)

(Supreme Court of California. Aug. 30, 1893.)

MUTUAL BENEFIT INSURANCE—ACTION ON CERTIFICATE—PLEADING—INTEREST.

1. An application for membership in a benefit society, and statements of the applicant to the medical examiner, both of which are on file in the office of the secretary of the society, and are referred to in the benefit certificate, and made part of the contract, need not be set out in the complaint in an action on the certificate. *Cowan v. Insurance Co.*, 20 Pac. Rep. 408, 78 Cal. 181, followed.

2. In an action on a benefit certificate, by which defendant promised "to pay out of its benefit fund to [plaintiff] a sum not exceeding \$500," the complaint after setting out the certificate alleged that "by the terms and conditions of the said contract the said defendant promised to pay to the plaintiff, out of its benefit fund, the sum of \$5,000;" that the member had performed all the conditions of the contract; "and that said sum of \$5,000 is now due and owing from the said defendant to this plaintiff." *Held*, that the complaint sufficiently stated a cause of action for \$5,000.

3. A provision in a benefit certificate, that it shall be payable only on its surrender, is waived where the benefit society refuses to pay solely on the grounds of nonpayment of assessments, and that another beneficiary had been substituted.

4. In an action on a benefit certificate, by the terms of which the claim was not due until proof of death was furnished, interest will be allowed only from the commencement of the action, where the complaint merely states that proof of death had been made, without showing when, and the findings only show that the proof was made "before the commencement of this action."

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Sarah A. Himmelein against the Supreme Council American Legion of Honor. There was a judgment in favor of plaintiff, and defendant appeals. Modified.

Walter D. Mansfield, for appellant. Davis Louderback, for respondent.

PER CURIAM. The defendant is an association incorporated under the laws of the commonwealth of Massachusetts for several purposes, one of which is: "5th. To establish a benefit fund from which, on the satisfactory evidence of the death of a beneficial member of the order who has complied with all its lawful requirements, a sum not exceeding five thousand dollars shall be paid to the family, orphans, or dependents, as the member may direct." It has power to institute subordinate councils and grand councils in other states and countries, and in 1879 did institute at the city of San Francisco, in the state of California, a subordinate council called "Golden Council, No. 118," of which Eugene Alphonso Millard became a member, of the sixth degree, on the 1st day of May, 1881; and thereafter, June 2, 1881, the said supreme council issued and delivered to Millard the following "benefit certificate" or policy of life insurance: "No. 24,311. \$5,000.

American Legion of Honor Benefit Certificate. This certificate is issued to companion Eugene Alphonso Millard, a member of Golden Council, No. 118, A. L. H., located at San Francisco, Cal., upon evidence received from said council that said companion is a sixth degree contributor to the benefit fund of this order, and upon condition that the statements made by said companion in application for membership in said council, and the statements certified by said companion to medical examiner, both of which are filed in the supreme secretary's office, be made a part of this contract, and upon condition that the said companion complies in the future with the laws, rules, and regulations now governing the said council and fund, or that may be hereafter enacted by the supreme council to govern said council and fund. These conditions being complied with, the supreme council of the A. L. H. hereby promises and binds itself to pay out of its benefit fund to Sarah Alexandrina Millard, wife, a sum not exceeding five thousand dollars, in accordance with, and under the provisions of, the laws governing said fund, upon satisfactory evidence of the death of said companion and upon the surrender of this certificate: provided, that said companion is in good standing in this order at the time of death: and provided, also, that this certificate shall not have been surrendered by said companion, and another certificate issued, in accordance with the laws of this order." From 1874 until the death of Eugene A. Millard, Sarah Alexandrina Millard, who is named as beneficiary in said certificate, was his lawful wife, but after his death she married John Himmelein, and, by the name Sarah Alexandrina Himmelein, commenced this action on said certificate on July 30, 1885, to recover from defendant \$5,000 and interest thereon; and the judgment of the court, without the intervention of a jury, was rendered in her favor on May 18, 1891, for the sum of \$5,000, and interest thereon from the death of Millard, (February 23, 1884), the judgment for principal and interest amounting to \$7,535.53. The defendant appeals from the judgment, and from an order denying a new trial.

1. It is contended for appellant that the complaint does not state sufficient facts to constitute a cause of action:

First. Because the statements in Millard's application for membership, and his statements to the medical examiner, both on file in the office of the supreme secretary, and both referred to in the policy, and made parts of the contract, are not set out in the complaint. A sufficient answer to this point may be found in the opinion of this court in the case of *Cowan v. Insurance Co.*, 78 Cal. 181, 20 Pac. Rep. 408.

Second. It is claimed the complaint does not state a cause of action, because it appears on the face of the policy set out in the complaint that it is not a contract to pay

\$5,000 absolutely, but only to pay a sum not exceeding \$5,000, and that no facts are alleged by which the court can estimate and determine what sum the plaintiff is entitled to. There was no demurrer to the complaint, and therefore appellant is not entitled to complain on the ground of mere uncertainty or ambiguity. The policy set out in the complaint states that the defendant "promises and binds itself to pay out of its benefit fund to [plaintiff] a sum not exceeding five thousand dollars, in accordance with, and under the provisions of, the laws governing said fund." After setting out the policy, the complaint states "that by the terms and conditions of the said contract the said defendant promised to pay to the plaintiff, out of its said benefit fund, the sum of five thousand dollars;" then alleges that Millard performed all the conditions of said policy to be performed by him; that the defendant has, and always has had, in its benefit fund, sufficient money to pay \$5,000, and the interest thereon; "and that said sum of five thousand dollars is now due and owing from the said defendant to this plaintiff." These allegations are to the effect, and must have been understood by a person of ordinary understanding to mean, that by the performance of all the conditions precedent on the part of Millard, and by virtue of, and "in accordance with, * * * the provisions of the laws governing said fund," the conditional promise of the defendant had matured into an absolute obligation to pay the full sum of \$5,000, with interest thereon. Yet it is contended that the "provisions of the laws governing said fund," referred to in the policy, should have been stated or set out in the complaint, and that otherwise the sum due on the policy could not have been estimated or determined from the complaint. Conceding the complaint to have been defective in this respect, the defect was waived, and rendered harmless, if not entirely cured, by a stipulation between the attorneys of the respective parties, made and filed before the defendant answered the complaint, by which it was agreed that two printed pamphlets then on file in the case contained all the laws of defendant applicable to or bearing upon this case, or referred to in the policy, and that such laws were to be "introduced, admitted, and read in evidence." This stipulation is expressly referred to in the answer of defendant, and in pursuance thereof the answer refers to said pamphlets as then being on file in this action, and containing the laws and constitutions of the defendant, as though they were exhibits annexed to the answer. The object and substantial effect of the stipulation was to make it a part of the pleadings by which all the laws of the defendant, applicable to the case, became conclusively admitted facts. Both parties acted upon, and had the benefit of, the stipulation. Each party read from the pamphlets such portions of the laws as deemed favorable

to its theory of the case, without objection, and the stipulation and the contents of the pamphlets are made parts of the statement or motion for new trial. If the stipulation had not been made, and defendant had demurred to the complaint, or had objected to evidence of the laws on the ground that they had not been pleaded, the plaintiff might have been permitted to amend her complaint so as to make it unobjectionable. The laws of the defendant, admitted by the stipulation, together with the facts properly alleged in the complaint, and found by the court to be true, warrant the legal conclusion that the policy obligated the defendant to pay the plaintiff the full principal sum of \$5,000; and in view of the stipulation, and the action of the parties thereunder, in which appear all the elements of an estoppel in pais, the defendant cannot be heard on this appeal, for the first time, to object to the complaint on the ground that those laws were not therein set out. *Donner v. Palmer*, 51 Cal. 630.

Third. The third objection to the complaint is substantially the same as the second, and admits of the same answer.

Fourth. Inasmuch as the policy is made payable "upon the surrender of this certificate," it is contended that the complaint is defective, in that it does not aver a surrender of the certificate. It is alleged in the complaint that satisfactory evidence of the death of Millard was furnished to defendant, but that defendant refused, and still refuses, to pay to plaintiff said sum of \$5,000, or any part thereof. The answer not only admits (by not denying) the alleged refusal to pay, but denies defendant's liability to pay any sum on other grounds than the failure of plaintiff to surrender the certificate, namely, nonpayment of assessments, and that another beneficiary had been substituted for the plaintiff, without alleging as a defense, or at all, a failure or refusal to surrender the certificate. Conceding, for the sake of the argument, merely, that the surrender of the policy is a condition precedent to the right to recover, yet like the condition in a policy of fire insurance requiring proof of loss, etc., it may be waived by the insurer's denial of all liability on other grounds. In *Bacon on Benefit Societies and Life Insurance*, (section 413,) the author says: "No proofs of loss are necessary if the company disclaims all liability under the contract. Probably no rule of insurance is better settled than this. * * * And so, when the insurer declines to pay the loss, and assigns a reason other than want of proofs, as, for example the nonpayment of an assessment, then proofs of loss are excused. This rule, also, has never been denied. Many other acts and circumstances will be construed to amount to a waiver of proofs of loss, or of any defects which might, under other conditions, be taken advantage of." See, also, *Schwarzbach v. Protective Union*, 25 W. Va. 648. And thus the defendant in this case waived a surren-

der of the certificate, since it must be presumed that its agents had knowledge of the failure to surrender the certificate, if such was the fact, at the time they denied all liability of defendant on other grounds.

2. It is contended for appellant that the court erred in allowing interest on the principal sum found due on the policy from the date of Millard's death, or any interest whatever, for the reason that before adjudication the sum which plaintiff was entitled to recover was uncertain and unliquidated; and, furthermore, that it does not appear when defendant was furnished with proof of Millard's death. It is true that, while it is alleged that proof of Millard's death had been made, the complaint does not show when it had been made, and the findings show only that it was furnished to defendant "before the commencement of this action." It was therefore error to allow interest for any time before the commencement of the action, since by the terms of the policy the demand was not due until such proof was furnished. Millard died February 23, 1884, and this action was commenced July 30, 1885. Therefore, interest should have been allowed only from and after this last-mentioned date. *Chase v. Insurance Co.*, 67 Me. 85-91; *Trager v. Insurance Co.*, 31 La. Ann. 235, 442. It is not true, however, that the sum to which plaintiff was entitled was unliquidated or uncertain at the time the action was commenced. On the complaint and stipulated facts the plaintiff was entitled to recover on the contract (policy) the certain principal sum of \$5,000, and interest thereon from and after the maturity of defendant's obligation to pay the same. The court found all the facts stated in the complaint to be true, and the defendant is estopped from denying the stipulated facts as to the laws and constitution of the defendant. *Donner v. Palmer*, 51 Cal. 630. By the terms of the policy, and according to defendant's answer, the defendant was to pay "out of its benefit fund * * * a sum not exceeding five thousand dollars, in accordance with, and under the provisions of, the laws governing said fund." According to those laws, the plaintiff, on the facts alleged in the complaint, was entitled to recover the certain sum of \$5,000. No assessment was necessary, since it is admitted by the pleadings that there was sufficient money in the benefit fund to pay the sum demanded. Nor was any assessment authorized, unless the benefit fund required it. Appellant's objections to interest, after the demand became due, ultimately rest on the alleged insufficiency of the complaint, in that it did not set out the laws, entirely ignoring the stipulation as to those laws. The reading of the laws governing the benefit fund as a part of the contract, in connection with the facts alleged in the complaint and found by the court, removes all uncertainty as to what sum the plaintiff was entitled to recover at

the date of the commencement of the action, and furnishes an answer to all objections to the allowance of interest from and after that date. Civil Code, § 3287. This conclusion is not in conflict with the decision of this court in the case of *Deardorff v. Association*, 89 Cal. 600, 27 Pac. Rep. 158, as will become obvious on comparison of the facts of this case with those of that.

3. It is contended that the finding that Millard was a member in good standing immediately before he died, and the finding that no other person had been substituted for plaintiff as beneficiary, are not justified by the evidence. There is but little real conflict of evidence upon either of these issues, and the evidence tending to sustain the findings on both seems amply sufficient.

4. The contention of appellant that, although no substitution of beneficiary was actually made, yet it should have been made, and therefore, upon equitable principles, should be considered as having been made, has no foundation either in defendant's answer or in the evidence. It does not appear that the substitution claimed would have been equitable, but the contrary.

5. The contention that plaintiff was estopped from claiming the benefit of the policy by her acquiescence in the proceedings in an action by Nellie C. Millard upon the same policy, (81 Cal. 340, 22 Pac. Rep. 864,) is without merit. That action is not mentioned or referred to in the pleadings. This plaintiff was not a party to it. No record of it was introduced in evidence, and there was no evidence that plaintiff acquiesced in it, or in any proceeding therein. The cause is remanded, with direction to the court below to modify the judgment by deducting therefrom the interest thereby allowed for any time prior to the commencement of the action. As so modified, the judgment and order are affirmed; costs of appeal to be taxed to respondent.

(39 Cal. 407)

ILLINOIS TRUST & SAV. BANK v. PACIFIC RY. CO. et al. (No. 15,460.)

(Supreme Court of California. Aug. 30, 1893.)

APPEALABLE ORDERS.

An order in foreclosure proceedings, entered before an order of sale, directing the application of the proceeds of the mortgaged property, is not a final judgment.

In bank. Appeal from superior court, Los Angeles county.

Action by the Illinois Trust & Savings Bank against the Pacific Railway Company and others to foreclose a mortgage. There was an order settling priority of claims, and defendants Alvord and Brown appeal. Dismissed.

Allen, McAllister & Frohman and John D. Pope, for appellants. Graves, O'Melveny & Shankland and Marble & Phibbs, for respondents.

BEATTY, C. J. These are motions to dismiss the appeal of Alvord and Brown from an order made in the above-entitled action before the entry of the final judgment. The action is to foreclose a mortgage of the property of a street-railway company. The defendants and cross complainants, Brown and Alvord, as trustees of the mortgaged property, bonds of the corporation, have the first mortgage lien, which by the order appealed from is subordinated to the indebtedness contracted by two receivers of the mortgaged property,—one (Trask) appointed in this action, and the other (Crank) previously appointed by another department of the same court in another action. It seems that Crank had been operating the road for a year or two under the orders of the court, when he was superseded by his own consent and the consent of all the parties to this action by the appointment of Trask. Thereupon he presented a report and account of his receivership, with an application for its settlement and allowance and for his discharge. Notice of said application was duly served on all the parties to this action, and Alvord and Brown appeared by their attorneys at the hearing, and contested the account. After the hearing the court made an order reciting the fact that Crank had been duly appointed receiver of the property of the railway company in an action commenced by one Russell; that he took charge of the road and other property; that he operated the road under the orders of the court, and in so doing received and expended money and incurred a considerable indebtedness to the Puente Oil Company, the L. A. Oil Burning & Supply Company, and others, for necessary and proper expenses, for which indebtedness he had by direction of the court issued receiver's certificates. After other recitals, not material here, the account of the receiver, Crank, is approved, and he is directed to turn the property over to Trask, who is required to assume and pay any balance remaining due from Crank, including the indebtedness evidenced by said receiver's certificates, out of the net receipts from the operation of the road, and, if this shall prove insufficient, then out of the first proceeds of the sale of the property. In short, the order in effect and in express terms makes the indebtedness contracted by the receiver appointed in another action a lien prior and paramount to the liens of any and all of the mortgages, judgments, etc., which are in litigation in this action, and directs the immediate application of the net receipts of the road to its discharge so far as they will go. This order was made March 2, 1893. On July 13, 1893, a final decree of foreclosure was entered in the action directing the sale of the mortgaged property subject to the lien of the creditors of the receiver. On July 12th—one day before the entry of the final judgment, and four months after the making of the above-mentioned order—Alvord and Brown gave notice of their

appeal from so much of said order as gives a prior lien to the Puente Oil Company and the L. A. Oil Burning & Supply Company for their claims against the receiver. Those corporations now move to dismiss the appeal upon the grounds: First, that the order is not appealable; and, second, that, if it is appealable, the notice was not served in time.

It is conceded by counsel for appellants that, unless the order appealed from is in effect a final judgment, the motion to dismiss must prevail upon both grounds. The only interlocutory or intermediate orders from which a separate appeal can be prosecuted are those enumerated in subdivision 3 of section 939 of the Code of Civil Procedure, and this order is not included in that enumeration. All other intermediate orders involving the merits or necessarily affecting the judgment are reviewable only on appeal from the judgment itself. Code Civil Proc. § 956. And even if this had been an order from which a separate appeal might be prosecuted, the notice of appeal, not having been served within 60 days after entry of the order, was too late. *Id.* § 939. The question to be decided is, therefore, as appellants concede, whether the order appealed from is in effect a final judgment. The statute which authorizes the appointment of a receiver in an action by a mortgagee for the foreclosure of the mortgage (Code Civil Proc. § 564) assumes that the rents and profits of the mortgaged property, pending the litigation, are, like the property itself, subject to the mortgage lien, and a part of the fund to which the creditor is entitled to resort for its satisfaction. But it does not follow from this that such rents and profits are, therefore, as much exempt from the control and disposition of the court pending the litigation as the property out of which they issue. The appointment of a receiver is for the benefit of the mortgagee, and is made upon his application. It carries with it, therefore, the necessarily implied condition that he is to be answerable for the legitimate costs of the receivership; that—as against him, at least—the receiver shall have a preferred lien upon the funds and estate which come into his hands, and that the rents and income of the property may be applied to the payment of the necessary and proper expenses of the receivership. The parties to the litigation, and all claimants of the fund, are secured against waste or misapplication by the personal liability of the receiver and the sureties on his official bond. To enforce this liability the court may compel the receiver to account for the funds that have come into his hands, and the order settling his account is reviewable in this court, on appeal from the judgment if made before judgment, or on appeal from the order if made after judgment. In *Rochat v. Gee*, 91 Cal. 355, 27 Pac. Rep. 670, we held that there could be no separate appeal from such an order when entered before final

judgment; and so, in this case, there can be no separate appeal unless the order in question is essentially different from the order made in *Rochat v. Gee*. It is true that this order is unusual, and in some respects peculiar, but as it affects Alvord and Brown it is in no wise different from an ordinary settlement of a receiver's account. The fact that it allows certain claims against the receiver in advance of payment, instead of approving them after payment,—the more usual course,—can make no difference. The merits of such claims can be reviewed on appeal from the judgment, and, if their allowance is disapproved, the effect will be the same as if they had been first paid and afterwards approved in the settlement of the receiver's account. As to that part of the order which directs the payment of these contested claims out of the first proceeds of the sale of the mortgaged property, its enforcement clearly depends upon the entry of a final decree directing such sale; and since there will be an opportunity to appeal from the judgment before any sale can be made, or any of its proceeds disposed of, no rights of the appellants can be prejudiced by denying them a separate appeal from the order if it can be reviewed on appeal from the judgment, as we have no doubt it can, for the final decree necessarily supersedes the order as to this matter, and leaves it of no force except in so far as its directions for the sale of the property and the application of its proceeds conform to the terms of the order. The appeal is dismissed.

We concur: DE HAVEN, J.; McFARLAND, J.; FITZGERALD, J.; HARRISON, J.

99 Cal. 477

REAY v. BUTLER et al. (No. 14,141.)

(Supreme Court of California. Sept. 5, 1893.)

COSTS—TAXATION—EXECUTOR.

1. Where the supreme court reverses a judgment for intervener, and orders the intervention dismissed, the costs of the trial should be taxed, with those of the appeal, against intervener.

2. Code Civil Proc. § 1031, provides that, in an action prosecuted or defended by an executor, costs may be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only on the estate represented, unless the court direct them to be paid by the executor personally, for mismanagement or bad faith. *Held*, that the section does not forbid the taxation of a memorandum of costs against an executor, but merely provides how they should be made chargeable by the judgment.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Reay against Butler and others. From an order denying motion of Mabel Treadwell, executrix of J. P. Treadwell, intervener, to strike out cost bill filed by plaintiff, she appeals. Affirmed.

W. S. Goodfellow, for appellant. J. B. Mhoon and W. W. Foote, for respondents.

PER CURIAM. Appeal from an order of the superior court, by Mabel Treadwell, executrix of the will of J. P. Treadwell, deceased, denying appellant's motion to strike out (or, in the alternative, to retax) a cost bill filed by plaintiff. In 1866 the plaintiff, Reay, commenced an action of ejectment against Butler and Owens to recover the possession of a tract of "outside lands" known as "Speck Ranch." J. P. Treadwell, appellant's testator, filed an intervention in said action, alleging, in substance, that he was the owner and in possession of said ranch; that the defendants, Owens and Butler, were his servants and employes, merely; that they were in collusion with the plaintiff; and that the action was commenced and was being prosecuted for the fraudulent purpose of tricking him out of the possession of his property upon legal process. Whereupon he prayed that the plaintiff be enjoined from prosecuting said action, and that the intervener's title be quieted, etc. The plaintiff, Reay, answered the intervener's complaint, denying all the material allegations thereof. The court ruled that the issues raised by the intervention and answer should be first tried, and a trial of said issues was had by the court without a jury, which resulted in findings and a judgment in favor of said intervener. From that judgment the plaintiff appealed to this court. Here the judgment was reversed, and the cause remanded, with directions to strike out the intervention, so that a trial might be had by a jury, if not waived, of the issues raised by the complaint and answer. The representative of the intervener, who died after the action was commenced, was allowed to defend in the name of the defendants. The intervener died in 1884, after the appeal from the judgment in his favor had been taken and perfected, and while it was pending in this court. Appellant was substituted as respondent here in place of said deceased. The remittitur was filed in the superior court on September 27, 1886, and two days thereafter plaintiff, Reay, filed his memorandum of costs, including those incurred on the trial of the issues raised by said intervention and answer, together with the costs of his appeal from the judgment rendered therein. It was that bill of costs that appellant moved to strike out or have retaxed, and this appeal is from the order denying her said motion.

If the original intervener were alive, we think it quite clear that he would be liable for the costs of the trial of the issues raised by his intervention and answer. If this court, in reversing the judgment, had ordered a new trial of those issues, the costs of the first trial would be taxable against the party against whom judgment was rendered on the new trial. *Ex parte Burrill*, 24 Cal.

350. But in the case at bar no new trial was ordered, and none could be had, of the issues between the intervener and the plaintiff. The judgment dismissing the intervention, which this court directed the superior court to enter against the intervener, was to be a final judgment, which completely disposed of his intervention, and the prevailing party was entitled to have his costs taxed.

Appellant, however, contends that the costs should not have been taxed against her, because she was not in the case until it was in this court on appeal, and that she was substituted for the deceased respondent, as his executrix, and cites section 1031, of the Code of Civil Procedure in support of that contention. That section reads as follows: "In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by a statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs must by the judgment be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense,"—while the respondent contends that under section 1509 of the Code of Civil Procedure the appellant is individually liable for the costs of the action in the first instance, but that she may be allowed the same in her account as executrix, unless it appears that the suit in which the costs were taxed was defended without just cause, and that this is a matter for the exclusive determination of the probate court settling such account. In the view we take of this case, it is unnecessary to determine whether the judgment should have been in the form prescribed by section 1031, above cited, or under section 1509 of the Code of Civil Procedure. Section 1031 of the Code

of Civil Procedure, as we construe it, does not forbid the taxation of a memorandum of costs against an executor in an action prosecuted or defended by him, but provides that such costs must, by the judgment, be made chargeable only upon the estate, unless the court, for a certain specified reason, directs the same to be paid by such executor. There is no judgment of the court before us, and we do not know that the court has not, by its judgment, made the costs chargeable upon the estate of appellant's testator. The taxation of the memorandum of costs would not prevent the court from directing in the judgment for costs that the same be chargeable upon the estate of appellant's testator. The refusal to strike out the memorandum of costs, or to retax them, does not determine the form of the judgment, or that it will not be or was not in exact accordance with the contention of appellant upon this point. If, in fact, it was not, and appellant felt aggrieved thereby, her remedy was an appeal from the judgment. The views we have reached upon the merits make it unnecessary to again consider the motion of respondent to dismiss the appeal. It is a matter of very grave doubt whether the case of *Muir v. Galloway*, 61 Cal. 498, was correctly decided, in so far as it holds that the superior court may, by the entry of two or more orders, (the first or any order or orders preceding the last expiring on Sunday,) extend the period of time within which any of the acts mentioned in section 1054 of the Code of Civil Procedure may be performed for a longer period than authorized by that section, if only one order of extension is made. We do not, however, undertake at this time to definitely pass upon this, and the question may be regarded as an open one. No sufficient ground appearing for the reversal of the order appealed from, it must be affirmed.

CALIFORNIA REPORTER

34 PACIFIC REPORTER

GILL v. DUNHAM et al. 4 Cal. Unrep. 220
(No. 18,145.)
(Supreme Court of California. Sept. 14, 1893.)
MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS
—ASSESSMENTS—ASSIGNMENT—PLEADING.
1. Act March 14, 1889, amending Act
March 18, 1885, in relation to improvement of
streets, provides (section 3) that before order-

ing improvements the council shall pass a resolution of intention, which shall be "published and posted for two days in the manner prescribed by section 34." The latter section provides that resolutions required to be published shall be published in a newspaper, etc.: provided, however, that in case there is no newspaper they shall be posted and kept posted for the same time as required for publication. *Held*, that a resolution which is published need not also be posted.

2. Though acts which the statute requires to be performed before making a public improvement are conditions precedent to the power to levy a tax on the property owners, only a substantial compliance with the statute is required; and the assessment is not vitiated by want of technicality of expression, or precision of statement as to the work, which does not affect the essential object in view.

3. Under Acts 1889, p. 159, relating to public improvements, and providing that plans and specifications shall be furnished to the city council, if required by it, by the city engineer, but not specifying the mode of requiring them, the fact that they were prepared by the engineer, and were on file, and approved by the council, is sufficient evidence of their authenticity.

4. Where all the members of the council were present at a special meeting, except one, and a resolution was adopted unanimously, there is no error in admitting testimony of the clerk of the council that he served a proper notice of the meeting on all the members, the notice not having been entered of record.

5. In an action by an assignee to enforce an assessment for a public improvement, which was against a certain lot, but to an unknown owner, the fact that the assignment, which describes the lot, also states that the assessment was to a certain person as owner, does not render it inadmissible, as the name of the alleged owner may be rejected as surplusage.

6. The lien of an assessment for a public improvement is merely an incident of the demand, and passes with an assignment thereof.

7. The fact that evidence is introduced to contradict a fact alleged in the complaint is immaterial, where the fact is not denied in the answer, as there is no issue on the question.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by T. A. Gill against S. Dunham and another to foreclose a lien for a street assessment. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Louitt, Woods & Levinsky, for appellants. J. M. Kile and J. A. Plummer, for respondent.

SEARLS, C. This is an action to foreclose a lien for street assessment in the city of Stockton. The plaintiff had judgment as prayed for in his complaint, from which judgment, and from an order denying a new trial, defendants prosecute this appeal.

A demurrer was interposed by defendants to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action, and upon the further ground that the complaint is uncertain, in that it fails to show that R. R. Ramsbottom ever reassigned to plaintiff his interest in the amount assessed against the land in the complaint described. The com-

plaint avers that the resolution of intention to perform the work in question was duly published in the Stockton Daily Independent, a newspaper printed, published, and circulated at said city of Stockton, etc., and further avers that it was posted conspicuously on or near the council chamber door of the said council of said city of Stockton, and remained so posted for two days consecutively, etc. The resolution of intention was passed by the said council of the city of Stockton on the 14th of October, 1889, and subsequent to the passage of the act of March 14, 1889, amendatory of the act of March 18, 1885, entitled "An act to provide for work upon streets, lanes, alleys," etc. The question presented by the demurrer relates to the necessity of posting the resolution of intention or notice thereof in three public places in the city. Section 2 of the amendatory act amends section 3 of the act of 1885, and reads, so far as applicable to the question in hand, as follows: "Sec. 3. Before ordering any work done or improvements made, which is authorized by section 2 of this act, the city council shall pass a resolution of intention which shall be published and posted for two days in the manner prescribed by section 34 of this act." Section 34 reads as follows: "Fourth: The notices, resolutions, orders or other matter required to be published by the provisions of this act and of the act of which this is amendatory shall be published in a daily newspaper in cities where such there is, and, where there is no daily newspaper, in a semi-weekly or weekly newspaper, to be designated by the council of such city, as often as the same is issued, and no other statute shall govern or be applicable to the publications herein provided for; provided, however, that in case there is no daily, semi-weekly or weekly newspaper printed or circulated in any such city, then such notices, resolutions, orders or other matters as are herein required to be published in a newspaper, shall be posted and kept posted for the same length of time as required herein for the publication of the same in a daily, semi-weekly or weekly newspaper, in three of the most public places in such city," etc. This section would seem to imply that notices and resolutions are to be published where there is a newspaper in which to publish them, and, when so published, posting becomes unnecessary, and that the posting referred to in the section is only required where no newspaper is published. If the contention of appellants is correct, and the resolution of intention is required to be posted in all cases, then, under section 34, it would be necessary to post it twice in those instances where there is no newspaper published or circulated in the city. We can scarcely conceive that this result was intended by the legislature, and are of opinion that under section 34 the

notice or resolution in question, when duly published in the newspaper, was not required to be posted.

The assignment from plaintiff, Gill, to Ramsbottom, and the reassignment by the latter to the former, as averred in the complaint, are sufficient to reinvest plaintiff with the right to collect, to the money collected, and to its incident,—the lien sought to be declared and enforced in this action. Hence, we are of opinion the demurrer was properly overruled.

It is next objected by appellants that the work provided for in the resolution of intention is not identical with that subsequently ordered done, while that included in the bid of plaintiff, and for which the contract was awarded to him, differs from both. The resolution of intention, among other things, provided for cross walks laid at the intersection of Church, Sonora, and Lafayette streets; culverts constructed at the east side of the intersection of Church street. The resolution ordering the work done called for cross walks laid as follows: "One on each of the north, west, and south sides of the intersection of Church street, and one on each of the four sides of the intersection of Sonora street and Lafayette street, and a combined culvert and cross walk on the east side of the intersection of Church street." The bid of plaintiff for the performance of the work included 11 new cross walks and 1 culvert, but did not mention specially a combined cross walk and culvert. The resolution ordering the work follows substantially the resolution of intention. The 11 cross walks, and the combined culvert and cross walk, so called,—by which we understand a culvert, the top of which was to serve as a cross walk,—constitute the 12 cross walks spoken of elsewhere, and involve a substantial specification, as in the resolution of intention and resolution for performance of work so required. It is conceded that, where the statute requires a series of acts to be performed before the owners of the property are properly chargeable with the tax, such acts are conditions precedent to the exercise of the power to levy the tax, and all the requirements of the statute must be complied with, or the tax cannot be collected. But, while this is admitted, it is a substantial compliance with the provisions of the law which is required; and, so that such substantial compliance is had, a mere want of technicality of expression or precision of statement which does not affect the essential object in view will not vitiate the proceedings. The award to the contractor by the city council seems to have been regular, and in consonance with the resolution, and was the authority to the superintendent of streets, under which he, in his official capacity, entered into the contract; and the contract entered into between the superin-

tendent of streets and plaintiff was for the work described in the resolution ordering the work, which is deemed sufficient.

It is next contended that the plans and specifications introduced in evidence were not prepared by the order of, or under the direction of, the said council of the city, and were not authenticated as being the work of the city surveyor of said city, or under such direction, and were therefore improperly admitted in evidence. The specifications, as offered in evidence, are indorsed as follows: "Plans and specifications for grading, graveling, laying cross walks and culvert on Aurora street, Nov. 25, 1889. Approved and adopted as submitted and read. [Signed] C. A. Campbell, City Clerk." The third section of the statute (St. 1889, p. 159) provides that "plans and specifications and careful estimates of the cost and expenses thereof shall be furnished to said city council, if required by it, by the city engineer of said city." G. A. Atherton, who was called as a witness on behalf of the plaintiff, testified that he was the city surveyor of the city of Stockton, and that he prepared the plans and specifications for this work. The statute does not, in terms, specify the mode by which the city surveyor or engineer shall be required to furnish the plans and specifications for work, nor does it, in terms, require such plans and specifications in all cases, but only "if required by it," (the city council.) The fact that the plans and specifications were prepared by the city engineer, were on file, and were approved by the city council, is sufficient evidence of their authenticity.

The time for completion of work under the contract was extended by resolution of the city council, passed at a special meeting called for that purpose, at which meeting one member of the council, to wit, the president thereof, was not present. Notice of the meeting, specifying the time, place, and object thereof, was served upon each member of the board by the clerk, but such notice was not entered of record. Objection was made at the trial to proof of the service of the notice otherwise than by record evidence, and to the ruling of the court permitting such proof. Exception was taken, and the action of the court is assigned as error. The record of the meeting shows that all the members of the city council were present, except Lehe, the president, and that the resolution extending the time for plaintiff to perform his contract was adopted by the unanimous vote of all the members present. Under these circumstances, there was no error in admitting the evidence of C. A. Campbell, clerk of the council, to prove that he served notice of the meeting, specifying the time of meeting, and the object thereof, upon each and every member of the city council. *San Luis Obispo County v. White*, 91 Cal. 432, 24 Pac. Rep. 864, and 27 Pac. Rep. 756.

The next point made by appellants relates to the record of the warrant which was recorded and issued to T. A. Gill, plaintiff herein, October 17, 1890, and under the law was to be returned and recorded within 30 days thereafter, and during which time the demand for the payment of assessments listed thereon is required to be made. The complaint avers the issuing and recording of the warrant, with the assessment and diagram attached, and their delivery to plaintiff, the demand thereafter of payment of the sum specified in the warrant as assessed against the lot in question, and that defendant has not paid any part thereof, and that thereafter, within 30 days from the date of said warrant, the same was duly returned to the said street superintendent, with the return indorsed thereon, verified by oath, stating the name and character of the demand made, etc., as required by the statute; that thereupon the said street superintendent duly recorded the said return so made by the said warrant in the margin of the record of said warrant, etc. These allegations are not denied by the answer. It follows that the contention of appellants that the demand was made after the return of the warrant is one not in issue in the court below, and upon which no question could properly arise. There was, it is true, testimony introduced tending to show a mistake in the date of the filing of the return, and that, while it purported to have been filed and recorded on the day of its issue, such return was in fact recorded on November 15, 1890. This, however, was of no importance, for the reason, as before stated, there was no issue on that question.

The plaintiff herein, on January 15, 1890, assigned the contract for the performance of the work in question to Robert Ramsbottom. To show a retransfer from the latter to plaintiff, a reassignment from Ramsbottom to plaintiff was offered in evidence, which, so far as material here, is in the following language: "I hereby assign to said T. A. Gill all my right and interest in and to the amounts assessed to S. Dunham, for street work, against lots 1, 3, 5, 13, 14, in block 259, east of Center street, in the city of Stockton, and all my right to collect the said amounts so assessed against said Dunham, and all my right to proceed against the said Dunham for the collection of said amounts." The introduction of this instrument in evidence was objected to by defendants upon the ground that it does not, upon its face, purport to be an assignment of any cause of action or right of lien against the property described herein, but simply a right to collect certain amounts assessed against said Dunham, and that there are no amounts assessed against said Dunham, and that his name does not appear in the official proceedings herein. Lot No. 1 in block No. 259, east of Center street, in said city of Stockton, referred to in the assignment, is the lot upon

which the lien is sought to be foreclosed in this action. It was assessed to "unknown owner," and the name of S. Dunham does not appear in the assessment. It is averred, however, in the complaint, and admitted by the answer, that said Dunham was and is in fact the owner thereof. The name of S. Dunham may be treated as surplusage, and the assignment sufficiently identifies the claim or demand sought to be assigned in the instrument. It would then read as an assignment in and to the amounts assessed for street work against lot 1, etc., in block 259. As the only object is to identify the subject-matter embraced within the assignment, the identification is sufficient, whether the name S. Dunham be retained or rejected. The lien was but an incident of the demand, and passed with its assignment.

The motion for nonsuit was properly denied. There was evidence tending to sustain, on the part of the plaintiff, all the issues in the case.

Upon the question of the fulfillment of the contract in the doing of the work, the testimony was conflicting, and the finding of the court, in consonance with the allegations of the complaint, is amply supported by the evidence. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

99 Cal. 386

MCDONALD v. CONNIEFF et al. (No. 15,085.)
(Supreme Court of California. Aug. 30, 1893.)
STREET ASSESSMENTS — ENFORCING LIENS — CONSTITUTIONAL LAW.

1. St. 1889, p. 157, § 7, subd. 8, provides that "where any work * * * is done on either or both sides of the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expense of said work so ordered shall be made upon the lots or portions of the lots only fronting the portions of the work so ordered." *Held*, that where a street was ordered to be paved for one block, where not already so paved, the assessment was properly made on those lots, only, on which the work done abutted.

2. St. 1889, p. 166, provides that a diagram shall be attached to the assessment, "exhibiting each street on which any work has been done, and showing the relative location of each lot to the work done, numbered to correspond with the numbers in the assessments, and showing the number of feet fronting, or number of lots assessed for said work." *Held*, that the diagram need not show on what portion of the street the work was done.

3. The provision of the act of 1889 which makes a street assessment prima facie evidence of the regularity of the proceeding is not a special or local law, within the constitutional provision that the legislature shall not pass special or local laws "regulating the practice of courts of justice."

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by John W. McDonald against Michael Conniff and others to enforce the lien of a street assessment. There was a judgment in favor of defendants, and plaintiff appeals. Reversed.

J. C. Bates, for appellant. Horace W. Philbrook, for respondents.

HARRISON, J. Action to foreclose a lien of a street assessment in the city and county of San Francisco. At the trial the plaintiff offered in evidence the assessment, diagram, warrant, certificate of engineer, with the affidavit of demand and nonpayment indorsed upon the warrant, to the introduction of which the defendants objected upon the grounds "that the same were immaterial, irrelevant, and incompetent, because the assessment is void on its face, as only a part of the lots on Tenth street, between Folsom and Harrison streets, were assessed; and also that the diagram did not show on which side of Tenth street, or what particular part of Tenth street, the work for which the assessment was made, or the relative location of the lot of defendant Conniff assessed to the work done, or any part thereof; also, because no foundation had been laid for introducing the diagrams, or any of them, offered, no prior proceeding having been shown, authorizing the assessment, diagram, warrant, or certificate, or any of them; also, because the item in the assessment of \$25.-83 engineering is unauthorized and illegal." The court sustained the objection, and excluded the evidence. Judgment of nonsuit was thereupon entered, and the plaintiff has appealed therefrom.

1. Section 2 of the act under which the proceedings were had (St. 1889, p. 157) authorizes the city council to order the improvement of "the whole or any portion, either in length or width," of the streets of the city; and in subdivision 11 of section 7 the council is authorized, in its order for any of the work mentioned in the act, "to except therefrom any of said work already done upon the street to the official grade." Subdivision 8 of section 7 of the act provides that "where any work * * * is done on either or both sides of the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expense of said work so ordered shall be made upon the lots or portions of the lots only fronting the portions of the work so ordered." It thus appears that authority is given to the city council, in certain cases, to order the improvement of only a portion of a street lying between two main street crossings, and that such improvement may

be confined to a portion of the street upon one side of its middle line, and also that, when only such portion of a street is to be improved, the assessment therefor must be upon only the lots which front the portions of the work ordered. In the present case the improvement ordered by the supervisors, and for which the assessment was made, was "that granite curbs be laid on Tenth street, between Folsom and Harrison streets, where not already laid; that the roadway thereof be paved with basalt blocks where not already so paved; and that granite curbs and plank sidewalks be laid on angular corners of the intersection of Sheridan and Tenth streets, and that granite cross-walks be laid across said intersection." It was for the supervisors to determine what portion of Tenth street they would order improved, and if, in fact, prior to the passing of the resolution of intention, any portion of the street had been so improved, it was the duty of the superintendent to make the assessment for the work done under the contract upon only the lots "fronting upon the work so ordered," and to exclude therefrom the lots "fronting upon said excepted work already done." If the superintendent, in making such assessment, included lots which ought not to have been assessed, or failed to include those which should have been assessed, the remedy of the party aggrieved was by an appeal to the supervisors for a correction of the assessment. Inasmuch, therefore, as there are instances in which an assessment is authorized to be made upon only a portion of the lots fronting upon a street on which an improvement has been ordered, it cannot be said that the assessment in question is void upon its face.

2. The objection that the diagram does not show "on which side of Tenth street or what particular part of Tenth street the work for which the assessment was made," is not clear. The grammatical construction of the objection is that the diagram does not show the work for which the assessment was made, and it is sufficient to say that there is no requirement in the statute that the "work" shall be shown or even designated upon the diagram; but, if it be construed as an objection that the diagram does not show upon what portion of Tenth street the work was done, it may also be said that the statute does not make this requirement. The provision of the statute is that a diagram shall be attached to the assessment, "exhibiting each street on which any work has been done, and showing the relative location of each lot to the work done, numbered to correspond with the numbers in the assessments, and showing the number of feet fronting, or number of lots assessed for said work contracted for and performed." The diagram is only auxiliary to the assessment, and is intended to be merely a map exhibiting "each street" upon which the work has been done, and not the

particular portion of the street in which the work was done. The requirement that it shall show "the relative location of each lot assessed to the work done" is satisfied if it shows their location in relation to the "exhibited" street upon which the work was done. Taken in connection with the description of the work for which the assessment was made, it can then be seen from an inspection whether any of the lots assessed are so located as to be liable for any part of the expense of the work, and if, for any reason, a particular lot ought not to have been assessed for that work, the error can be corrected upon application to the proper tribunal. The diagram is not intrinsically invalid unless the lots shown thereon are so located that they could not, under any circumstances, be made liable for a portion of the expense of the work. It is not essential to the validity of an assessment that the lots assessed should front upon the entire portion of the street exhibited upon the diagram. In the case of an assessment for work done upon main street crossings, or at the termination of one street in another, the street crossing or the termination is required to be exhibited on the diagram, while the lots to be assessed front upon portions of the streets on which none of the work was done, and the diagram is to show their relative location to the work done, by showing that they are within the quarter blocks or territory liable to be assessed. The diagram in the present case sufficiently complies with the statute. It exhibits Tenth street as the street upon which the work was done, and it also delineates the several lots assessed, and shows that each of the lots assessed fronts upon Tenth street, and that its location is within the territory liable to be assessed for work done upon Tenth street.

3. The statute makes the assessment, with the other documents offered by the plaintiff, *prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council, upon which it is based, and it was therefore not necessary to offer any evidence of these prior proceedings as the foundation for introducing these documents. It is competent for the legislature to prescribe rules of evidence for the trial of actions, and statutes which make a document *prima facie* evidence of the regularity of official proceedings in reference thereto, or which cast the burden of proof in an issue upon either party to the action, are within the constitutional power of the legislature. *Cooley*, Const. Lim. 450. Neither does this provision of the statute contravene the provision of the constitution prohibiting the legislature from passing special or local laws "regulating the practice of courts of justice." It is not necessary that a law shall affect all the people of the state in order that it may

be general, or that a statute concerning procedure shall be applicable to every action that may be brought in the courts of the state. A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special. A statute regulating the rights of married women, or which affects all mining corporations, or confers rights upon municipal corporations of a certain class, or places restrictions upon all foreign corporations, is a general law. *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. Rep. 604; *In re Madera Irr. Dist.*, 92 Cal. 316, 28 Pac. Rep. 272, 675; *Wheeler v. Philadelphia*, 77 Pa. St. 348; *Land Co. v. Soper*, 39 Iowa, 112; *In re New York El. R. Co.*, 70 N. Y. 350. The provision under consideration is neither a local nor a special law. It is applicable to all actions for the foreclosure of street-assessment liens, and is in force in all parts of the state. That the legislature may prescribe different rules of procedure, as well of pleading as of evidence, for different actions, is illustrated by what it has done in defining the form of pleading upon judgments and in other special actions, in requiring the pleadings in forcible entry and detainer to be verified, in denying a divorce upon the mere default of the defendant, in making a tax deed *prima facie* evidence of the regularity of the proceedings prior to its issuance, and in requiring a different form of proof for the execution of a will from that of any other written instrument, as well as in numerous other instances.

4. The objection to an item for engineering is evidently the result of an oversight. Section 8 of the act under consideration requires the superintendent to include "any incidental expenses" in the assessment to be made by him. Section 34 provides that the city and county surveyor shall do the surveying and "other engineering work necessary to be done," and that his compensation therefor shall be included in the term "incidental expenses." Upon the face of the assessment, it must be assumed that the engineering work was done, and that the amount included therefor is correct. The court, therefore, erred in excluding the evidence, and for this error its judgment is reversed.

We concur: GAROUTTE, J.; PATERSON, J.

4 Cal. Unrep. 182
GRUNWALD et al. v. FREESE. (No. 15,-
069.)

(Supreme Court of California. Aug. 31, 1893.)
EXPERT EVIDENCE — RELEASE — FOREIGN DEBT—
DOMESTIC VALUE.

1. Testimony as to the quality of old wire rope sold by sample, that the outer wires were broken into short pieces; that the rope was "rotten, and a little broken, instead of being as the sample;" that much of it was "broken, rusty, and rotten,"—relates to facts open to

common observation, and not requiring expert knowledge.

2. Merchants and clerks of merchants in a foreign country who deal in a certain article are competent to testify as to the market value of the article in such foreign country.

3. A release of a cause of action is not available unless it is specially pleaded.

4. A debt contracted in a foreign country is payable in the currency of that country, and therefore, where the creditor sues in the United States, he is entitled to recover such sum in money of the United States as equals the debt in the foreign country when it was payable.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Fritz Grunwald and Otto Munch, partners under the firm name of H. C. Morf & Co., against William Freese. There was a judgment in favor of plaintiffs, and defendant appeals. Affirmed.

Page & Eells, for appellant. Young & Powers and James Herrmann, for respondents.

SEARLS, C. This appeal is prosecuted by the defendant from a final judgment in favor of plaintiffs, and comes up on a bill of exceptions. The action was brought by plaintiffs, factors and commission merchants at Yokohama and Hiogo, in the empire of Japan, to recover from the defendant, a merchant, in the city and county of San Francisco, \$4,999.60 Mexican dollars, of the value of \$4,149.67 gold coin of the United States, a balance due on a mutual, open, and current account, with interest, etc. For some time prior to 1888, defendant had shipped from San Francisco to plaintiffs in Japan, for sale by them as his factors in the Japanese market, merchandise of various kinds, and plaintiffs had also shipped Japanese goods to defendant, for sale by him in like manner, and for their account in San Francisco. On July 10, 1888, defendant wrote to plaintiffs that he could buy in San Francisco a large amount of old cable rope after it was laid aside by the cable railroad companies, and sent a sample of the rope, asking plaintiffs to notify him by return mail what they could do with the article in Japan; what quotations they could make per picul (133½ lbs.) in Mexican dollars, and about how many tons they could dispose of per month. Defendant also inquired if the plaintiffs would authorize him to draw on them, against consignments, for an advance of say \$10 gold per ton of 2,240 lbs., F. O. B., (free on board,) San Francisco, 90 days' sight draft, etc. Plaintiffs responded by letter under date of August 16, 1888, saying: "The article in condition like sample is very salable here, only the thickness is not suitable. People here want 13, W. G. No. 8-13, (Birmingham wire gauge,) whereas your samples, according to B. W. G., measure only 16. People here do not wish wire which is thicker than No. 8 or thinner than No. 13," but that between those

numbers it was desirable, and a considerable business could be done in it. Plaintiffs inclosed in a letter samples of No. 8 and No. 13 wire. They also added that, subject to defendant's approval, they had contracted for 50 tons according to his sample, but only of sizes 8 to 13, at the gross sale price of \$2.50 per picul. Plaintiffs consented that defendant should draw upon them for 75 per cent. advances of the probable net proceeds, freight and insurance paid there, (San Francisco.) They further stated that, "in the event the first shipment turns out satisfactory to our customers, we will easily be able to sell 20 tons per month." Defendant denied that he owed plaintiffs anything upon the account, and by way of counterclaim sets out that he was induced by the representations of the plaintiffs to purchase and ship to them large quantities of wire cable; that he was misled by them; that they failed to notify him promptly that the cable could not be sold; and in apt terms stated facts which, if true, constituted a defense to the action. It seems that the wire rope was sent to Japan, not to be used in its then condition for mechanical purposes, but to be disassembled, and the wires contained therein to be worked into nails for tea chests, frames for umbrellas, etc. For these purposes the sizes of the wires were required to be from No. 8 to No. 13, inclusive. The two wires sent by letter to the defendant, before mentioned, were samples as to size, and not as to quality, being Nos. 8 and 13, respectively.

In rebuttal of the case made by defendant in support of his counterclaim, plaintiffs read in evidence the depositions of Ernest Becker, Theodore Bunge, Henry Lucas, Johann F. Crosser, and Fritz Grunwald, taken upon interrogatories in Japan. These witnesses all testified to a greater or less extent in regard to the condition or appearance of the wire rope forwarded by the defendant, its relative condition with the sample forwarded by defendant to the plaintiffs, the market value of goods like the sample and the market value of the goods actually shipped. Cross interrogatories were waived by defendant's counsel, and no objections seem to have been made until the reading of the depositions at the trial, when counsel for defendant moved to strike out from each deposition, severally, certain portions thereof, viz. those portions relating to the quality of the wire rope shipped, and its comparative merits as relating to the samples; also that relating to the market price for this class of goods in Japan, upon the ground that it did not appear that the witness knew the market prices, or that he was sufficiently expert to give an intelligent opinion upon any of these matters. The objections to the several depositions were similar in language, and all based upon the same grounds. The witnesses were all either commission merchants in Japan or clerks in the employ of such merchants.

The question of value, or market value, is mainly one of fact, but is usually defined as a matter of opinion gathered from facts, and as was said by Story, J., in *Alfonso v. U. S.*, 2 Story, 421: "We must necessarily resort to opinions of merchants and others conversant in trade for market prices or values of the goods." Wharton, in his work on Evidence, (section 447,) lays down the rule as follows: "Two essentials, therefore, exist to a proper estimate of value: First, a knowledge of the intrinsic properties of the thing; second, a knowledge of the state of the markets. As to such intrinsic properties as are occult and out of the range of common observers, experts are required to testify; as to properties which are cognizable by an observer of ordinary business sagacity, being familiar with the thing, such an observer is permitted to testify." So far as the condition of the wire rope was concerned, it was a question to be determined, not from its occult qualities, but from its appearance, and from the effect produced upon it by handling; that its outer wires were broken up into short pieces; that "the goods sent were rotten, and a little broken, instead of being as the sample;" that much of it was "broken, rusty, and rotten," or, as another witness said, "in trying to undo the coils the whole thing broke to pieces, into small pieces from half an inch to two inches long." These were facts to be gleaned from observation, and were stated as such, facts open to every observer, and not requiring expert knowledge, and whether they were experts on the subject or were not is of little importance. The question of the value of the rope in the market was one upon which merchants dealing in the article in question were competent to speak. As before stated, the witnesses were all commission merchants in Japan, or were in the employ of such merchants; and it may be added that it appeared directly or incidentally that all of them who testified as to the value of the commodity were or had been engaged in the sale of the article, or were in the employ of those thus engaged. They all showed themselves to possess more or less knowledge of the efforts made by plaintiffs to dispose of the goods, and had themselves either sold, attempted to sell, or were familiar with the efforts made to sell the goods. Under such circumstances, while the depositions are not as full and satisfactory as could be wished in showing knowledge and experience on the part of some of the witnesses, I do not regard the errors assigned in the rulings upon the depositions as sufficiently established to warrant a reversal.

If, however, we are wrong in the foregoing conclusion, and should hold that the depositions were, so far as objected to, improperly admitted, it is not perceived that the court below would have been justified in reducing the amount of plaintiffs' recovery. The balance of account in favor of

plaintiffs was not only proven, but at the trial, in answer to a question by the court, "defendant's counsel announced that there was no contest on the account at all, but as an offset defendant relied on plaintiffs' assurance of disposing of the rope as sent, and that defendant had suffered loss far greater than the amount plaintiffs claimed against defendant by reason of plaintiffs' failure to do what was agreed in the matter, and that defendant asked no affirmative relief, but charged that he was damaged in the sum of \$5,000 in round numbers." The case as made by the defendant failed to establish a counterclaim, and hence the evidence objected to, which tended to show why consigned goods brought no higher price, and were not sooner disposed of, was unnecessary.

There is a further contention that plaintiffs released defendant from the balance due them. On the 3d day of June, 1889, the plaintiffs, in a letter to defendant, used the following language: "Naturally you know very well that we will never consent to proceed against you legally. Our hope to reduce our loss in this transaction, if possible, to a minimum limits itself, therefore, that after the settlement of your different transactions the loss will be small," etc. Conceding, without deciding, that the quoted clause of plaintiffs' letter amounted to a release, then it should have been specially pleaded. *Moss v. Shear*, 30 Cal. 468; *Piercy v. Sabin*, 10 Cal. 22; *Coles v. Soulsby*, 21 Cal. 47. There was no consideration for the promise, and therefore it did not amount to a covenant not to sue. *Canal Co. v. Roach*, 78 Cal. 552, 21 Pac. Rep. 304. It is apparent, however, that neither of the parties regarded the letter as amounting to a release. In the following December we find defendant writing to plaintiffs: "I refuse to participate in the loss caused by your fault and recommendations, with more than that already suffered, which amounts to nearly 30 per cent.," to which plaintiffs reply: "We hope soon to find the opportunity to dispose of the goods, and after a thorough inspection we shall consult with our Yokohama house as to what steps we shall take to compel you to the liquidation of this debt."

The account in Japan was kept, as appears, for convenience sake, in Mexican dollars. Plaintiffs aver that on the 7th day of August, 1890, there was due them \$4,999.60 Mexican dollars, of the value of \$4,149.67 gold coin; that on or about August 26, 1890, they submitted their account to defendant, and demanded payment, and pray judgment for such sum, with interest. It was stipulated that Mexican dollars were at the date of the commencement of the suit worth 83 cents. At the date of the demand (August 23, 1890) they were worth 93½ cents, and at the date of trial 74 to 75 cents. The court gave judgment for the value at the date of suit brought. This was more favorable to de-

fendant than it would have been to have computed the value of the foreign silver at the date of the demand of payment, but not as advantageous to him as a computation at the date of trial. A debt contracted in a foreign country, in the absence of a contrary understanding, is payable there, and in the legal currency of that country. The parties having, by common consent, expressed their account in Mexican dollars, and the debt having been contracted in Japan, it stands on the same footing as though Mexican dollars were the currency of that country. It follows that, the debt not having been paid in Japan, and plaintiffs being compelled to sue here, they were entitled to judgment for such sum in our currency or money as was equivalent to their claim in Japan. *Benners v. Clemens*, 58 Pa. St. 24; *Cash v. Kennion*, 11 Ves. 315. In the language of the chancellor in the case last cited: "Where a man agrees to pay £100 in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him the law of that country ought to give him just as much as he would have had if the contract had been performed." Apply the principle thus enunciated to this case, and we may say that, had defendant met his contract when it was due,—that is to say, when demand was made upon him,—plaintiffs would have had \$4,999.67 Mexican dollars of the value of 93½ cents each, or their equivalent in our currency; a sum in excess of that which the court awarded them. If a man contracts to deliver wheat on a given day, and fails to do so, the measure of damages is the market price of the article on that day; and in principle it is difficult to see why the rule should not hold good when he agrees to deliver Mexican dollars, or other foreign money, which, in the absence of some positive law of our own, is but a commodity. There are authorities which hold that the rate of exchange at the date of the trial is the criterion by which to determine the amount of the judgment, but in most instances the only question evidently relates to the mere expense of effecting the exchange, or, in other words, the cost of transmitting the funds, for that is what it amounts to,—cases in which, so far as appears, the question of depreciation or appreciation of the currency in which the debt was payable cut no figure. In *Benners v. Clemens*, supra, cited by appellant, the recovery was had upon the basis of the value of legal tenders at the date of the presentation of the account. To discuss the question satisfactorily would require more space than can reasonably be accorded to it, and I content myself with saying that my conclusion, drawn from a perusal of the conflicting authorities, prompts the declaration that if any error was committed by the court below it was in favor of the defendant, and hence that he is not in a position to complain. The evidence supports the findings,

and the latter cover the issues in the case, and the judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

99 Cal. 425

PEARSON v. DROBAZ FISHING CO. et al.
(No. 14,985.)

(Supreme Court of California. Aug. 31, 1893.)

VACATING JUDGMENT—INADVERTENCE OF COUNSEL.

On an application to set aside a judgment it appeared that the cause was the seventh on the calendar for the day on which it was set for trial. Defendant's counsel was not present on that day, as he had business in another court, but he had some one to answer "Ready" when the case was called, supposing that it would not be reached for trial on that day. It was reached, however, and judgment was rendered for plaintiff. Defendant's counsel was informed of the judgment on the same day, and at once requested plaintiff's counsel to consent that it should be set aside, which was refused, whereupon he immediately made an affidavit of the facts, and procured an order to show cause. *Held*, that the judgment should have been set aside for excusable inadvertence of counsel.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Edward Pearson against the Drobaz Fishing Company and others. There was an order refusing to set aside, on the ground of excusable inadvertence of counsel, a judgment theretofore entered in favor of plaintiff, and defendants appeal. Reversed.

A. Ruef, E. Parker, and Haines & Ward, for appellants. Henry H. Davis, for respondent.

PER CURIAM. The plaintiff commenced this action in the superior court of the city and county of San Francisco to recover the sum of \$382.25 alleged to be due for work, labor, and services rendered and performed by him for defendants at their special instance and request. The complaint was filed July 15, 1891, and on the 25th of the same month the defendants answered thereto, denying that the defendants, or any of them, were indebted to the plaintiff in the sum named, or in any other sum, for work, labor, and services, or otherwise, or that the said sum, or any portion thereof, was due and payable from defendants, or either of them, to the plaintiff. Shortly after the answer was filed the case was placed on the trial calendar of department 6 of the court, and on October 6, 1891, it stood for trial as No. 7 on that calendar. When the calendar was called on the morning of the last-named day the defendants' attorney, thinking the case would not be reached for trial until the next day, and having business in

another court, was not present, but he had some one answer for him, to the call of the case, "Ready." The six cases preceding this one were at once continued or otherwise disposed of, and thereupon, in the absence of the defendants and their attorney, the plaintiff was called and examined as a witness in his own behalf, and the case was then submitted, and judgment given in his favor for the amount demanded in the complaint. The attorney for defendants was informed of the trial and judgment about 11 o'clock of the same day, and at about the same hour called upon the attorney for the plaintiff, and requested him to stipulate that the judgment should be set aside, which request was refused, and thereupon he at once made an affidavit setting out facts to show that the judgment was taken against defendants through their mistake, inadvertence, and surprise. On this affidavit an order was made by the court on the afternoon of the day the judgment was rendered, requiring the plaintiff to show cause on the 9th day of the same month why the judgment should not be set aside, and the defendants allowed to present evidence in support of the issues raised by their answer. At the time appointed the motion to set aside the judgment came on regularly for hearing before the court, and was submitted upon affidavits filed by the respective parties and the judgment roll in the case. The plaintiff, in his affidavit, stated that some of his witnesses were seafaring men, and had left the city of San Francisco, and that their whereabouts was unknown, and that to the best of his belief he would not be able to find them again. Thereafter, on December 1, 1891, the court denied the motion, and the defendants excepted to the ruling. From the judgment entered and the order denying their motion the defendants appeal.

It is contended in support of the appeal that upon the facts shown the court below should have set aside the judgment, and that its refusal to do so was not a proper exercise of its discretion, and we think it must be so held. There was undoubtedly negligence upon the part of the attorney for the defendants, but it was not inexcusable negligence, under the circumstances here appearing. It is apparent that the defendants were not seeking to delay the trial. The application to set aside the judgment was made almost immediately after its rendition, and in all probability before it was actually entered. The plaintiff had notice of the fact that the application would be made. This being so, his affidavit, made two days thereafter, that his witnesses had gone, and their whereabouts were unknown, ought not to have been deemed a sufficient answer to the motion. Courts are established for the purpose of administering justice in controversies between parties, and this result will be generally best attained by a trial upon the merits, and neither of the parties should be deprived of such a trial except

when guilty of inexcusable negligence, and we do not think such a degree of negligence appears here. "Applications of this character," said this court in *Watson v. Railroad Co.*, 41 Cal. 20, in passing upon an appeal from an order opening a default, "are addressed to the discretion—the legal discretion—of the court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined by its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application. In connection with its allowance, terms and conditions ought generally to be imposed upon the party in default, which, of course, should be more or less severe, as the particular circumstances would seem to warrant." The application of the rule thus stated to the facts of this case must result in the reversal of the order. Judgment and order reversed.

(99 Cal. 449)

SMITH v. SMITH et al. (No. 15,158.)
(Supreme Court of California. Aug. 31, 1893.)
HOMESTEAD OF WIDOW—LIMITATION ON VALUE—
DISCRETION OF COURT.

1. Under Code Civil Proc. § 1465, which provides that, in case no homestead has been selected by a married man in his lifetime, the court must select, set apart, and cause to be recorded, a homestead for the use of the surviving wife, the court may set apart one exceeding \$5,000 in value.

2. Where the value of an estate is \$85,000 in excess of debts and expenses of administration, it is not an abuse of discretion to set apart as a homestead to the surviving wife, out of the community property, premises worth \$10,000, which were occupied by deceased and his family in his lifetime, and which are indivisible.

Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Proceeding for the allotment of homestead to Catherine S. Smith, widow of E. O. Smith, deceased. From an order setting apart premises of the value of \$10,000 as such homestead, J. D. Smith and others appeal. Affirmed.

S. A. Barker, for appellants. Arthur Rodgers and C. D. Wright, for respondent. S. F. Leib, amicus curiae.

McFARLAND, J. This is an appeal by certain heirs at law of E. O. Smith, de-

ceased, from a probate order setting aside certain premises as a homestead to the respondent, who is the widow of the deceased. The facts necessary to be stated are these: The said premises consist of an ordinary city lot in the city of San Jose. It has a dwelling house on it which covers nearly the entire lot, and in this house the deceased and the respondent resided for several years next before the death of the former. The said premises were community property, and there was never any declaration of homestead upon the same made by either of the spouses. The deceased purchased the lot for \$4,500, paying \$2,000 in cash and giving his note for \$2,500; the deed remaining in escrow, to be delivered upon payment of the note. The note was not paid nor the deed delivered during the lifetime of the deceased, but afterwards the respondent procured a third person to take an assignment of the note, and thereupon the deed was delivered and recorded, said third person now holding the note. There are no minor heirs of the deceased. The premises are now of the value of \$10,000, and the balance of the estate, above all debts and expenses of administration, is worth \$75,000, with a rental of \$5,100 per annum. The lot could not be divided without destroying its character and use as a home, and is, as the court finds, "indivisible." There is no other land of the estate suitable for a homestead. The contest is entirely between the respondent and certain heirs at law of the deceased, the rights of creditors not being in any way involved.

Appellants contend that upon the foregoing facts the court had no power to set aside said premises to the widow as a homestead, because their value exceeds \$5,000, and contend that the court should have directed that the said premises be sold, and that out of the proceeds respondent be given \$5,000, and no more, in "lieu of a homestead." The position of appellants is not tenable. Section 1465 of the Code of Civil Procedure provides that in a case like the one at bar the court "must select, designate, and set apart, and cause to be recorded, a homestead for the use" of the surviving wife. This "homestead" which is to be selected, recorded, etc., is not \$5,000, nor any other sum of money. It is a place of residence; it is land,—real property. When a homestead has been selected by the parties, under the provisions of the Civil Code, circumstances may arise under which they will not be able to continue to hold it. Notably is this so when the rights of a creditor are involved, and the Code provides the machinery by which, in such a case, the creditor may have the homestead sold, and the proceeds in excess of \$5,000 applied to his debt. But this provision has nothing to do with the creation of a homestead, even when it is established by the parties under the Civil Code. In case of a probate homestead under the Code

of Civil Procedure, the court, in the first instance, creates the homestead, and the question there is, not what shall be done with an existing homestead, but how shall an original homestead be created by the court, and out of what property shall it be carved? And there are no existing provisions of the Code which restrain the court from selecting premises as a homestead because they exceed in value \$5,000. There were such provisions in sections 1480-1484, Code Civil Proc., but those sections were repealed in 1874. If the contention of appellants be sound, then in the case at bar the court could not possibly have set aside a homestead to respondent, because there was no other land of the estate out of which a homestead could have been carved, and the premises which the court did set aside were indivisible. The appeal here is from the order setting aside the homestead, and under what provision of the Code could the court have ordered \$5,000 paid to respondent, either out of the general assets of the estate, or out of the proceeds of the sale of any particular piece of property, before any homestead had been created?

If appellants' view be right, then collateral kin might drive a widow and minor children out of their home because it happened to be worth a little more than \$5,000. But we think that in *Estate of Walkerly*, 81 Cal. 579, 22 Pac. Rep. 888, the point made by appellants was clearly decided against them. In that case the court set aside a homestead worth \$18,000, and appellants there made the contention insisted on by appellants here, viz. "that the court could not set apart a probate homestead greater in value than five thousand dollars." The court, however, affirmed the order, holding that "the provisions of the Code authorizing a homestead to be set aside to the family of a decedent, where none has been selected before his death, contains no limitation as to the value of such homestead." The court further held that such an order will not be disturbed by this court on account of the value of the homestead, unless there had been an abuse of discretion; and, considering the condition and value of the estate in the case at bar, we see no abuse of discretion in the order appealed from. The fact that in that case the homestead was selected from the separate property of the deceased does not in any way distinguish it from the case at bar. The same principle and reasoning equally apply to both cases. See, also, *Estate of Schmidt*, 94 Cal. 334, 29 Pac. Rep. 714. We see nothing in the point that the provisions of the Code as above construed are unconstitutional. Order affirmed.

We concur: BEATTY, C. J.; DE HAVEN, J.; FITZGERALD, J.; HARRISON, J.

GAROUTTE, J. I concur. If the question were a new one, I would dissent.

99 Cal. 490

LEVI et al. v. DIMMICK et al. (No. 15,007.)

(Supreme Court of California. Sept. 7, 1893.)

WARRANTY—ACTION FOR BREACH—EVIDENCE.

Where the contract for the sale of a quantity of dates, of two kinds, makes no distinction as to the respective values of the two kinds, evidence is incompetent, in an action for the breach of warranty of the merchantable condition of one of the kinds, as furnished, to show that such kind was not worth as much as the other kind.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by H. Levi & Co. against Dimmick and others to recover damages for the breach of an express warranty of the merchantable character of certain dates sold by defendants to plaintiffs. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Rhodes & Barstow, for appellants. Wal. J. Tuska, for respondents.

McFARLAND, J. This is an action to recover damages for the breach of an express warranty of the merchantable character of certain dates sold by defendants to plaintiffs, and paid for by plaintiffs at the contract price. Judgment went for plaintiffs, from which, and from an order denying a new trial, defendants appeal. We have considered carefully the oral and written arguments of counsel, and are satisfied that no reversible error was committed by the trial court. There is only one point which we think necessary to be specially noticed, and that is, whether or not the court erred in excluding testimony offered by appellants to show a difference in value between two kinds of dates which are mentioned in a contract between the parties. On November 29, 1890, the parties entered into a written contract as follows: "Sold this day to Messrs. H. Levi & Co., San Francisco, 4,000 boxes dates, more or less, consisting of Hallowee ^{AAA}_B and Sairs, at six (6) cents per pound, delivered at the wharf at San Francisco in merchantable condition. Terms, cash on delivery. The above lot being such as are received and on the way, consigned to order of G. H. Ballou & Co. 2,500 boxes, more or less, for immediate delivery, and balance, 1,500 boxes, more or less, for delivery on arrival at San Francisco. It being understood that 1,500 are now afloat. If, by unavoidable accident, balance of 1,500 do not arrive, sale of 1,500 boxes is void. Weights to be estimated at actual gross weight, less uniform tare of 10 lbs. each box." This document was signed by appellants and respondents. It will be observed that in this contract no distinction is made between Hallowee dates and Sair dates, either as to the price or as to the quantity of either kind sold; and,

if it be true that there is a marked difference in the value of the two kinds of dates, then the case illustrates the carelessness with which contracts are frequently made, and how difficult questions are thrust upon courts by the looseness with which business is often done. It appears that 2,500 boxes of dates were delivered at the time the said contract was made, and paid for by respondents at the said price of six cents per pound, and that they were Hallowee dates. These 2,500 boxes were in merchantable condition, and with reference to them no trouble occurred. But afterwards, on December 11, 1890, the 1,500 boxes mentioned in said contract having arrived, appellants delivered them to respondents, and respondents paid appellants for them at the said contract price of six cents per pound. These 1,500 boxes were, as a matter of fact, Sair dates, and they proved to be not merchantable. The court gave judgment for the difference between the contract price of these last 1,500—six cents per pound—and their actual value as unmerchantable goods. But the appellants, having averred in their answer that Sair dates were worth less than Hallowees, asked of one or two of their witnesses the questions: "Was there any real difference at that time in the value, in this market, between Hallowees and Sair dates?" and "What is the difference between Hallowees and Sairs?" and the court sustained objections to these questions, and we think that the objections were properly sustained. These questions amounted to nothing more or less than an attempt to show that goods sold and delivered under an express contract, at a stated price, were not worth as much as the price at which they were expressly sold, which, of course, a seller is estopped from doing, except under peculiar circumstances, not here existing. As before observed, the contract, on its face, makes no difference between Hallowee and Sair dates, either as to the amount of either or the price of either. But, as to the aggregate amount of dates, it is clear that the contract was severable as to the first lot, of 2,500 boxes, and the second lot, of 1,500 boxes. The first lot was delivered and paid for at the price named, and that ended the contract as to that lot. As to the second lot, of 1,500 boxes, the sale and delivery were contingent. They were subject to the uncertainties of a sea voyage, and it was provided that if they did not arrive the "sale of 1,500 boxes is void." If they had not arrived the transaction would have closed with the sale of the 2,500 boxes, and the payment for them by respondents at the contract price; but, as they did arrive, payment had to be made for them by respondents at the contract price of six cents per pound, and such payment was made. If the 1,500 boxes had been lost at sea, could appellants have recovered anything of respondents upon the theory that the 2,500

boxes of Hallowees already delivered and paid for were worth more than the contract price? We think, therefore, that the contract price of the 1,500 boxes was six cents per pound, and that it was not admissible for appellants to show that these dates, in a merchantable condition, were worth less. The case which counsel for appellants put, of the sale of a lot of cattle at \$15 per head, —some of them worth \$500 apiece, and others worth only \$5,—would need conditions not suggested by them before it would be an apt illustration of their contention in the case at bar. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

99 Cal. 483

ROEBLING SONS CO. v. BEAR VALLEY IRRIGATION CO. et al. (No. 19,025.)

(Supreme Court of California. Sept. 7, 1893.)

MECHANICS' LIENS—ENFORCEMENT—EVIDENCE.

Where in an action to enforce a lien for material furnished for the construction of a telephone line there is no evidence that such material was used in the construction of the particular line against which the lien was sought to be enforced, a judgment for plaintiff will be set aside on appeal.

Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by the Roebling Sons Company against the Bear Valley Irrigation Company and others to enforce a mechanic's lien. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant irrigation company appeals. Reversed.

Geo. E. Harpham, for appellants. Henry Goodcell, Jr., and Zue G. Peck, for respondent.

McFARLAND, J. This is an appeal by the defendant the Bear Valley Irrigation Company from a judgment in favor of the plaintiff in an action to enforce a mechanic's lien, and from an order denying a motion for a new trial.

It is averred in the complaint that appellants' grantor employed one Stebbins to construct a certain telephone line, and that respondent sold and delivered to said Stebbins certain materials which were intended to be used in, and were used in, the construction of said line. The court found these averments of the complaint to be true. It is doubtful if the evidence supports the finding that plaintiff sold the materials to Stebbins; the evidence being strongly to the point that they were sold to a company called the "Elec. Construction Co." But, waiving that point, it is clear that there was no sufficient evidence to support the finding that the materials were sold "to be used in the construction of said telephone line."

The only evidence upon the subject is to be found in the testimony of the witness Sime, a salesman in the employ of respondent, and who testified: "I can't tell where the goods were to be used; I don't know." He also testified that the goods were of the kind that are used "for the construction of a telegraph line," and, upon further question, said that they would answer for either a telegraph or telephone line. But he nowhere testified that they were sold for the purpose of being used in the construction of the particular telephone line against which the lien is sought to be enforced. In order to enforce the lien of a material man against a building or structure, "the materials must not only have been used in the construction of the building, but they must have been, by the express terms of the contract, furnished for the particular building on which the lien is claimed." *Bottomly v. Rector*, 2 Cal. 92; *Houghton v. Blake*, 5 Cal. 240; *Holmes v. Richet*, 56 Cal. 307; *Cohn v. Wright*, 89 Cal. 86, 26 Pac. Rep. 643.

The judgment and order appealed from are reversed, and the cause remanded.

We concur: DE HAVEN, J.; FITZGERALD, J.

99 Cal. 497

SAM YUEN v. McMANN et al. (No. 14,480.) (Supreme Court of California. Sept. 9, 1893.)

SHERIFF'S BOND—ACTION ON—PLEADING—UNLAWFUL DETAINER—STAY BOND—SHERIFF'S FEES—EVIDENCE.

1. A complaint alleged that defendant M., as principal, and the other defendants as sureties, executed the official bond of defendant M. as sheriff, by which defendants became bound for the faithful performance by M. of his duties as sheriff, and then proceeded to state the act of M. as sheriff for which damages were sought. Held, that the complaint stated a cause of action against the sureties.

2. In an action on a sheriff's bond for detention, after the giving of an appeal and stay bond, of property levied on under execution, a letter of the sheriff offering to return part only of the property was properly excluded.

3. Under Code Civil Proc. § 946, declaring the effect of perfecting an appeal and giving an undertaking to stay execution of the judgment to be not only "to stay all further proceedings in the court below on the judgment or order appealed from," but to also "release from levy property levied upon under execution issued upon such judgment," it is the duty of the sheriff to release all property levied on immediately on notice of the perfection of the appeal and the filing of the stay bond, without regard to the sufficiency of the sureties.

4. In order to justify a sheriff in retaining for his fees, after notice of the filing of the stay bond, property levied on, he should, on demand for the property, state the amount of his fees, and offer to return the property on payment thereof.

Department 2. Appeal from superior court, city and county of San Francisco; W. C. Van Fleet, Judge.

Action by Sam Yuen against McMann and others on the bond of McMann as sheriff. Judgment for plaintiff. Defendants appeal. Affirmed.

R. B. Mitchell, for appellants. James F. Smith and A. N. Drown, for respondent.

DE HAVEN, J. This is an action against McMann, as sheriff, and his codefendants, as sureties upon his official bond, to recover possession of certain personal property taken by him as such sheriff under a writ of possession issued upon a judgment obtained by one Lee Chuck against Quan Wo Chong in an action of unlawful detainer, and by which writ the said defendant was commanded to place the plaintiff in that action in possession of the premises described therein, and to make out of the personal property of plaintiff's assignors the amount of damages recovered by the judgment upon which the writ was issued. The plaintiff brought this action as the assignee of Quan Wo Chong & Co., and recovered judgment for the return of the property, or its value, \$5,000, and for the further sum of \$1,000 damages for its detention, and for interest and costs of suit. The defendants appeal.

1. The motion to dismiss the action as to the sureties was properly denied. They were not improperly joined with their codefendant, McMann, as defendants in the action, as claimed by them, and, if they were, the objection was waived by the failure to demur to the complaint upon this ground. The complaint was also sufficient in its statement of facts to show a cause of action against the said defendants as sureties upon the official bond of their codefendant, McMann. The complaint alleges that defendant McMann as principal and the other defendants as sureties made and delivered the official bond of the defendant McMann, as sheriff of the city and county of San Francisco, by which the defendants became jointly and severally bound for the faithful performance by the said McMann of his official duties as such sheriff, and then proceeds to state the alleged wrongful act of McMann in his official capacity for which damages are sought in this action. This is sufficient to show a liability upon the part of the defendants, as sureties upon such official bond, for by the terms of such bond they became liable to respond in damages in a sum not exceeding the amount specified therein for any wrongful act or default of their principal in his official capacity. Pol. Code, §§ 960, 961; Van Pelt v. Littler, 14 Cal. 194. The case of Ghiradelli v. Bourland, 32 Cal. 585, cited by defendants, is not opposed to our conclusion upon this point. The complaint in that case did not directly aver that the defendants sued therein as sureties signed or joined in the execution of any official bond, nor did it show the terms of such bond, and it was not distinctly alleged that the defendant, sued therein as sheriff, ever executed any official bond as sheriff. The distinction between that case and the present is, we think, quite obvious.

2. The letter of defendant McMann, dated December 31, 1888, was properly excluded, as it did not contain an offer to restore to plaintiffs all the personal property sued for in the action, and the same may be said of the subsequent letter of January 4, 1889, also excluded. In addition to this, it seems that the plaintiff did, upon January 5, 1889, accept from defendant McMann the property offered to be returned in this last letter and at the time named therein, so that, in any view, its exclusion could not possibly have injured the defendants.

3. The evidence on the part of plaintiff tended to show, among other matters, that on December 22, 1888, his assignors appealed from the judgment against them in the action for unlawful detainer before referred to, and, in addition to the usual bond on appeal, filed an undertaking in an amount fixed by the court in which the judgment was rendered sufficient to stay the execution thereof in all its parts, and the defendant McMann was on that day served with notice of such appeal, and of the filing of the undertaking to stay the execution of the judgment. The defendant McMann had already made a levy upon certain personal property of the defendants in that action, and was engaged in placing the plaintiff therein in possession of the premises recovered at the time he received this notice. The evidence further tended to show that at the time of giving to defendant McMann notice of the filing of the bond on appeal, and of the undertaking to stay the execution of the judgment appealed from, the assignors of plaintiff demanded that he should release from levy the personal property taken upon the execution, and he refused to do so, giving as a reason that they were not entitled to such release until the sureties upon the undertaking staying execution of the judgment had justified. At this time, however, no exception had been taken to such sureties by the plaintiff in that action. In this state of the evidence the defendant requested the court to instruct the jury as follows: "It was not the duty of the defendant McMann to deliver the personal property so levied upon, even in the event that his fees had been paid him, upon the mere filing of the stay bond on appeal to the supreme court. It was his duty to hold the property until the sufficiency of the sureties on that appeal bond had been approved by the court, or all questions as to their sufficiency had been waived by stipulation, or in some other proper manner, between the parties to the suit." The court refused to give this instruction, but, on the contrary, instructed the jury as follows: "I instruct you that the sufficiency or insufficiency of the sureties on the bond on appeal from the judgment rendered * * * in no way affected the question of the perfection of the appeal so far as these defendants are concerned, and that upon the

filing and service of the notice of appeal from said judgment, and the filing of the bond on appeal and stay bond on appeal from said judgment, the appeal thereupon became perfected, notwithstanding any question as to the sufficiency or insufficiency of the sureties, and it was the duty of the defendant William McMann to release all property from levy under the writ of possession issued upon said judgment, immediately upon notice to him of the perfection of said appeal." The defendants now claim that the court erred in refusing to give the instruction requested by them, and in giving the foregoing instruction; and it is argued in support of this proposition that when a levy has been made under an execution the only effect of filing an undertaking to stay the execution of the judgment is to stay the sale of the property, but that the officer executing the writ may retain possession of such property until the sureties on the undertaking have justified, or their justification has been waived, or the time within which to except to their sufficiency has expired. But the language of section 946 of the Code of Civil Procedure cannot be construed so as to sustain this position of defendants. By that section the declared effect of perfecting an appeal and giving an undertaking to stay the execution of the judgment appealed from is not only "to stay all further proceedings in the court below upon the judgment or order appealed from," but to also "release from levy property levied upon under execution issued upon such judgment." In view of this explicit language of the statute it must be held that the court below correctly instructed the jury upon this point. It was no concern of the defendant whether or not the sureties upon such undertaking, or others in their place, would be able to justify if exception should be taken to their sufficiency, and we understand that this was so substantially held by this court in the case of *Lee Chuck v. Quan Wo Chong*, 81 Cal. 222, 22 Pac. Rep. 594. In that case the court said: "Section 946 provides that, whenever an appeal is perfected, as provided in the preceding sections, proceedings shall be stayed. This must be so without reference to the sufficiency or insufficiency of the sureties. It is only necessary, under these sections, that a bond be given at the proper time, and in due form. If the sureties are insufficient pecuniarily, the opposite party has his remedy under section 948. He may, as provided in that section, except to the sureties at any time within thirty days after the filing of the undertaking, and, unless they or other sureties justify as therein provided, within thirty days after the appellant has been served with notice of such exceptions, execution of the judgment, order, or decree appealed from is no longer stayed." It is true that in that case the question before the court was wheth-

er or not the filing of such an undertaking was, before justification of the sureties thereon, sufficient to prevent the execution of that part of the judgment directing that the plaintiff therein be put in possession of certain premises awarded to him by the judgment. But there is no difference in principle between that case and this, the question in both being whether the undertaking to stay execution shall have attached to it the effect declared by the statute before the sureties thereon have justified; and if, prior to such justification, it is sufficient to prevent a plaintiff from proceeding to levy upon property for the purpose of securing satisfaction of his judgment, or from proceeding to obtain possession of property awarded to him by such judgment, no reason is perceived why it should not be equally effective to require a release of property actually levied upon under execution issued upon such judgment. Its operation in the one case would work no greater hardship upon a judgment creditor than in the other.

4. We do not think the court erred in any of its rulings in the admission or exclusion of evidence, or in modifying the first instruction requested by defendants so as to read: "The defendant McMann, at the time of the levy of the writ of possession in *Lee Chuck v. Quan Wo Chong*, was the sheriff of the city and county of San Francisco. He levied upon a portion of the personal property contained in the premises described in the amended complaint, and caused it to be conveyed to a warehouse. He was entitled to hold such property so levied upon as security for his fees and necessary disbursements in levying upon said property, excepting keepers' fees, in removing it to a warehouse, in storing it there, and insuring it, and taking proper care of it. He could not be required to surrender said property until his fees and expenses, as aforesaid, were paid, if the same were demanded by him." The defendants object to that part of the instruction as given which denied to the sheriff the right to hold the property until the payment of keepers' fees, and the last sentence, which, in effect, told the jury that the sheriff could not justify his retention of the property, because of the nonpayment of his fees and disbursements, unless he had demanded the payment of such fees and disbursements. The law was correctly declared in the instruction as given, and was particularly applicable to the facts of the case as presented by the evidence. Whatever expense was incurred for keepers' fees accrued while the defendant McMann was unlawfully retaining it in his possession, if the property in respect to which such expense was incurred was ever levied upon; and it is clear that, until notified of the amount of the fees for which the sheriff claimed the right to retain the property, no tender thereof could have been made. It was the duty

of the sheriff to inform the plaintiff of the amount of his fees, and, when demand for the property was made, to offer to return the same upon payment of such fees. Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

99 Cal. 523

ORD et al. v. ORD et al. (No. 14,369.)

(Supreme Court of California. Sept. 11, 1893.)

DEED—CONDITIONAL DELIVERY—EVIDENCE—DECLARATIONS OF GRANTOR.

1. For the purpose of defeating a deed, statements of the grantor, made some time after its execution, that he delivered it only conditionally, are not admissible, as a grantor cannot thus disparage his deed by declarations in his own interest.

2. Such declarations are also inadmissible as hearsay.

Department 2. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Ejectment by George W. M. Ord and others against William M. Ord and others. Judgment for defendants. Plaintiffs appeal. Reversed.

S. W. Holladay and E. B. Holladay, for appellants. Z. N. Goldsby, for respondents.

FITZGERALD, J. This is an action of ejectment. Defendants had judgment, and plaintiffs appeal therefrom, and from the order denying their motion for a new trial. It appears that in April, 1873, William Marcellus Ord, the common grantor of plaintiffs, and the defendant Anna E. Ord, conveyed by deed of gift to plaintiffs, who are the minor children of his brother, John S. Ord, certain property in Santa Cruz county, commonly known as the "Ord Rancho," and which contained about 160 acres, including the property in controversy. By the same deed he granted and confirmed to his sister Mrs. Holladay five acres of the above tract, but they are not involved in this action. This deed was delivered to Mrs. Holladay by her husband, S. W. Holladay, Esq., to whom it had been previously mailed by the grantor from Boston, Mass., on the 21st day of April, 1873, but it was not recorded until September 2, 1878. On April 6, 1877, William Marcellus Ord, theretofore a bachelor, intermarried with the defendant Anna E. Ord. On June 10, 1878, Mrs. Holladay informed Mrs. Ord of the deed executed by her husband to the minor children of his brother John. On June 17, 1878, William Marcellus Ord executed to his wife, the said Anna E. Ord, in consideration of love and affection and one dollar, a deed of the demanded premises, and on the same day it was duly recorded, at her request. At the time of the commencement of this action, March 16, 1880, Anna E. Ord was in possession of the property under the deed from her husband, who, it appears, died April 26, 1882, nearly seven

years before this cause came on for trial. Upon these facts, it became a material question on the trial as to whether the grantor, by the delivery of the deed to Mrs. Holladay, intended that upon such delivery it should have the effect of passing the title absolutely to the plaintiffs, or whether it was merely a conditional delivery, with the right reserved in the grantor to control or recall it. Upon the trial, Anna E. Ord was called as a witness for defendants, and upon this point testified "that she was present at the Pacific Ocean House at the time testified to by Mrs. Holladay, when the latter told her that William M. Ord did not own the land; that she did not ask Mrs. Holladay any questions upon receiving such information from her, because she thought it did not concern her; that on the same evening, or the next day, she told her husband, William M. Ord, that his sister had said that he did not own the land. Witness was asked by her counsel what William M. Ord said to her upon receiving such information, to which question plaintiffs objected, as being incompetent, irrelevant, immaterial, and hearsay. The objection was overruled, and plaintiffs duly excepted, and witness answered, under plaintiffs' said objection, that, upon hearing it, said William M. Ord was angry, and explained that he had made the deed to the children when he was going away to Boston, and delivered it to his sister provisionally, and left it in his trunk at Holladay's house, and that on his return he had demanded it of her, (Mrs. Holladay,) but she would not give it back to him." This witness further testified that the deceased, upon a subsequent occasion, substantially repeated this statement. The object of this testimony was to show that the deed of April 18, 1873, did not operate as a conveyance of the property to plaintiffs, for the reason that it was never delivered to Mrs. Holladay, or to any one else, with any such intention. This testimony was clearly incompetent, for this or any other purpose—First, because it was hearsay; and, secondly, because a grantor will not be permitted to disparage his deed by declarations made or acts done by him, in his own interest, subsequent to its execution; and such was held to be the rule in *Bury v. Young*, 33 Pac. Rep. 339, (recently decided by this court,) in which it was said that "a grantor cannot be allowed to undermine his deed either by words or acts. His declarations and acts made and done, in his own interest, months after the deed was delivered, are not admissible as indicating his intentions in delivering the deed." But subsequent declarations and acts by the grantor for the purpose of sustaining his deed, as was the case in *Dean v. Parker*, 88 Cal. 283, 26 Pac. Rep. 91, are admissible to show his intention in delivering it. From these views it follows that the court erred in admitting this testimony against plaintiffs' objection, for which the judgment and order must be

reversed; and, as the testimony on another trial may not be the same, it is unnecessary to consider the other questions discussed by counsel. Let the judgment and order be reversed.

McFARLAND, J. I concur.

DE HAVEN, J. I concur in the judgment, and in the foregoing opinion of Mr. Justice FITZGERALD. The language of the opinion in *Dean v. Parker*, 88 Cal. 283, 26 Pac. Rep. 91, is broad enough to justify the admission of the evidence held to be inadmissible in this case. But in *Dean v. Parker* the declarations considered were those of the grantor, sustaining his deed, and the attention of the court was not directly called to the admissibility of subsequent declarations of a grantor, denying the fact of the previous delivery of a deed, and the general and somewhat inaccurate language of that opinion, to the effect that, upon a question relating to the delivery of a deed, any declaration made by a grantor at the time of the alleged delivery, or subsequent thereto, would be relevant to the inquiry, must be considered with reference to the particular facts then before the court.

(99 Cal. 462)

SMITH v. OCCIDENTAL & ORIENTAL STEAMSHIP CO. (No. 15,084.)

(Supreme Court of California. Sept. 1, 1893.)

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—PERSONAL INJURIES—RELEASE—WHEN BINDING—DANGEROUS PREMISES—INSTRUCTIONS.

1. In an action against a steamship company for personal injuries sustained by falling through the hatchway of defendant's vessel into the hold, it appeared that defendant negligently omitted to light the passageway; that plaintiff and other employees passed down a stairway to the hatchway; and that one man preceded plaintiff. The latter testified that he could not see the hatchway; that he tried to stand there, but the men pressed him from behind, and he fell in; and that there was room for the men to stand if it had been lighted. His conduct while on the vessel, and the extent of his knowledge of the danger by reason of his previous experience, did not clearly appear. *Held*, that the question of plaintiff's contributory negligence was for the jury.

2. Where the facts constituting the defense of contributory negligence are so disconnected from the facts constituting defendant's negligence that it cannot be determined as a matter of law that the one was the cause or sequence of the other, their relation or dependence should be submitted to the jury.

3. Evidence that plaintiff had previously worked on the vessel, and had opportunity to learn the position of the hatchway, and that it was open on such occasions, was not conclusive that he had such knowledge.

4. The court properly refused to charge that the verdict must be for defendant if plaintiff knew, or could by ordinary care have learned, that it was defendant's custom to sometimes have the hatchway open and sometimes closed, when he would have occasion to descend the same in the course of his employment.

5. Defendant pleaded a release by plaintiff, but it did not appear that anything was ever said to him concerning a release by any one on

behalf of defendant, and he testified he could not and did not read it when he signed it. An employee of defendant read it to plaintiff's wife, who could not read it, and she testified that from what he read, and from his explanation of it, she was led to believe it was simply a receipt, and that on her request plaintiff signed it. Such employee was a witness, but did not testify about reading the paper to plaintiff's wife. *Held*, that the court properly charged that plaintiff was not bound by the release unless he had knowledge of its contents or purport, or had the means of such knowledge.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Trout, Judge.

Action by Smith against the Occidental & Oriental Steamship Company for personal injuries caused by defendant's negligence while he was in its employ. From a judgment entered on the verdict of a jury in favor of plaintiff, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

Foshay Walker and Fred B. Lake, for appellant. J. D. Sullivan and Herbert Choyinski, for respondent.

HARRISON, J. The plaintiff, while employed as a stevedore upon the defendant's steamship *Oceanic*, on the 17th of November, 1889, fell through an open hatchway, breaking his leg, and sustaining other serious injuries, and brought this action to recover damages therefor, alleging that they were caused by the negligence of the defendant. The jury rendered a verdict in his favor for \$3,000, and from the judgment thereon, and an order denying a new trial, the defendant has appealed.

On the morning of that day the plaintiff, with several others, was directed by the foreman of the stevedoring work of the defendant to go down to the hold of the vessel for the purpose of stowing away a cargo of coal that was to be loaded from another vessel alongside. The hatchway on the main deck was closed, and the men were compelled to go forward and down to the steerage deck, and then along this deck about 25 feet to a stairway leading to the orlop deck, and, after going down these steps, go along the orlop deck to the hatchway, where there was a ladder leading to the hold. The foot of the steps to the orlop deck was about 10 feet from the coamings of the hatchway, and there were two or three stanchions between these steps and the hatchway. When the hatchway of the main deck was open, the light from above made it light on this deck, so that the opening and the ladder leading to the hold could be clearly seen, but on this morning that hatchway was closed, so that it was quite dark on the orlop deck. It was also customary, when the men were stowing coal in the hold, to have a lighted lamp hung near the hatchway, and it was the duty of the foreman of the gang to light this lamp upon reaching the place; but on this morn-

ing others went ahead of the foreman, and the lamp was not lighted until after the accident. The men went down the stairway to the orlop deck in single file, and, as each reached the foot of the steps, he passed along to make room for the others to descend. One man had gone into the hold, and another had commenced to light the lamp, but before it was lighted the plaintiff fell into the hold, a distance of about 20 feet, sustaining the injuries aforesaid. The testimony concerning the way in which the accident occurred was given by the plaintiff on cross-examination as follows: "Question. How did you come to fall down that hatchway, Mr. Smith? Answer. Because I was getting down on the orlop deck, and there were four or five of us; I don't know how many; and, of course, we had to keep getting that way, as they had to come down the ladder. The ladder was away, and the standee, (something of a bit of a ladder that they keep the freight from falling into the hold,) we had to get down on that, and, of course, I had to get further away from this man, and, of course, as I came here, they all were all here coming behind me, and down I go 20 feet into the hold. Q. Was there not room enough between the stairway leading to the orlop deck and where this hatchway was for the men to stand? A. They could if they could have seen it. I was trying to stand there, and I fell down. I could not see where it was. It was that dark you could not see your finger, and could not see nothing. If there had been a light I could have had room to stand." At the close of the testimony the defendant requested the court to instruct the jury to find a verdict in its favor, and in support of this request urges that it appeared from the evidence that the plaintiff was guilty of such contributory negligence as to prevent his recovery.

1. When the facts are undisputed and clearly settled, contributory negligence is to be determined by the court as a matter of law, just as any other question of law depending upon a given state of facts, or as the judgment which is to be rendered upon a special verdict; and if at the close of the testimony in a case the facts shown by the evidence and the inferences therefrom which reasonable men would agree upon are clearly defined, it is the duty of the court, upon proper application therefor, if it shall be of the opinion that these facts establish contributory negligence on the part of the plaintiff, or do not, as a matter of law, constitute negligence on the part of the defendant, to grant a nonsuit, or direct a verdict in favor of the defendant, but "when the evidence is conflicting, or when reasonable men might differ as to the inferences which ought to be drawn from the undisputed evidence, the question of negligence or contributory negligence is not one of law, but of fact." *Davies v. Steamship Co.*, 89

Cal. 286, 26 Pac. Rep. 827. Especially is this rule applicable when the negligence of the plaintiff depends upon conflicting evidence, or the credibility of witnesses, or a comparison of his conduct with that which may be assumed to be the conduct of an ordinary man, or results from a disregard of his knowledge of the surroundings, and that knowledge depends upon his opportunity to acquire it from experience. "Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon the credibility of witnesses or inference from facts and circumstances about which honest and impartial men might differ, such a case should be submitted to the jury." *Swoboda v. Ward*, 40 Mich. 424. The proximity of one fact to another in a case, and their relation or sequence to each other, are essentially within the province of a jury to determine; and whenever the injury complained of is the result of a series of facts that are interlinked with or dependent upon each other, the certainty that the final act is the result of a prior one diminishes in proportion to the remoteness of the first act from the result, and the jury must determine whether the several acts constitute such a successive series, or are linked together so as to form one continuous whole, or whether they are so independent that the result cannot be said to be the natural consequence of the first. In Massachusetts and in New York, and in several other states, it is held that the plaintiff must show as a part of his right of action against the defendant that he himself exercised ordinary care, and that his own negligence did not cause or contribute to the injury sustained, and the reported opinions of courts in those states upon this proposition are apt to be misleading unless attention is given to the distinction between the rule there observed and that which is established in this state. In this state, in accordance with the weight of authority, (*Shear. & R. Neg.* §§ 107, 108,) as well as with the principles upon which the rule rests, it is established that it is sufficient for a plaintiff to show, in the first instance, that the injury resulted from the negligence of the defendant. *Nehrbas v. Railroad Co.*, 62 Cal. 320; *MacDougall v. Railroad Co.*, 63 Cal. 431; *Magee v. Railroad Co.*, 78 Cal. 430, 21 Pac. Rep. 114. Whenever the burden of proof of any issue rests upon a party, the failure to make such proof necessitates a decision against him; and in those states in which it is held necessary for the plaintiff to show that he was himself without negligence and in the exercise of ordinary care, a nonsuit would be granted more frequently than where a different rule prevails. There may be such contributory negligence on the part of the plaintiff as will defeat his right to recover, and it may happen that in presenting his own case he will show such facts as will establish that his own negligence so contrib-

uted to his injury as to prevent a recovery, and in such case the court will be authorized to grant a nonsuit. But where the contributory negligence of the plaintiff is an affirmative defense to be established by the defendant, it will not often happen that the facts presented by the plaintiff in the development of his case will be such as to justify the court in withdrawing the case from the jury. The contributory negligence of the plaintiff that will defeat his right to recover must be shown to be the proximate cause of the injury; and if the facts constituting this defense are so disconnected with the facts constituting the negligence of the defendant that they do not appear until after the presentation of the defendant's case, it will rarely occur that it can be determined as a matter of law that the one was the cause or sequence of the other, and, if not, their relation or dependence should be submitted to a jury. In the present case the conduct of the plaintiff while on the vessel was not distinctly before the jury, and the extent of his knowledge of the danger by reason of his previous experience was not clearly shown, and it was properly left to the jury to determine, not only the facts established by the evidence, but also the inferences to be drawn from those facts, and whether he had been negligent or not.

2. At the request of the defendant the court instructed the jury that if they should find from the evidence that the plaintiff was familiar with the location and position of the hatchway, or knew, or was informed, or by the exercise of ordinary care could have learned, that the hatchway through which he fell was open, a sufficient time before the accident to have avoided the same by the exercise of ordinary care, or if, after descending the ladder to the orlop deck, he did not exercise ordinary care in approaching the hatchway, they should render a verdict in favor of the defendant. The verdict in favor of the plaintiff establishes that the jury believed that neither of these propositions was sustained by the evidence, and, as the evidence on each of the propositions was conflicting, the determination of the jury upon its weight as well as its value is conclusive. The plaintiff himself testified that he was not familiar with the size or location of the hatchway; that, although he had been up and down this hatchway before, it had always been by a continuous trip from the hatchway on the main deck; that he had never before been down in the way he went at this time; that when the hatchway on the main deck was open it threw light upon the hatchway through which he fell, but on this morning the hatchways above the orlop deck were closed, and it was so dark that nothing could be seen there; that when a hatchway like this is open there are usually lights near it, or it is protected with rods or chains as a guard, but that upon this morning there were no guards to this hatch-

way, and no light upon this deck. There was testimony in behalf of the defendant to the effect that when the men were directed to go on board the vessel they were told by the foreman that the hatchway was open, and to wait until the lights on that deck should be lighted before going down, but the plaintiff testified that he did not hear these instructions, and in this he was corroborated by others who were with him, and who testified that no such instructions were given. The testimony that the plaintiff had previously worked upon the steamer, and had had an opportunity to learn the position of the hatchway, and that it was open on such occasions, was not conclusive of such knowledge, but was to be considered by the jury in connection with the other evidence in the case. *Ingerman v. Moore*, 90 Cal. 424, 27 Pac. Rep. 306. Whether, under the circumstances, after he had descended to the orlop deck, and found it was so dark that he could not see, he was in the exercise of ordinary care in going from the foot of the ladder to the hatchway, considering that others were coming down from the steerage deck, and pressing him behind, and that those in front were advancing, one having gone to the hold in safety, was also to be considered by the jury in determining the question of his negligence, but was not itself conclusive thereof.

3. One of the defenses pleaded by the defendant was a release executed to it by the plaintiff, in consideration of its caring for him at the hospital until he should have sufficiently recovered to resume labor. Plaintiff, in the affidavit which he filed in reply to this averment, and also in the answer filed by him, admitted the signing of this release, but alleged that by reason of the pain and suffering consequent upon the injuries he had received he was incapacitated from attending to business, and ignorant of the contents of said instrument, and signed the same without knowing or understanding what he was doing, and that it was not his free and voluntary act. The defendant requested the court to instruct the jury that, if they should find that the plaintiff did freely and voluntarily sign and deliver the release to the defendant, and that the defendant had complied with the conditions therein expressed, their verdict should be for the defendant. The court modified the instruction requested by adding thereto that they should also find that the plaintiff had knowledge of the contents of said paper, or its purport, or had the means of such knowledge, and gave it thus modified. To the refusal to give it as requested, and to the giving it as modified, the defendant excepted. We are of the opinion, however, that under the testimony given at the trial, the court was justified in making the modification. The general rule is that, when a person with the capacity of reading and understanding an instrument signs it, he is,

in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding; but it is also a general rule that the assent of a party to a contract is necessary in order that it be binding upon him, and that, if the circumstances of a transaction are such that he is not estopped from setting up his want of assent, he can be relieved from the effect of his signature if it can be made to appear that he did not in reality assent to it. *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Whitney v. Snyder*, 2 Lans. 477; *Selden v. Myers*, 20 How. 506; *Trambly v. Ricard*, 130 Mass. 259; *Freedley v. French*, 154 Mass. 339, 28 N. E. Rep. 272. In the present instance the plaintiff's knowledge of the instrument which he signed was made one of the issues before the jury without any objection at the trial, and it was therefore proper for the court to submit that issue to the jury. It does not appear that anything was ever said to the plaintiff concerning a release of his claim by any one on behalf of the defendant, and the plaintiff testified that he could not read the instrument, and that he did not read it when he signed it. It had been prepared by one of the employes of the defendant for the purpose of procuring a release, and was given to the plaintiff's wife to procure its signature by her husband. She could not read it, nor could the person who gave it to her; but she testified that at her request it was read to her by Green, the defendant's timekeeper, and that from what he read, and his explanation of it to her, she was led to believe that it was simply a receipt, and upon her request her husband signed the paper without reading it. Although Green was a witness in the case, he did not testify about his reading the paper to Mrs. Smith, and, in the absence of any contradictory testimony, it must be assumed that the understanding which Mrs. Smith received from the paper was that which was given to her by his reading. The representations by Green to the plaintiff's wife must be considered as a representation by the defendant to the plaintiff, and the jury were authorized to find that the plaintiff did not understand the contents or purport of the instrument.

4. The request of the defendant that the court instruct the jury that their verdict must be in favor of the defendant, if they should find that the plaintiff knew, or could by ordinary care have learned, that it was the custom of the defendant sometimes to have the hatchway open and sometimes closed, when the plaintiff would have occasion to descend the same in the course of his employment, was properly refused. These facts, if they existed, were only proper to be considered by the jury in determining whether the plaintiff was guilty of contributory negligence, but were not of themselves determinative of that issue.

5. The request of the defendant that special issues be submitted to the jury was addressed to the discretion of the court, and the refusal of the court to grant the request was not the subject of an exception. *American Co. v. Bradford*, 27 Cal. 360. The judgment and order are affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

99 Cal. 443

FRESHOUR, Road Overseer, v. HIHN.
(No. 14,941.)

(Supreme Court of California. Aug. 31, 1893.)

HIGHWAYS—BOUNDARIES—OBSTRUCTION.

1. A pleading described a highway as 40 feet wide, commencing at a certain point named, and following the course and distance of a given line "to the line of average high tide to the bay of M." *Held* sufficient, the line described being presumed to be the center line, and not a side line, of the road, without direct averment to that effect.

2. Under Act March 31, 1876, § 52, declaring that roads used as public roads for the five years preceding the passage of the act are highways, the public user is the only thing to be considered, without regard to the owner's intention in permitting it.

3. Pol. Code, §§ 2731, 2732, 2734, provide that, if any highway "duly laid out and erected" is encroached on, the overseer may require the encroachment to be removed, by notice to the owner, specifying "the breadth of the highway," and the place and extent of the encroachment, and, if this is disregarded, he must sue to abate the nuisance, and, if successful, may recover a penalty of \$10 a day therefor. *Held*, that said penalty could not be recovered for encroachment on a highway by user, never regularly laid out and recorded.

4. An ordinance of a board of supervisors directing their clerk to record a road as a highway must specify the width of the highway, and not merely its direction by the course and distance of a given line.

5. When the case was set for trial, plaintiff waived a jury, and defendant stated that, while he did not demand a jury, he did not expressly waive it. On the day set for trial a jury was in attendance, and the parties then announced that they had agreed to try the case without a jury. Plaintiff did not pay or become liable for any jury fees. *Held*, that he could not recover the jurors' attendance fees as costs.

Department 2. Appeal from superior court, Santa Cruz county; F. J. McCann, Judge.

Action by J. T. Freshour, road overseer of the Soquel road district, against F. A. Hihn, to abate a nuisance and recover a penalty therefor. Judgment for plaintiff. Defendant appeals. Reversed in part.

Charles B. Younger and Edward R. Taylor, for appellant. W. T. Jeter, Julius Lee, and Carl E. Lindsay, for respondent.

DE HAVEN, J. The plaintiff is the road overseer of Soquel road district, in Santa Cruz county, and this action was commenced by him to have an obstruction placed by defendant in a public highway in that district abated as a nuisance, and also to recover from defendant the sum of \$10 for

every day the obstruction remained after he had received notice to remove it. The judgment of the superior court was in favor of plaintiff, and was to the effect that the obstruction complained of be abated as a nuisance, and that plaintiff recover from defendant, in addition to the costs of the action, the sum of \$870, the penalty demanded in the complaint, because of defendant's failure to remove the obstruction. The defendant appeals.

1. The objection is made that the complaint is fatally defective in its description of the highway defendant is charged to have obstructed. The complaint alleges that the highway referred to is 40 feet wide, and that it commences at a certain point named, thence following the course and distance of a given line "to the line of average high tide to the bay of Monterey;" but it is not directly averred whether the land thus described is the center or one of the side lines of such road. We think this general description sufficient. When in describing the location of a road the width is given, and but one of its lines particularly described, as in the complaint here, the line so described by its course and distance will be deemed to refer to the center line of the road, in the absence of anything in other parts of the description tending to indicate a contrary intention.

2. The court below found "that the road mentioned and described in the complaint has been traveled and used as such by the public generally, as a route of travel for the ordinary uses and purposes of a public road or highway, for a period of more than twenty years continuously immediately preceding the 1st of May, 1890." This finding was within the issues made by the pleadings, and is a sufficient finding that the road in question was a public highway, under the provisions of section 52 of the act approved March 31, 1876, entitled "An act to establish and maintain public and private roads in the county of Santa Cruz," and which declares that "roads used as public roads, for a period of five years unobstructed, next preceding the passage of this act, are roads or highways within the meaning of this act." Under this statute, which defendant concedes is applicable to this case, the use of the road by the public for the period named, without any reference to the question whether the defendant, in permitting such use, intended thereby to dedicate the land used as a public highway, is the controlling fact upon which the right of the public to continue such use is made to rest. *Bolger v. Foss*, 65 Cal. 250, 3 Pac. Rep. 871; *McRose v. Bottyer*, 81 Cal. 125, 22 Pac. Rep. 393. Upon the question of fact thus found by the court below there is a substantial conflict in the evidence, and, under the rule which has been often declared here, the finding will not be disturbed by this court.

3. The most important question in the case

relates to the right of the plaintiff to recover the penalty of \$10 for each day the obstruction continued after defendant was notified to remove it. This right, if it exists at all, is given by sections 2731, 2732, and 2734 of the Political Code. Section 2731 provides: "If any highway duly laid out or erected is encroached upon by fences, buildings or otherwise, the road overseer of the district may orally, or in writing, require the encroachment to be removed from the highway." Section 2732 provides for the giving of notice to the person causing or owning the encroachment, which notice must specify "the breadth of the highway, the place and extent of the encroachment, and requiring him to remove the same within ten days." And by section 2734 it is provided that "if the encroachment is denied and the owner, occupant, or person controlling the matter or thing charged with being an encroachment refuses either to remove or permit the removal thereof, the road overseer must commence in the proper court an action to abate the same as a nuisance; and if he recovers judgment he may, in addition to having the same abated, recover ten dollars for every day such nuisance remained after notice, and also his costs in said action." The encroachment referred to in this last section is one upon such a highway as is described in the preceding section 2731, viz. a highway "duly laid out or erected." The words "duly laid out or erected," as there used, have reference to the formal and official action which the law enjoins upon those charged with the duty of establishing public highways; and a highway "duly laid out or erected," within the meaning of section 2731 of the Political Code, is one which has been established by the proper officers in the manner prescribed by law. By subdivision 2 of section 2643 of the Political Code it is made the duty of the boards of supervisors of the several counties to "cause to be recorded as highways such roads as have become such by use or abandonment to the public" within their respective counties; and, in our opinion, until so recorded, such a highway cannot be said to have been "duly laid out or erected," so as to authorize a recovery of the statutory penalty given by section 2734 of the Political Code. The only remedy which the public has for an obstruction in a highway which exists only by user is an action to remove the obstruction as a nuisance. Substantially the same conclusion was reached by the court of appeals of the state of New York in construing certain sections of the Revised Statutes of that state relating to penalties for the encroachment upon highways, and containing language very similar to that which is used in the above-mentioned sections of the Political Code. See *Doughty v. Brill*, *42 N. Y. 612; *Talmage v. Hunting*, 29 N. Y. 447. And it is not difficult to understand why the legislature deemed it proper to make this distinc-

tion in regard to the remedies allowed to the public for an encroachment between the case of an encroachment upon a highway established with deliberation and care by officers appointed for that purpose, and one upon a road not formally accepted and recorded, and existing only by reason of dedication or abandonment to the public. In the latter case the exact location of the highway, as well as the fact of its existence, is often a matter of doubt and honest dispute between the citizens and the public, and, until its location and existence have been definitely ascertained and determined in some appropriate mode, it would be unjust to subject the citizen to the extreme penalty given by section 2734 of the Political Code, and which is intended only for the willful encroachment upon a highway, the location and existence of which are matters of public record, and of which all persons must take notice. That it was not the intention to impose this penalty for the obstruction of a highway which is only such by user or abandonment to the public, but has not been recorded as a highway, is also apparent from section 2732 of the Political Code, which requires a notice "specifying the breadth of the highway" to be given to the person charged with the obstruction, before bringing an action to recover such penalty. The giving of the prescribed notice is essential to the right to maintain the action; but, unless the breadth of the highway has been established by some order or ordinance of the board of supervisors, it would not be possible for a road overseer to give the required notice "specifying the breadth of the highway." In the case of a highway by user or dedication, its width is limited by the extent of the actual user or dedication; and in recording such a road the board of supervisors cannot enlarge the actual boundaries of the road so used or dedicated. The board is simply authorized to make a record of the location of the road as it actually exists, for the purpose of perpetuating the evidence of the public right. As said by Bronson, J., in *People v. Judges of Cortland Co.*, 24 Wend. 491: "Both the extent and the fact of the dedication depend on the user, and the public must take secundum formam doni." It follows from what has been said that the complaint here does not state facts sufficient to entitle plaintiff to the penalty recovered by the judgment in this action.

4. The court erred in admitting in evidence the ordinance of the board of supervisors directing the clerk of the board to record as a public highway "that certain road in Soquel road district * * * leading from the village of Soquel to the beach near the wharf of the steamship company." Assuming that this ordinance was meant to refer to the road in controversy here, it is void, because it does not state the width of the road, and describes it only by the course and distance of a given line. In addition to

this, the complaint did not allege the encroachment to be upon a highway duly laid out or established by law.

5. In the memorandum of costs filed by plaintiff there was an item or charge of \$49.70 for jury fees, and the defendant made a motion to have the same stricken out and disallowed. The motion was made before judgment, and was denied, and the order may therefore be reviewed on appeal from the judgment. *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406, 7 Pac. Rep. 810. It appears that when the case was set for trial the plaintiff waived a trial by jury, and the defendant stated that, while he did not demand a jury, he would not expressly waive the same. Upon the day fixed for the trial a jury was in attendance, and the bill of exceptions states that "the parties then announced that they had agreed to try the case without a jury; thereupon the court discharged the panel of jurors, and the case was tried by the court without a jury;" and that the plaintiff did not pay any jury fees, nor incur any liability therefor. Upon these facts the court erred in denying the motion of defendant. The plaintiff neither paid nor incurred any expense because of the attendance of the jury, and we are not aware of any law which entitles him to recover from defendant the amount of the attendance fees of such jurors.

Judgment and order reversed, with directions to the superior court to enter a judgment in favor of plaintiff and against defendant, to the effect that the encroachment described in the complaint be abated as a nuisance, and that plaintiff have and recover from defendant, F. A. Hihn, his costs in the action, amounting to the sum of \$167.

We concur: FITZGERALD, J.; McFARLAND, J.

4 Cal. Unrep. 188

MARSHALL v. KEEFE. (No. 15,124.)
(Supreme Court of California. Aug. 31, 1893.)
CONTRACT OF SALE — MERCHANTABLE QUALITY OF GOODS.

The fact that part of a lot of potatoes contracted for as "merchantable" have "sprouted a little" does not necessarily show that they are unmerchantable, but, there being evidence that the lot in question were salable for table use or shipment, the question whether the purchaser was justified in refusing to receive them is for the jury.

Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by P. S. Marshall against D. Keefe. From a judgment for plaintiff, defendant appeals. Affirmed.

E. F. Preston, for appellant. Wm. H. Chapman, for respondent.

PER CURIAM. This action was brought by the seller of a lot of potatoes to recover

damages from the purchaser, who refused to receive them when tendered. A jury trial was had, plaintiff recovered judgment, and defendant appeals from the judgment, and from an order denying a new trial. The contract called for Early Rose merchantable potatoes. It is claimed that there was no evidence at all tending to show that the goods tendered were merchantable. In this, we think, after carefully examining the record, the appellant is in error. There is much testimony to that effect. Appellant seems to conclude, because plaintiff's witnesses testified that some of the potatoes had sprouted a little, that it would necessarily follow that they were not merchantable. But this proposition cannot be sustained. That might depend upon how badly they had sprouted, and perhaps upon the time of the year in which they were to be delivered. Some witnesses testified that the potatoes tendered were salable for table use, or, as the witnesses preferred to say, for shipment. It became a question for the jury, and was submitted to them under instructions which are not complained of here. The judgment and order are affirmed.

4 Cal. Unrep. 190

MOORE v. MOORE et al. (No. 14,337.)

(Supreme Court of California. Aug. 31, 1893.)

EJECTMENT—POSSESSION AND OUSTER BY DEFENDANT—EVIDENCE—PRACTICE ON APPEAL—TENANTS IN COMMON.

1. In an action in the nature of ejectment, a specification of error that "the evidence showed that defendant M. was not in possession of said premises, or of any part thereof, at the time of the commencement of this action," is insufficient.

2. In an action in the nature of ejectment, where the evidence tends to prove that defendants were in possession of the premises when the action was commenced, an answer denying plaintiff's title and right of possession is sufficient evidence of ouster.

3. A tenant in common cannot, as against his cotenant, give a license to a third person to enter on the land held in common.

4. An exception reading, "To said oral instructions, and each and every part thereof, and to the giving thereof by the court, the defendant then and there duly excepted," is too general.

5. In ejectment by a widow against her husband's administrator for premises which had been set apart by order of court as a homestead to plaintiff and her minor children, absolutely, it appeared that, from the time of defendant's appointment as administrator till the homestead was set apart, defendant collected the rents of the premises, and paid taxes; that two months thereafter plaintiff demanded possession of him, which, she testified, he refused to give; that in his verified statement to the tax collector he included this homestead property; and that he leased part thereof to another. *Held*, that the evidence justified a verdict that defendant was in possession when the action was commenced.

6. Where a defendant in ejectment is in possession of any part of the premises as tenant of another, it is proper to join the latter as party defendant.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; James F. Breen, Judge.

Action by Helen M. Moore against Thomas W. Moore and Leonard T. Almstead. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Spalsbury & Burke, Joseph N. Skirm, and Warren Olney, for appellants. Charles B. Younger, for respondent.

VANCLIEF, C. Action in the nature of ejectment to recover possession of an undivided half of a parcel of land situate in the county of Santa Cruz, and containing about 35 acres, which plaintiff claims as a probate homestead. It is alleged in the complaint that the plaintiff is the owner, and entitled to the possession, of the demanded premises; that defendants are in possession, and wrongfully withhold the possession from the plaintiff; that the rents and profits of the land have been and are of the value of \$480 per year; and that the plaintiff has sustained damages in the sum of \$2,300 by reason of the detention and withholding of the possession. Prayer that plaintiff may recover the land, with rents, profits, and damages. The separate answers of the defendants each "denies that plaintiff is, or ever was, the owner, or entitled to the possession, of an undivided one-half of the real estate described in said complaint, or any part thereof," and specifically denies every other allegation of the complaint, except that it is admitted that the value of the rents and profits have been one dollar per year. The jury returned a general verdict for the plaintiff, and assessed the damages at \$847, upon which judgment was rendered in favor of the plaintiff. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

The plaintiff is the widow of William H. Moore, deceased, who left surviving him four minor children by a former marriage, and a son by his marriage with plaintiff was born after his death, and named William H. Moore. The defendant Thomas W. Moore is a brother of the deceased, and administered upon his estate. On the petition of the plaintiff, filed after the birth of her son, William H. Moore, the demanded premises were set apart from the separate estate of her deceased husband by the probate court, as a homestead for the use of the widow and three of said minor children, namely, Charles Moore and Stella Moore, children of the former marriage, and William H. Moore, the son of plaintiff. The order setting apart the homestead was made April 26, 1881, and apportions the homestead as follows: "The undivided one-half part thereof to said widow, Helen H. Moore, and the undivided one-sixth thereof to each of the said minor children of the deceased, to wit, Charles Moore, Stella Moore, and William H. Moore." The effect of this order was determined in the case, *Estate of Moore*, 96 Cal. 522, 31 Pac. Rep. 584, in which it was held that conceding the order to have

been erroneous, in that it did not limit the duration of the homestead as required by section 1468 of the Code of Civil Procedure, yet, as there had been no appeal from it within the time limited by law, it was not void, and passed absolute title to the widow and the children named, so that the homestead was not subject to distribution on the settlement of the estate. The defendant Thomas W. Moore was a party to that appeal. It appears that Charles Moore was 14 years of age at the time the petition for homestead was filed, (August 2, 1877,) and consequently became of age some time in 1884. The homestead has upon it a large and a small dwelling house, a barn and other outhouses, and an orchard, besides a field of about 20 acres.

1. It is contended for appellants that the evidence is insufficient to justify the verdict that defendants were in possession of the demanded premises at the time of the commencement of the action, and also insufficient to justify a verdict for any damage whatever. The only specifications of deficiency of evidence as to the possession of the defendants are the following: "The evidence showed that the defendant Thomas W. Moore was not in possession of said premises, or of any part thereof, at the time of the commencement of this action," and a similar specification as to the defendant Almstead. This is not a specification of any particular in which the evidence is insufficient to justify the verdict, nor is it substantially equivalent to such specification. In the absence of the specification required by section 659 of the Code of Civil Procedure, the respondent was not required to bring into the statement all the evidence applicable to the issue as to the possession of defendants, nor can it be presumed that the statement contains all such evidence unless it purports to contain all the evidence in the case, which this statement does not. Yet, while I think respondent's point that the specification is insufficient is well taken, it appears that the evidence contained in the statement is amply sufficient to justify the verdict that defendant Almstead was in possession at the time the action was commenced. The defendants, in their testimony, admitted that defendant Moore, as administrator, verbally leased to defendant Almstead the land of the estate adjoining the homestead from October 1, 1884, to October 1, 1885, and again from October 1, 1885, to October 1, 1886. It was proved and admitted by Almstead that during those two years he cultivated the 20-acre field on the homestead, and that his employes occupied the small dwelling and other outhouses; but he and his codefendant, Moore, denied that the latter leased to him any part of the homestead, although two witnesses (Hoff and Bennett) testified that during the years 1885 and 1886, while they were working for him upon the homestead, he told them, severally,

at different times, that he had rented the homestead, except the big dwelling house, from defendant Moore. As to the possession of the defendant Moore at commencement of the action, the evidence is not so clear, yet, I think, tended to prove it. It is not controverted that, from the time of his appointment as administrator (March 4, 1872) until the order setting apart the homestead, (April 26, 1881,) he had at least constructive possession of all the decedent's real estate, including the homestead, and it appears that he collected the rents and paid the taxes during that period. He contested the application for the homestead; the plaintiff not being in possession at the time the application was made, nor at any time since. A part of the order setting apart the homestead is as follows: "It is hereby further ordered and adjudged that the administrator of said estate of William H. Moore, deceased, deliver the possession of the said homestead above described to Helen M. Moore, the petitioner herein." It is admitted that about two months after the order the plaintiff made both written and oral demand of the administrator for possession of the homestead, and she testified that upon such demand he expressly and emphatically refused. She said: "I asked said Thomas W. Moore if he would deliver me possession of the homestead. He said he would be damned if he would do it." He denied this, saying he only refused to deliver the personal property. In his verified statement to the county assessor of property in his possession in the years 1884 and 1886, subject to taxation, he included the land constituting the homestead. I think the testimony, and circumstantial evidence also, tended to prove that he leased to the defendant Almstead so much of the homestead as the latter cultivated and occupied. It was not necessary to constructive possession that the administrator should have personally resided upon or cultivated the homestead. *Barstow v. Newman*, 34 Cal. 90. And constructive possession of a defendant in ejectment is sufficient to entitle a plaintiff to recover in that form of action. *Crane v. Ghirardelli*, 45 Cal. 235. And if the defendant Almstead was in possession of any part of the homestead, as a tenant of the administrator, the latter was properly joined as a party defendant. *Code Civil Proc. § 379; Gaslight Co. v. Dameron*, 67 Cal. 663, 8 Pac. Rep. 595. As to the alleged insufficiency of the evidence to justify the verdict for damages, the specification is sufficient, but in that particular the evidence appears to be sufficient. Two witnesses testified that the rental value of the premises was from \$25 to \$30 per month, and one that it was \$35 per month, and the evidence tended to prove that the possession was withheld more than two years.

2. At request of plaintiff's counsel, the court gave ten written instructions to the jury, to each one of which counsel for de-

fendants objected, without stating any ground for the objection, and excepted to the ruling of the court in overruling their objections, the objection and exception to each instruction being as follows: "To the giving of which said instruction to the jury said defendants objected, which objection was overruled by the court, and said instruction was given by the court to the jury, to which ruling of the court the defendants then and there duly excepted." The statement on motion for new trial specifies, as an error in law, the giving of each of the ten instructions, without stating in what the error consists. There is nothing in the record indicating that the ground of objection to any one of the instructions was that it was not applicable to the evidence, nor that the evidence was not sufficient to justify the verdict in respect to the possession of the defendants, yet, upon this ground alone, it is contended for appellants that the ninth of said instructions is erroneous, which is as follows: "Each of the defendants, in his several answer in this action, denies that the plaintiff is or ever was the owner, or entitled to the possession, of an undivided one-half of the real estate described in the complaint, or of any part thereof. Such denial was an ouster of plaintiff, and did away with occasion for a demand of possession." Assuming that the evidence tended to prove the defendants were in possession of the demanded premises at the time the action was commenced, (which I think should be presumed, in the absence of any specification of insufficiency of the evidence to prove it, even though such evidence were not to be found in the record,) the answers of the defendants, denying the plaintiff's title and right of possession, afford sufficient evidence of an ouster. *Ketchum v. Barber*, (Cal.) 12 Pac. Rep. 251, (not officially reported;) *Marshall v. Shafter*, 32 Cal. 177; *Payne v. Treadwell*, 16 Cal. 220.

The following is the tenth instruction given at the request of the plaintiff: "If the land described in the complaint is the same land described in the order setting apart the homestead to Helen M. Moore and the minor children of W. H. Moore, deceased, then the right to the possession of the homestead was in said plaintiff and the said children, and none of the children named in said order could give any right to any person to occupy any part of said homestead, as against said plaintiff." This instruction was objected to in the same form as was the ninth, no ground of objection being stated. The ground of objection here stated for the first time is founded upon evidence tending to prove that the defendant Almstead occupied and cultivated the homestead by express license from Charles Moore, who, it is claimed, was a tenant in common with plaintiff in the homestead, to the extent of one-sixth thereof, by virtue of the order setting it apart. It is contended that, inasmuch as Charles Moore

was then 21 years of age, his bare license or permission to Almstead to enter, occupy, and cultivate the homestead, as he did, conferred upon the latter a right to do so, as against the plaintiff; that such license is a complete defense to this action, so far as Almstead is concerned; and, consequently, that the tenth instruction is erroneous, in that it instructs the jury that "none of the children named in said order [setting apart the homestead] could give any right to any person to occupy any part of said homestead, as against said plaintiff." Conceding that Charles Moore was a tenant in common, as claimed, it is well-settled that the instruction is correct. "No action of a portion of several tenants in common can impair the right of their cotenants." *Mahoney v. Van Winkle*, 21 Cal. 553, (per Field, C. J.) *Freem. Coten. § 172*, and cases there cited. Other objections are made to some of the 10 instructions, given at the request of plaintiff's counsel, for which, however, I find no valid ground in the record.

3. Besides the ten written instructions given at request of the plaintiff, the court gave about an equal number of oral instructions, occupying about five pages of the printed transcript. To these defendants excepted in the following language, and not otherwise: "To which said oral instructions, and each and every part thereof, and to the giving thereof by the court, the defendants then and there duly excepted." This was too general, (*Sill v. Reese*, 47 Cal. 296-348; *Rider v. Edgar*, 54 Cal. 127; *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. Rep. 318,) and for this reason the oral instructions will not be reviewed on appeal. I think the judgment and order should be affirmed.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(4 Cal. Unrep. 196)

DUNLOP et al. v. KENNEDY et al.¹
(No. 15,112.)

(Supreme Court of California. Aug. 31, 1893.)

MECHANICS' LIENS—THE CONTRACT—PAYMENTS—RIGHTS OF SUBCONTRACTORS.

1. Failure of the contract for erecting a building to comply substantially with Code Civil Proc. §§ 1183, 1184, relating to mechanics' liens, does not render the contract void. *Lumber Co. v. Wooldredge*, 27 Pac. Rep. 431, 90 Cal. 578, followed.

2. A contract for erecting a building, which provides that 25 per cent. of the sum to be paid shall remain unpaid until 35 days after completion of the building, and the remainder be paid in partial payments equal to 75 per cent. of the value of the work and material done and furnished at the time of such payments, sufficiently complies with Code Civil Proc. § 1184, providing that the contract price shall, by the terms of the contract, be made payable in installments at specified times after commencement of the work, and on the com-

¹ Rehearing granted.

pletion of the work, provided that at least 25 per cent. of the whole contract price shall be made payable at least 35 days after final completion of the contract.

3. Under Code Civil Proc. § 1184, requiring the contract for erecting a building to specify times when payments are to be made, and requiring 25 per cent. of the price to be retained until 35 days after completion, partial payments, however they are specified as to time, may be safely made, provided no notice of their subcontracts is given by material men, in the absence of which they must rely on the responsibility of the contractor, and the 25 per cent. required to be retained; and in such case they are not injured by any uncertainty as to the times of payment specified, nor by payments in advance of the specified time.

4. All that material men can require, in such case, is that at the time they serve written notice upon the owner, or, if no notice is served, at the time their lien is filed, there shall be in his hands the amount required by the contract and said section.

5. It does not prejudice persons furnishing a contractor material for erecting a building that the owner of the land purchased material from a firm of which he was a member, and furnished it to the contractor as a partial payment of the contract price, which partial payment he had a right to make.

6. The owner of a building who, out of the contract price, has paid laborers who were entitled to file liens, and would have filed them but for such payment, and who has also retained out of the contract price the 25 per cent. required by Code Civil Proc. § 1184, to be retained until 35 days after completion of the contract, is entitled to credit for such payment; and material men are not entitled to have the amount of such payment considered as part of the fund available for their claims, on the ground that there could be no privity between the owner and such laborers until they filed their liens, so as to entitle him to pay them.

7. The mechanic's lien statute does not require that the contract for erecting a building shall be signed by the owner, and it is sufficient if it be signed by the reputed owner.

8. A contract for erecting a building, and also for improvements on an adjoining lot running "westerly," is not avoided by the fact that the recorded memorandum of the contract erroneously uses the word "easterly," nor is the sufficiency of the memorandum destroyed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Consolidated actions by Charles Dunlop and others against Alice Kennedy and John F. Kennedy to enforce liens for material. From a judgment for plaintiffs, defendants, Kennedy, appeal. Reversed.

Atty. Gen. Hart and Nowlin & Fassett, for appellants. Parker & Eells, for respondents.

HAYNES, C. Consolidated actions to enforce liens of material men. Plaintiffs had judgment, and defendants, Alice Kennedy and John F. Kennedy, the owners, appeal from the judgment, and an order refusing a new trial. On September 26, 1889, Alice Kennedy, wife of said John F. Kennedy, entered into a contract in writing with Gray & Stover, of which firm the defendant Stover is the surviving partner, by which they were to erect for her a three-story building,

(flats,) and to furnish all materials and labor therefor, together with certain cement sidewalks and other walks on the same lot, and "also sidewalk in front of lot adjoining, running forty-two feet westerly, and all walk ways and yard in connection with said lot." The contract did not apportion the price of the work upon each lot, but the contractors were to be paid \$6,600 "at the times and in the manner following, to wit: Twenty-five per cent. of the contract sum to remain unpaid until thirty-five days from and after completion of said building, and its acceptance by the within-named architect. The remaining amount to be paid in partial payments in amount equal to seventy-five per cent. of the value of the work done and materials furnished at the time of such payments." The contract was not filed in the recorder's office, but a memorandum of it was filed before the commencement of the work. Gray & Stover prosecuted the work until January 19, 1890, when Gray died, and Stover continued the work until February 18, 1890, when he abandoned the work before completion; and the owners, after due notice to the surviving contractor, continued the work, and completed it March 17, 1890. At the time of the contract there was a stable upon the lot, for which the contractors were to pay \$150, and remove it. On December 21, Kennedy paid the contractors \$3,000 in cash; and on January 14, 1890, the contractors received for \$4,000, which included the said payment of \$3,000, and \$1,000 for lumber furnished under the following circumstances. John F. Kennedy was a member of the Kennedy-Shaw Lumber Company, and he agreed with the contractors to furnish the lumber, and it was furnished to the contractors to the above amount, and used in the building, the lumber company charging it to Kennedy, and that amount was included in the receipt as paid upon the contract. At the time Stover abandoned the work, there was due from the contractors to laborers \$285, which amount was at once paid by the owners to the laborers. There was also due from the contractors to material men at the date of abandonment, including the amount due the plaintiffs in the consolidated cases, \$2,656.74. The actual cost of completing the work in the manner the contract required was \$1,255.89. After completion, the owners estimated the balance of the contract price remaining in their hands at \$890.86, and offered to the respondents Towle & Broadwell, and to respondent Dunlop, and the other material men, their several pro rata shares of said sum. All except Towle & Broadwell and Dunlop accepted the offer, and received the payment in satisfaction of their several claims. Dunlop and Towle & Broadwell refused to accept the offer. Those accepting the settlement were five in number, and their claims aggregated \$998.74. Whether the offer was made to respondents before

their liens were filed, does not appear. The others did not file liens. The court found due to respondent Dunlop \$585, and to Towle & Broadwell \$1,073, besides costs and attorneys' fees to each, and that they were entitled to liens for those amounts. Other findings necessary to be noticed are that John F. Kennedy was and is the owner in fee of the premises, and that Mrs. Kennedy is the reputed owner; that no memorandum of the contract was ever filed, except that set out in the findings; that the defendants did not comply with the terms of the contract as to payments, but that on December 21, 1889, there was paid \$3,000 in cash, and on January 14, 1890, a receipt was given for that sum, and \$1,000 for the lumber hereinbefore mentioned, and that no cash payments were made, except said sum of \$3,000; and, as a conclusion of law, that the materials furnished by plaintiffs were furnished at the personal instance of defendants. But whether this conclusion is based upon the supposed insufficiency of the contract and memorandum, as to the time of making partial payments, or upon the ground that overpayments were made, is difficult to ascertain. Both grounds are urged in respondents' brief, and require consideration.

If it were conceded that the contract and memorandum did not substantially comply with sections 1183 and 1184 of the Code of Civil Procedure, that fact would not, as respondents' counsel contend, make the contract void. *Lumber Co. v. Wooldredge*, 90 Cal. 578, 27 Pac. Rep. 431. It was said, however, in that case: "But the same consequence follows for a material nonconformity of the contract with the statute, under section 1184, so far as to permit material men and laborers to recover without regard to the amount due upon the contract." Said section provides that "the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work or on the completion of the work, provided that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after final completion of the contract." I think the contract in question substantially complied with the requirements of this section. The owner cannot with safety agree to pay a definite amount on a particular day, as he cannot know in advance whether the contractor will have earned the payment; and, if the payment is to be made upon reaching certain stages of the work, it only furnishes the means of ascertaining the day of payment when it actually arrives. The whole object of the provision is to protect material men, and any specification which accomplishes this purpose is sufficient. The partial payments, no matter how they are specified as to time, may safely be made, provided no notice of their subcontracts has been given by material men. These pay-

ments may therefore be anticipated and secured as a fund for the payment of their claims, by giving written notice as provided by statute. In the absence of such notice they must rely upon the personal responsibility of the contractor, and the 25 per centum of the whole contract price required to be retained for 35 days after the completion of the work; and in such case they are in no wise affected by any uncertainty as to the time when partial payments are to be made, nor by payments thereof in advance of the time specified. If, however, a material man gives written notice of his claim for materials furnished to the contractor before the time fixed for a partial payment, he thereby acquires an interest in that and subsequent payments, to the extent of his claim, and may hold the owner for the amount thereof, notwithstanding the fact that that payment was made before the notice was served. In this case, however, no notice was served, and it is therefore immaterial whether the contract was indefinite as to the time of payments. It requires the owner to have in his hands at all times at least 25 per centum of the value of the work done and materials furnished, so that at any time notice might be served the owner was liable for that proportion of the work actually done, as well as all the contractor should earn thereafter. The record does not show the value of the labor and materials done and furnished at the date of the payment of \$3,000, but the court found that at the date of Gray's death the work was not more than three-fourths completed. At that date the owners had paid \$287.50, more than 75 per cent. of the work done. But Stover, the surviving partner, continued the work until February 17th, when he abandoned it. The testimony of the architect shows, without contradiction, that it cost to complete the work \$1,255.89, showing that the contractors had earned, at the time of abandonment, \$5,344.11. Seventy-five per cent. of that sum is \$4,008, showing in the hands of the owners \$8 more than the 25 per cent. required by the contract to be retained from partial payments. All that material men can require is that at the time they serve written notice upon the owner, or, if no notice is served, at the time their lien is filed, there shall be in the hands of the owner the amount required by the contract and the law; and if that amount is in his hands there can be no liability resting upon him, or his property beyond it. The statute must have a reasonable construction as well for the protection of the owner as of the material man. It would be no hardship upon material men if their right to a lien were by statute made to depend upon prompt notice to the owner of their agreement with the contractor to furnish materials; and if they would avail themselves of the right now given them by the statute, to serve written notice upon

the owner, a very large amount of vexatious and expensive litigation would be wholly avoided. In this case the owners were not liable to laborers and material men for more than the balance of the contract price after deducting all proper credits, and the cost of completing the work in the manner required by the contract. In ascertaining this balance the court rightly excluded the item of \$150, the price of the stable sold to the contractors. It appears to have preceded the commencement of the work, and therefore within the express letter of the statute, though it does not appear that respondents were or could have been injured by the payment.

I am unable to ascertain from the findings whether the court considered the \$1,000 paid by the lumber transaction as a payment. Respondents' counsel insist that it is not a payment, as against them. It is true Mr. Kennedy, in his testimony, spoke of it as an "offset." The name given to a transaction, especially by a nonprofessional witness, does not change its character. The contract required the contractor to furnish all materials, and neither the contract nor the law restricts him as to the person from whom he shall purchase them. The lumber was delivered to and used by the contractor in the erection of the building. No question is made as to the price paid for the lumber, nor that any injury or injustice did or could accrue therefrom to respondents. The Kennedy-Shaw Lumber Company had no interest in the erection of this building. They had the right, for their own protection, to require that the owner should become personally liable. Suppose that one of these respondents should have pursued that course, and had been paid by Kennedy with the consent of the contractor. Could the other have objected? The statute is not aimed at transactions such as this. The "prior or subsequent indebtedness, offset, or counterclaim in favor of the reputed owner and against the contractor," mentioned in the statute, applies to dealings of a different character, and was intended to prevent transactions between the owner and contractor by which the contractor's ability to pay for material might be diminished or destroyed. Material men are not privies to the contract, and can have no possible interest in it, further than above indicated.

I also think that appellants should be allowed the amount paid to the laborers and to the other material men. The bill of exceptions contains the following: "It was admitted by Mr. Eells, who represented the plaintiffs on the trial, that the various claims on account of which the defendants, Kennedy, paid a pro rata to the various mechanics and material men for materials and work performed previous to the abandonment of said contract were correct, and the parties were entitled to file a lien, except for the artificial stonework, and for the fences

and curbs set on and in front of the adjoining lot, and would have done so if the payments had not been made, but it was not admitted that they, or any of them, would have filed good liens." Respondents contend that until liens are filed there is no privity between the owner and subcontractors; that no money was due them from the owners, and none could be paid until after liens were filed, complying with all the essential requirements of the statute. As a general proposition, that is true, and fully supports the position hereinbefore taken touching the payments made by the owners to the contractors. But the admission above quoted is very broad. It concedes that the claims of these laborers and material men were correct; that they were entitled to file liens therefor, except as to work on the adjoining lot, and would have filed them, but for the payment. The qualification that it is not admitted that they would have filed "good liens" does not change the situation. Being entitled to file liens for the amount of their several claims, and it appearing that they would have filed them, we cannot assume, at the expense of the owner, that they would have so defectively prepared them as to render them invalid. The presumption is the other way. Actions to enforce liens under the mechanic's lien law, though statutory, are in their essential features equitable. If liens had been filed the laborers would have been entitled to the first lien, and payment in full, while the material men would have shared in the remainder of the fund pro rata with respondents, and the fund would have been diminished by additional costs and attorneys' fees if the settlement had not been made. Respondents were therefore benefited, instead of injured, by the settlement made, though not so largely benefited as they would be if they compel the owner to pay a like sum to them in addition to what they are equitably entitled to. The same offer was made to respondents, but, whether before or after their liens were filed, does not appear. As to the work done upon the adjoining lot, it was all included in the one contract for a lump sum, and it cannot be divided so as to apportion it between the two lots. The work upon the adjoining lot was all of a character for which a lien is given by the statute, (Code Civil Proc., § 1191,) and when materials have been furnished under a single contract for buildings or improvements on two or more contiguous lots owned by the same person a lien may be filed against all, (*Lyon v. Logan*, 68 Tex. 521, 5 S. W. Rep. 72.) The fund sought to be reached by respondents in part accrued from work and materials bestowed upon the adjoining lot, and, if they can file a valid lien upon one lot under such contract, (a point not argued or decided,) I fail to see why all laborers and material men may not file valid liens upon the lot upon which the building was erected, and upon which alone

respondents filed their liens. Besides, a conclusive answer to the exception contained in the admission of respondents is that the record does not show that any of the claims settled and paid by appellants were for work done upon the "adjoining lot." I think these payments should have been allowed to defendants in reduction of the fund.

It is also urged by respondents that the contract does not conform to the requirements of the statute, because it was signed only by Mrs. Kennedy, while the court found that her husband, John F. Kennedy, was the owner in fee. The statute does not require that the contract be signed by the owner. It is sufficient if signed by the reputed owner, and it was found that Mrs. Kennedy was the reputed owner. Besides, the owner, not having given notice as required by the statute that he would not be responsible for the improvements upon his property, is as conclusively bound, so far as laborers or subcontractors are concerned, as though he had made the contract.

The contract described the adjoining lot as running 42 feet "westerly," while in the memorandum "easterly" was inserted instead. The error did not destroy the sufficiency of the memorandum. It was described as "the lot adjoining" the lot first described; and, as a misdescription does not avoid a contract of this character, (*Yancy v. Morton*, 94 Cal. 558, 29 Pac. Rep. 1111,) the error was capable of correction by proper averment and proof.

The payments by the owners to the laborers and material men (other than the respondents) were alleged in the answer, but there was no finding as to the fact of payment. The findings, as made, however, do not support the judgment, inasmuch as the facts found show a balance in the hands of the owners much less than the amount of the liens adjudged to the respondents, the judgment being based upon an erroneous conclusion of law that the materials supplied by plaintiffs were furnished at the special instance and request of the owners. The judgment and order appealed from should be reversed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

99 Cal. 456

PEOPLE ex rel. EADIE v. NOYO LUMBER CO. (No. 15, 110.)

(Supreme Court of California. Sept. 1, 1893.)

STATE SCHOOL LIEU LANDS—APPLICATION TO PURCHASE—CURATIVE ACT—CANCELLATION OF PATENT—LIMITATION.

1. Defects in an application to purchase state school lieu lands, made September 23, 1868, were cured by the curative act of

March 24, 1870, (St. 1870, p. 352;) and Act March 27, 1872, limiting the effect of said curative act in the matter of school lands to the amount of 320 acres for any one purchaser did not apply, the application having been made before the passage of the curative act.

2. The act of 1872 was superseded by Pol. Code, § 3573, which is substantially the same as Act March 24, 1870.

3. Act Cong. March 1, 1877, (19 Stat. 267,) known as the "Booth Act," "relating to indemnity school selections in the state of California," and confirming to the state the titles to these lands selected by the state, was equivalent to a grant of the lands to the state as of the date of listing, and the title thus ratified was within the effect of the curative act of March 24, 1870, and was thereby validated, as though the lands belonged to the state at the time of the passage of the act.

4. Under Code Civil Proc. § 338, subd. 4, which provides that an action for relief on the ground of fraud or mistake must be begun in three years after the cause accrues, and that the cause is not deemed accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake, a relator suing in the name of the state to cancel a patent of lands for fraud of the purchaser is not an aggrieved party, within the meaning of the section, so that his ignorance of the fraud can exempt the action from its provisions.

5. In such action by the state to cancel the patent for fraud of the applicant to purchase, the averment in relator's complaint that the "false statement" of the applicant was not known to the officers of the state is not sufficient to exempt the action from the provision of the above section.

Department 1. Appeal from superior court, Sonoma county.

Action by the people, on the relation of William Eadie, to cancel a patent to land. From a judgment for defendant, plaintiff appeals. Affirmed.

Atty. Gen. Hart, John T. Carey, and B. F. Bergen, for appellant. J. A. Cooper and Chas. E. Wilson, for respondent.

HARRISON, J. Action to cancel a patent issued by the state of California, in 1876, to A. W. Macpherson for certain lands in Mendocino county. It is alleged in the complaint that the lands in question are agricultural lands, which were listed to the state February 15, 1870, in lieu of a section 36,—that section then supposed to be within the exterior limits of a reservation, but subsequently ascertained to be excluded therefrom; that said selection was confirmed to the state by the provisions of the act of congress approved March 1, 1877, entitled "An act relating to indemnity school selections in the state of California;" that Macpherson made application September 23, 1868, to the state surveyor general to purchase the lands in lieu of said school section, and that on March 20, 1870, his application was approved by the surveyor general, and that thereupon he paid to the county treasurer of Mendocino county 20 per cent. of the purchase money, with the first year's interest on the balance, and received from the register of the said land office a certificate of

purchase thereof; that on the 21st of September, 1876, upon paying the balance of the purchase money and surrender of said certificate, letters patent were issued to him by the state; that on the 29th of March, 1888, the defendant succeeded to whatever right and interest in the land Macpherson had by virtue of said application, certificate of purchase, and letters patent, but did not enter into possession of the lands until September, 1890. The complaint further alleges that the application of Macpherson was null and void for the reason that in his affidavit therefor he failed to describe the lands by legal subdivisions, and was also false and fraudulent, for the reason that he stated therein that there were no improvements on said land other than his own, whereas, in fact, the said land was at that time in the actual occupation and possession of one Joseph Hardy, who remained in such occupation and possession until his death in 1874, and whose son succeeded to his interest, and continued in the possession of the land until within two years prior to the commencement of this action, August 6, 1891. The complaint further alleges that on the 11th day of July, 1891, the relator possessed the requisite qualifications therefor, and on that day made application to the state surveyor general to purchase the said lands as a portion of the state school lieu lands, but that officer refused to file said application, for the reason that the said patent to Macpherson was outstanding and uncanceled. Plaintiff therefore asks that the letters patent issued to Macpherson be canceled, and that the relator be adjudged to have the right to file his application to purchase said lands. To this complaint the defendant demurred, and, his demurrer having been sustained, judgment was entered in his favor, and the plaintiff has appealed.

Whatever defects there may have been in the application of Macpherson, they were cured by the act of March 24, 1870, (St. 1870, p. 352.) *Copp v. Harrington*, 47 Cal. 236; *Rooker v. Johnston*, 49 Cal. 3. The provision in the act of March 27, 1872, limiting the effect of that act in the matter of school lands to the amount of 320 acres for any one purchaser, has no application to the present case. As Macpherson's application to purchase was made September 23, 1868, prior to the passage of the curative act of 1870, after his application had once been validated, it was not in the power of the legislature to place other limitations to the title thus conferred upon him. Moreover, the act of 1872 was superseded by section 3573 of the Political Code, which is substantially the same as the act of March 24, 1870. Hence the averment in the complaint that prior to March 24, 1870, he had purchased from the state more than 320 acres of school lands is immaterial. By the act of congress approved March 1, 1877, (19 Stat. p. 267,) commonly known as the

"Booth Act," the title to these lands was confirmed to the state. "This statute was a full and complete ratification by congress according to its terms, of the list of indemnity school selections which had been before that time certified to the state of California by the United States as indemnity school selections, no matter how defective or insufficient such school certificates might originally have been, if the lands included in the lists were not of the character of any of those mentioned in section 4, and if they had not been taken up in good faith by a homestead or pre-emption settler prior to the date of the certificate." *Durand v. Martin*, 120 U. S. 372, 7 Sup. Ct. Rep. 587; affirming *Martin v. Durand*, 63 Cal. 39. This ratification by the United States of the listing of the lands was equivalent to a grant of those lands to the state as of the date of the listing, February 5, 1870, and the title thus ratified was within the effect of the curative act of March 24, 1870, and was thereby validated as though the lands had belonged to the state at the time of the passage of the act. The expression to the contrary in the opinion of Mr. Justice Thornton in *Land Co. v. Moir*, 83 Cal. 105, 22 Pac. Rep. 55, and 23 Pac. Rep. 359, did not receive the approval of the court, and cannot be regarded as authority.

Section 338, subd. 4, Code Civil Proc., declares that an action for relief on the ground of fraud or mistake must be commenced within three years after the cause of action accrues, and further provides that the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. In *People v. Blankenship*, 52 Cal. 619, this provision was held to apply to an action by the state to cancel a patent for land alleged to have been procured by fraud. The plaintiff herein seeks to take the present case out of this limitation by averring "that the fraudulent and false statement made by Macpherson was not known by the relator until within the past two years, nor was it discovered by the land officers or the attorney general of this state, until on or about the 11th day of July, 1891." The relator is not, however, the "aggrieved party," within the meaning of section 338, and the averment that the "false statement" was not known to the officers is not sufficient to exempt the action from the provisions of the section. The statement itself must have been known to the officers at the time it was received by them from Macpherson; and, as any defects in that statement, whether fraudulent or false, were cured by the act of 1870, it is immaterial whether or not they were subsequently ascertained by the land officers of the state. The judgment is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(109 Cal. 682)

RUED v. COOPER et al. (No. 14,247.)

(Supreme Court of California. Aug. 31, 1893.)

VACATING JUDGMENT—LIMITATION—ASSIGNMENT IN INSOLVENCY—WHAT PASSES.

1. Code Civil Proc. § 473, limiting the setting aside of any judgment or proceeding to six months after the same was taken, has no application to an order granting the discharge of an assignee in insolvency on final settlement of his account; and where an assignee finds property belonging to the insolvent's estate after his discharge the court may set aside the discharge, though more than six months have expired.

2. Const. art. 4, § 26, declares that "all contracts for the sale of shares of the capital stock of any corporation or association on margins, or to be delivered at a future day, shall be void, and any money paid on such contract may be recovered by the party paying it by a suit in any court of competent jurisdiction." *Held*, that a right of action accruing under the section to an insolvent passes to the assignee, though it was not included in the schedule of assets.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. C. Rued, assignee of C. A. Macomber, insolvent, against F. T. Cooper and Warner Stauff. From a judgment for defendants on demurrer to the complaint, plaintiff appeals. Reversed.

Henley, Swift & Rigby, for appellant. Newlands, Allen & Herrin, for respondents.

HAYNES, C. This is an appeal from a judgment rendered upon defendants' demurrer to the complaint. The principal questions arise upon the following facts appearing in the complaint: On August 19, 1887, C. A. Macomber was, on his own petition, adjudged an insolvent debtor, and on September 6, 1887, the plaintiff herein, J. C. Rued, was appointed assignee, and qualified as such. On May 8, 1888, the assignee filed in court his final account, which was settled and allowed; and on June 13, 1888, an order was made by the superior court ordering the final discharge of the assignee. After the discharge the assignee discovered that he had a good cause of action against the defendants for a large amount of money upon a liability existing in favor of the insolvent at the time he filed his petition. This liability was not included in the insolvent's schedule nor in the assignee's account, for the reason that it was unknown to him until after his discharge. That on January 18, 1889, after discovering said alleged cause of action against the defendants, he procured an ex parte order to be entered, setting aside his said discharge and the order settling his final account, and thereafter commenced this action. The causes of action stated in the complaint were to recover moneys paid by the insolvent to the defendants for the purchase and sale of stocks on a margin. Respondents contend that the order setting aside the order of final discharge of the as-

signee is absolutely void, because made more than six months after the order of final discharge was entered; that the only authority given the court to set aside any judgment or order is found in section 473 of the Code of Civil Procedure, which expressly limits its exercise to a period "not exceeding six months after such judgment, order or proceeding was taken;" while appellant contends that this section has no application; that it applies only to judgments, orders, or proceedings taken "against" the party applying for relief therefrom; that the order of discharge vacated upon his application was one in his favor, procured upon his application, relieving him from responsibility to creditors of the insolvent, and was not final; that even if it were a final order, the court having once had jurisdiction, its jurisdiction may be restored by consent.

In *People v. Greene*, 74 Cal. 403, 404, 16 Pac. Rep. 197, it was said: "Under the former system of practice in this state the decisions were numerous, and quite uniform, to the effect that upon the expiration of the term of court all power to alter, change, modify, or annul judgments entered during the term, or prior thereto, was lost, unless saved by some motion or action of the court during the term, except as otherwise provided by statute. Under our present system of jurisprudence, terms of court are abolished; and, as the rule cannot apply literally, it is provided by section 473 of the Code of Civil Procedure that the relief which formerly could be had during the term may be sought within a reasonable time, which is defined to be six months." In that case it was further said: "In *Hastings v. Cunningham*, 35 Cal. 550, it was held that the rule indicated had no application, except as to final judgments, and did not apply while the proceedings remained in fieri." The meaning of the old rule was that the court lost jurisdiction at the expiration of the term at which final judgment was rendered. Until jurisdiction was lost the court had full power over its proceedings and the cause. In determining whether the court had lost jurisdiction to take further proceedings after the discharge of the assignee, and the lapse of the time limited by section 473, Code Civil Proc., the character of the case, the nature of the jurisdiction in insolvency cases, and of the order of discharge, must be considered. By the adjudication of insolvency, all the property of the insolvent (not exempt from execution) is, by operation of law, placed in the hands of the court, and under its control, and subject to its disposition. The insolvent act requires no conveyance from the insolvent. Upon the appointment and qualification of the assignee "the clerk of the court shall, by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate, real and personal, of the debtor, with all his deeds,

books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in insolvency, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee." Insolvent Act of 1880, § 17. By the adjudication, therefore, the property of the insolvent debtor passed from him, and came under the control of the court, and the sheriff was required to take possession of it. It is a proceeding in rem, or, at the least, quasi in rem. The proceeding by creditors to establish their claims, though they name the insolvent as the debtor, is in reality a proceeding to establish their several claims against the property, to which they can alone look for payment. The assignee is but the hand of the court, and, though elected by the creditors, derives his powers from, and discharges his duties under the direction of, the court, and is, for the purposes of the proceeding, an officer of the court. The insolvent practically disappears as a party to the proceeding, and only the execution of the trust remains. The title to his property has passed from him, and by operation of law is vested in the assignee, who is an officer of the law, and a trustee for the creditors. Nor is the title of the assignee restricted to property or demands embraced in the schedule filed by the insolvent. The status of all the property owned by the debtor, of whatever character, is conclusively fixed by the statute, upon his insolvency being adjudged by the court. Section 18 of the insolvency act provides: "The assignee shall have the right to recover all the estate, debts and effects of said insolvent." The language of the bankrupt act of congress of 1841 was scarcely more comprehensive than that above quoted, yet it was held that "all but the excepted property of the bankrupt passed to the assignee, although not included in the schedule." *Holbrook v. Coney*, 25 Ill. 543. In a recent work on Jurisdiction, it is said: "There are two divisions that should be made of proceedings in rem pertaining to 'things indebted.' The first pertains to a class of actions where the entire res comes under the control of the court, as the basis of jurisdiction. The second are actions personal in their nature, but in which the law permits the property to be seized in the progress of the action as a basis of jurisdiction. The latter class has been defined to be a 'proceeding quasi in rem.'" *Brown, Jur.* § 64. In the same section the author places in the first class, among others, probate proceedings, proceedings in bankruptcy, and assignments for the benefit of creditors. In bankruptcy and insolvency proceedings, it is clear that the indebtedness of the bankrupt and insolvent is upon the adjudication transferred from the person to the res. The jurisdiction, being based upon the res, was not lost by the settlement of what was called the "final account," nor by

the so-called discharge of the assignee. The insolvent, when he received his final discharge, was no longer a necessary or proper party to the subsequent proceedings. That adjudication, so far as it is personal, is final; but the other jurisdiction must remain until the property, the subject of the trust, is finally disposed of. The title has passed out of the insolvent, and is vested in the assignee, and still remains under the control and subject to the disposition of the court. The accident that the assignee believes that he has disposed of all the property of the insolvent, and has settled his account, does not divest his title, nor so end the proceedings that they may not be revived, should other property be discovered. He is not authorized or empowered by the statute to reassign or convey to the insolvent such subsequently discovered property, and his duty to creditors will not permit him to conceal the property thus discovered, or refuse to recover it, and distribute the proceeds among them. If the court can be said to have lost jurisdiction at all, it could only be as to the assignee; but as to him, if the jurisdiction had lapsed by virtue of the order and the efflux of time, it may be restored by his consent, the court not having lost its jurisdiction of the subject-matter. In *Brown v. Crow's Heirs*, *Hardin*, 451, the court said: "It must be admitted, as a general principle, that consent cannot give jurisdiction; but this principle only applies to original jurisdiction, or, in other words, to those cases where the court never had, by law, jurisdiction in the case. But where the court once had jurisdiction, although the power may have been executed, so that without the consent of parties the court could not change their former judgment or decree, the jurisdiction may be, and in many cases has been, restored by consent. In such cases the maxim, 'consent takes away error,' applies. *Bogle v. Fitzhugh*, 2 Wash. (Va.) 213, recognizes this distinction." The only parties before the court after the discharge of the insolvent were the assignee and the creditors, who are represented by the assignee as their trustee. Nor do we think that the discharge was a final judgment or order, as affecting the jurisdiction of the court. Section 33 of the insolvent act authorizes the court, upon the grounds there stated, to "immediately discharge such assignee from his trust, and shall have power to appoint another in his place," while section 34 provides that upon filing his final account, and application for its settlement, "the court thereupon shall settle the account and order a dividend of any portion of the estate remaining undistributed, and shall discharge the assignee, subject to compliance with the order of the court, from all liability as assignee to any creditor of the insolvent." It will be observed in the one case that the assignee is discharged from his trust, while in the other he is simply discharged

from liability as assignee to any creditor of the insolvent; thus, by the very form of the discharge, leaving him with all his powers as trustee in case other property than that disposed of by his previous accounts should be discovered. Whether or not it was necessary to set aside the former order of discharge and settlement of account, in order to bring the present action, it is not necessary to decide, though this action of the court, even if not strictly necessary, was nevertheless proper, as it was a direct recognition of the continuing authority of the assignee. We think section 473, Code Civil Proc., has no application to such an order as that entered, discharging the assignee from liability to creditors, for it is manifest that if the assignee in fact knew of other property which should have been appropriated to the payment of the creditors, and had omitted to apply it, the discharge in question could not have relieved him from responsibility; and, that being true, the discharge can only apply to matters appearing in his account, to which they have had an opportunity of excepting.

It is further contended by respondents that there is no allegation in the complaint that an assignment of the insolvent's property was made to plaintiff, and that the omission of that averment is fatal. The complaint averred "that on the 26th day of September, 1887, an order was duly made by and in the said superior court, duly appointing the said plaintiff assignee of the said insolvent debtor, C. A. Macomber; that on the 27th day of September, 1887, the said plaintiff, as said assignee, filed his bond as required by law, and on the same day duly qualified and entered upon the discharge of his duties as such assignee; that on May 8, 1888, the said assignee filed in said court his final account, and the same was settled and allowed." We think these allegations sufficient under a general demurrer. The special demurrer of defendants does not go to this point. The statute makes it the duty of the clerk of the court to convey to the assignee all the estate of the debtor as soon as the assignee has given bond and qualified. The clerk is an officer of the court, acting under its direction, and the presumption is that every officer discharges every duty specifically enjoined upon him. Code Civil Proc. § 1963, subd. 15. If the assignment were required by the statute to be made by the insolvent, a much more serious question would arise; but here the assignment is based upon the previous proceedings of the court, and becomes a step in the cause, and essentially a part of the regular and orderly proceedings therein, and therefore is presumed to have been taken. If there was in fact no assignment, it may be pleaded as matter of defense. We think the complaint, upon this point, is sufficient, at least in the absence of a special demurrer.

Respondents further contend that "Ma-

comber alone, not his assignee, can maintain any action to recover the claims counted upon." The constitution, art. 4, § 26, provides: "All contracts for the sale of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." This provision, it is said, creates a new right, and provides a remedy, and that such remedy is exclusive, and limited to Macomber personally. We think this contention cannot be sustained. The remedy given is a recovery of money paid on a void contract. There is no distinction between money paid under a contract declared void by the constitution, and that paid under any other void contract. In all such cases the party who has paid the money remains the equitable owner of it, though he could not, in many cases, maintain an action for its recovery. But here the constitution, which declares the contract void, expressly authorizes its recovery. It was, prior to Macomber's insolvency, a part of his estate; and in case of his death the right of action would have survived, unless the right of action is limited to him personally, for a right of action which survives is, under the general rule, assignable. This question was considered in the case of *Meech v. Stoner*, 19 N. Y. 26. There, by the statute, all wagers, bets, or stakes upon any gaming are declared to be unlawful, and all contracts for or on account of any money or property or thing in action so wagered are void; and it is provided that the person who shall, by playing at any time, or betting on the sides or hands of those who play, lose at any time or sitting the sum of twenty-five dollars or upwards, and shall pay or deliver the same, or any part thereof, may, within three calendar months after such payment or delivery, sue for and recover the money or value of the thing so lost, paid, or delivered, from the winner thereof. It was claimed on the part of the defendant that the loser at play has, by the statute, a merely personal privilege to sue and recover back his losses, but has no interest in the money or thing sued for, which is capable of assignment, so as to give the right of action to any one else. In that case it was held that, if the statute had not given an action to recover money lost at play, a suit for such purpose could not be maintained; that this exemption, however, would not result from any title in the defendant to the money or thing won and received by him, but because the courts withheld their remedial process from each of the offending parties, thus leaving the parties where the law finds them, and the defendant prevails, not upon his own merits or title, but because the plaintiff is deemed unworthy to be heard in the case. But the court further said: "That difficulty being removed by

the legislature, I see no reason why the right to demand and recover money staked and lost in gaming is not as much a part of a man's estate as any other right in action which he can possess; and, if this be so, why is not such a demand, like any other, capable of being transferred by act of the party or of the law. But the statute, it is said, gives the action to the 'person,' and not to his assigns or representatives. Upon the precise terms of the statute, this is so, yet it is difficult to suggest any reason why the right to be asserted in such an action would not devolve upon the administrator, and thus become a fund for the payment of debts, or for distribution amongst the next of kin, or why an assignee in bankruptcy or insolvency would not succeed to the claim, and be able to enforce it for the benefit of creditors. Assignability of things in action is now the rule; nonassignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." The court, in this case, sustained the views above quoted by further argument and the citation of a number of cases, both English and American, and in these views we concur. We think the court erred in sustaining the demurrer to the complaint, and that the judgment should be reversed, with leave to the defendants to answer.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be reversed, and that the defendants have leave to answer.

99 Cal. 429

FAIRBANKS v. LAMPKIN et al. (No. 15,130.)

(Supreme Court of California. Aug. 31, 1893.)

SUPREME COURT—JURISDICTIONAL AMOUNT.

Under Const. art. 6, § 4, granting the supreme court appellate jurisdiction in cases at law only where the demand, exclusive of interest, amounts to \$300, that court cannot review an order, made after final judgment, taxing a cost bill which is less than that amount.

Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action by one Fairbanks against Lampkin and others. From an order taxing costs after final judgment, plaintiff appeals. Appeal dismissed.

J. A. Cooper and J. M. Mannon, for appellant. T. L. Carothers and J. H. Seawell, for respondents.

McFARLAND, J. This is an appeal from an order made after final judgment taxing a cost bill, the whole amount of the bill being only \$171.20. We do not think that this

court has jurisdiction of the appeal, for the reason that the amount involved is less than \$300. We strongly intimated this conclusion in *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. Rep. 795; and further consideration satisfies us that the intimations given in the opinion in that case should be taken as a correct statement of the law on the subject. Section 4, art. 6, of the state constitution, provides that "the supreme court shall have appellate jurisdiction in all cases * * * at law * * * in which the demand, exclusive of interest * * * amounts to three hundred dollars;" and no doubt the rule has been too firmly settled to be now disturbed that, on an appeal from a final judgment in an action to recover money, jurisdiction depends upon the "demand" made by plaintiff, —upon the *ad damnum* clause of the complaint. But that rule should not be extended further than previous decisions necessarily carry it. An order made after final judgment is a separate, independent proceeding; and where it involves money only, and the amount involved is less than \$300, this court has no jurisdiction, under the constitution, of an appeal from such order. Such an appeal has been sustained in one or two instances where the point was not brought to the attention of the court, but in no case has the point been raised and determined in favor of the jurisdiction. In *Lumber Co. v. Neal*, 94 Cal. 192, 29 Pac. Rep. 622, the only question involved was whether a certain order should be considered as a part of the final judgment, or as an order made after final judgment, but there was no question raised or decided which called for a consideration of the amount of money involved in the order; and the point under discussion was not raised in any of the other cases decided by this court, to which our attention has been called. On the other hand, in *Langan v. Langan*, 83 Cal. 618, 23 Pac. Rep. 1084, which was an independent appeal from an order allowing an attorney's fee in a divorce suit, this court, sitting in bank, held, without any dissent, that "the appeal from the order allowing \$150 counsel fee must be dismissed, because the amount in dispute is too small to give this court jurisdiction." And in *Oullahan v. Morrissey*, 73 Cal. 297, 14 Pac. Rep. 864, the court, sitting also in bank, delivered the following opinion: "The Court. The plaintiff, having consented to the entry of the judgment against himself, cannot appeal from it, or, if he can, can only be heard as to that portion to which he did not consent. That, in this case, is, at the most, the demand for costs, which, being less than three hundred dollars, does not give this court jurisdiction." If the two cases last above cited are not conclusive against the jurisdiction in the case at bar, they certainly point clearly in that direction; and, considering all the former decisions together, it can be confidently said, at least, that the question has not been definitely determined the other way.

And, assuming the question to be an open one, we are satisfied that we have no jurisdiction of this appeal. The clear meaning of the constitution is that the litigation of independent issues involving money only, in an amount less than \$300, must end in the superior court. The appeal is dismissed.

We concur: DE HAVEN, J.; FITZGERALD, J.

99 Cal. 416

BLUMBERG v. BIRCH. (No. 19,165.)

(Supreme Court of California. Aug. 31, 1893.)

MORTGAGES — FORECLOSURE — ACTION FOR DEFICIENCY — MERGER IN JUDGMENT — PLEADING.

1. In an action to foreclose a mortgage, in which service is made by publication only, the court has no jurisdiction to enter a personal judgment for a deficiency.

2. Code Civil Proc. § 726, prohibiting more than one action to recover a debt or enforce a mortgage, does not prevent a new action on a note which was secured by a mortgage to recover a deficiency left on foreclosure of the mortgage, as the amount realized on foreclosure may be treated as a payment on the note, and the action as brought to recover the balance.

3. A complaint to recover a deficiency after foreclosure of a mortgage securing a note, which shows the foreclosure and the fact that a deficiency resulted, states a good cause of action, whether it is based on the note, or on an indebtedness resulting from the foreclosure and deficiency.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by A. W. Blumberg against Cullum Birch to recover a deficiency on a mortgage foreclosure. From a judgment for defendant, plaintiff appeals. Reversed.

H. L. Poplin, for appellant. Orr & Hall, for respondent.

BELCHER, C. It is alleged in the amended complaint in this case that on the 13th day of August, 1887, the defendant executed and delivered to the plaintiff his promissory note, and a mortgage on certain real property to secure payment of the same; that on the 15th of December, 1890, the plaintiff commenced an action against the defendant in the superior court of Ventura county to foreclose the said mortgage, and that a summons in the action was issued, and served on the defendant by publication only, he being then a nonresident of this state, and absent therefrom; that defendant did not appear in the action, and, after the time allowed by law for him to appear and answer or demur, his default was duly entered by order of the court; that the court then heard proof of plaintiff's demand set out in his complaint, and examined him on oath respecting any payments that had been made on account of such demand, and thereupon made and entered in the action its decree of foreclosure in the usual form; that under this decree, on March 27, 1891, an or-

der of sale was duly issued to the sheriff of the county, and in pursuance thereof the sheriff advertised for sale, and on April 27, 1891, sold the said real property for the sum of \$1,000, and applied the same to the payment of the said indebtedness, interest, attorneys' fees, costs, and expenses, as directed by said decree; that after so applying the said sum there remained due and unpaid to the plaintiff, on said indebtedness for principal and interest on the said note, and as determined by said decree, the sum of \$1,746.99; that the sheriff's return being made, showing such balance or deficiency, judgment was duly docketed therefor in favor of the plaintiff and against the defendant on April 28, 1891; and that no part of said sum had been paid. Wherefore, the plaintiff demands judgment against the defendant for the sum of \$1,746.99, with interest thereon, etc. The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and his demurrer was sustained. Judgment was thereupon entered that the plaintiff take nothing, from which judgment he appeals.

There can be no doubt that the court, by the constructive service of the summons by publication in the foreclosure case, acquired jurisdiction to ascertain the amount secured by the mortgage, and to make and enter a valid decree of foreclosure, directing a sale of the mortgaged property, and the application of the proceeds to the payment of the amount so secured, including costs and expenses. It did not, however, thereby acquire jurisdiction to enter or docket a personal judgment against the defendant for any deficiency left unpaid by the proceeds of the sale. *Pennoyer v. Neff*, 95 U. S. 714; *Belcher v. Chambers*, 53 Cal. 639; *Anderson v. Goff*, 72 Cal. 65, 13 Pac. Rep. 73. But, notwithstanding no valid judgment could be entered for the deficiency, still, when properly ascertained, the deficiency constituted a subsisting indebtedness then due from the defendant to the plaintiff. The plaintiff brought this action to recover that indebtedness, and in his complaint set out all the facts on which he based his right of recovery; and the defendant's contention is that no sufficient cause of action was stated, because (1) the personal judgment set out was void; and (2) the note was merged in the foreclosure judgment, and under section 726 of the Code of Civil Procedure no new or other action could be maintained thereon. It is true that the personal judgment docketed against the defendant was void, and also that under the section of the Code cited there can be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage upon real or personal property. It does not follow, however, that after the mortgage security is exhausted, leaving a deficiency which is no longer secured, no new action on the note

can ever be maintained. On the contrary, it has been held that an action may be maintained against an indorser of a note, payment of which has been secured by a mortgage given by the maker, to recover any deficiency resulting after a sale of the mortgaged premises under a judgment of foreclosure against the mortgagor. *Vandewater v. McRae*, 27 Cal. 596; *Allin v. Williams*, 97 Cal. 403, 32 Pac. Rep. 441. It seems to us, therefore, that in a case like this the amount realized from the proceeds of the sale may properly be treated as a payment on the note, and that an action thereon may be maintained to recover the balance left unpaid. But, however this may be, it is clear and not disputed that the defendant was justly indebted to the plaintiff, in some form, for the amount of the deficiency; and, being so indebted, the familiar maxim of the law, that where there is a right there is a remedy, "*ubi jus ibi remedium*," is applicable to the case.

Under our system of pleading, the complaint should contain a statement of the facts constituting the cause of action, in ordinary and concise language, and the court may grant the plaintiff any relief consistent with the case made. Sections 426, 580, Code Civil Proc. Here the complaint complies with the rule prescribed, and whether it be said to be based on the note, or on an indebtedness resulting from the facts stated, is, in our opinion, immaterial. In either view, it states facts sufficient to constitute a cause of action, and the demurrer was therefore improperly sustained. We advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

99 Cal. 392

BOWIE v. GRAND LODGE OF LEGION OF THE WEST. (No. 15,149.)

(Supreme Court of California. Aug. 31, 1893.)

MUTUAL BENEFIT SOCIETIES — PAYMENT OF CERTIFICATES — CHANGE IN LAWS — EFFECT ON MEMBER.

1. Where a certificate in a mutual benefit society provides for its payment "in an amount to be computed according to the laws" of the society, and these latter provide that their provisions in regard to the payment of such certificates may be changed at any time, a member is bound by a change made in such laws after his procurement of the certificate, and before the time for its payment.

2. A change of the laws of a mutual benefit association in regard to the payment of benefit certificates is not an amendment of its certificate of incorporation or articles of associa-

tion, within the meaning of Civil Code, § 362, providing the method for making such amendments.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by one Bowie against the Grand Lodge of the Legion of the West. From a judgment for plaintiff, defendant appeals. Reversed.

F. Wm. Reade, for appellant. Rogers & Chilstrom, for respondent.

DE HAVEN, J. The defendant is a corporation existing under the laws of this state, and belongs to the class known as mutual benefit associations. Under its constitution and laws it agrees to pay a stipulated sum of money to a designated nominee upon the death of the beneficiary member, and also issues to members known as "special benefit members" a certificate entitling them to receive an endowment, payable in installments during the life of such members. The defendant is without capital stock, and, like all associations of a similar character, depends upon the collection from its members of certain fixed assessments, in order to provide a fund for the payment of the certificates issued by it. Upon February 15, 1888, the defendant issued to the plaintiff a special benefit certificate of the sixth class, with 10 coupons attached thereto, each providing for the payment of a sum not exceeding \$600, the first one maturing in June, 1891, and the tenth in the month of February, 1921; and by the terms of this certificate, the defendant agreed with plaintiff, in effect, that, should he live to the period of time set forth in each of the 10 coupons attached thereto, he would be entitled "to participate in the special benefit fund of the order, in an amount to be computed according to the laws of the order, not exceeding the amount named in the coupons, respectively." At the time of the issuance of this certificate the constitution and laws of the defendant contemplated that the defendant would make and collect a sufficient number of assessments to enable it to pay each maturing coupon in full, unless one assessment on each special benefit member would amount to \$600, in which event there should be but one assessment. The constitution, however, contained a provision that "the constitution * * * relating to the beneficiary fund and the laws governing the same" might be amended by a three-fourths vote of all the members present at a regular meeting of the Grand Lodge.

This action is brought by the plaintiff to recover the sum of \$600, alleged to be due upon a coupon maturing in June, 1891, and attached to the special benefit certificate held by him. The coupon is in these words: "This first coupon issued by authority of the Grand Lodge, Legion of the West, shall not exceed \$600, and shall not mature before

the month of June in the year 1891." The defendant in its answer alleged that the law of defendant in relation to its beneficiary funds was amended in March, 1891, so as to provide that, if the amount of an assessment called and received in the second calendar month next preceding the maturity of a coupon "shall be insufficient to pay the full face value of each and every certificate or coupon payable in the same calendar month, * * * then the sum to be paid on any coupon or certificate payable in said calendar month, and which shall be in full satisfaction thereunder, shall be a proportionate amount of such one assessment, and all that can be claimed by any person." The answer further alleged that $37\frac{1}{2}$ coupons of the sixth class matured in the month of June, 1891, and that, according to the provisions of the laws of defendant, the proportion due on each, to be paid from the assessments received by defendant, would be \$108, and that defendant had no other funds applicable to the payment of such coupons. The defendant offered to show, upon the trial of the case, that this alleged change in its laws had been made, but the evidence was, upon the objection of the plaintiff, excluded. The plaintiff recovered a judgment for the sum of \$600, with interest thereon from the date of the commencement of the action.

The defendant appeals, and assigns as error the ruling of the court in not permitting it to show that its laws in relation to its beneficiary funds were changed, as alleged in the answer; and we are of the opinion that the court erred in excluding this offered evidence. The alleged change made in the laws of the defendant did not impair the obligation of plaintiff's contract or affect any vested right of his. The plaintiff, when he became a member of the defendant corporation, became also bound by its constitution and laws, and such constitution and laws became a part of his contract of membership, as much so as if they had been written therein in express terms, and his rights under the certificate issued to him were subject thereto and limited thereby. The certificate issued to plaintiff contained the express provision that "he shall be entitled to participate in the special benefit fund of the order, in an amount to be computed according to the laws of the order, not exceeding the amount named in said coupons, respectively." This certificate, when read and construed, as it must be, in connection with the constitution and laws of the defendant existing at the time of its issuance, and which provided that a change might be made in the laws of defendant governing such funds, means that the plaintiff is to participate in the special benefit fund of defendant in an amount to be computed according to the laws of defendant in force when the several coupons shall mature. "Parties may contract in reference to laws of future enactment,—may agree to be bound and affected by them as they would

be bound if such laws were existing. They may consent that such laws may enter into and form parts of their contracts, modifying or varying them. It is their voluntary agreement which relieves the application of such laws to their contracts and transactions from all imputation of injustice." *Superior Commandery v. Ainsworth*, 71 Ala. 436. This was also, in effect, so decided by this court in the case of *Stohr v. Society*, 82 Cal. 557, 22 Pac. Rep. 1125. In that case it appeared that Stohr had become a member of the defendant therein, and at the time he became such member the by-laws of that society provided that a member disabled by sickness should receive \$10 per week. Subsequently the society limited the amount of benefits to be paid, and it was contended for the plaintiff therein that such amendment of the by-laws impaired the obligation of his contract; but the court thought otherwise, saying: "Undoubtedly, when the plaintiff complied with what was required of him as a member, the by-laws constituted a contract; and, unless the contract itself otherwise provide, it cannot be changed without the consent of all the members. But here the contract itself does provide otherwise. Under the averments of the second defense there is an express provision that the by-laws may be changed. * * * This provision must be held to enter into and form a part of the contract, and, in legal effect, it is as potent as the express provision of the second defense. * * * In the present case the plaintiff can have no right to have the contract remain unchanged, because, as we have seen, the contract itself provides that it may be changed. * * * If the plaintiff has any right which is so fixed that it is not subject to change, we think it can only be to the fruits which ripened before the change was made; in other words, to such sums as became due before the new by-law was adopted." The change alleged in defendant's answer to have been made in its constitution and by-laws was not an amendment of its certificate of incorporation or articles of association, within the meaning of section 362 of the Civil Code. Judgment reversed.

We concur: McFARLAND, J.; FITZGERALD, J.

99 Cal. 419

GISSON v. SCHWABACHER et al. (No. 15,059.)

(Supreme Court of California. Aug. 31, 1893.)
INJURY TO EMPLOYE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Plaintiff was employed as a sack sewer in defendant's flour mill, and to do such other work as the foreman might direct. In complying with the latter's directions to assist him in taking apart some rollers on one side of the room in which he worked, he was caught in some belts and rollers, which he could not see on account of the darkness of the room, and which were not protected by any guards or

railing. The only lantern in the room, the foreman had at the place of the accident. The evidence on plaintiff's part tended to show that he had never been in that part of the room, and did not know of the location of machinery in that place. *Held*, that a verdict for plaintiff would not be disturbed on the ground that he had assumed such risk, or was guilty of contributory negligence.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by one Glsson against one Schwabacher and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Estee, Wilson & McCutchen, for appellants. A. Ruef, for respondent.

DE HAVEN, J. This is an action to recover damages alleged to have been sustained by the plaintiff by reason of the dangerous condition of a flouring mill conducted by defendants, and in which plaintiff was employed as a laborer at the time he received the injuries complained of. The plaintiff recovered judgment in the superior court for the sum of \$2,500, and the defendants appeal.

The plaintiff was employed as a sack sewer, and when not so employed, and when the necessity arose, it was also his duty to do such other work about the mill as the foreman might direct. On June 29, 1888, he was directed by the foreman to assist him in taking apart some rollers upon a raised platform on one side of the room in which he was engaged in sewing sacks, the foreman taking with him to the place where the work was to be done a lantern used by plaintiff when engaged in his ordinary work, and which was the only light in the room. Upon this platform, or, rather, passing over and above it, were rollers, belts, and pulleys, such as usually form part of the machinery of a flouring mill, but they could not be distinguished there, on account of the darkness of the room. The room was unlighted except with the one lantern which the foreman took with him, as already stated, and this was not sufficient to light that part of the platform occupied by the plaintiff at the time, and the belts, pulleys, and rollers were not protected in any manner by guards or railing. While engaged with the foreman upon this platform, the plaintiff, in some way, stumbled and fell, and became entangled in the belting and pulleys referred to, and sustained the injuries on account of which this action is brought. The appellants do not dispute the fact that the place where plaintiff was injured was extremely dangerous to a person working there, and that they knew of its dangerous character; but their main contention is that plaintiff knew, or ought to have known, of the risk and danger surrounding the place, and that he voluntarily assumed such risk when he went upon the platform, and, fur-

ther, that he was guilty of contributory negligence in working there without a light. It is undisputed in the evidence that there was but one light in the room, and this the foreman had with him at the time and place of the accident. The evidence upon the part of plaintiff also tended to show that he was never upon this platform before the accident, and that he had no knowledge of the location of the machinery, belts, and pulleys in that part of the mill where he was engaged, and that his general duties were not such as to require him to have such knowledge. We cannot, in view of the evidence, disturb the implied findings of the jury, to the effect that the injury received by plaintiff was not caused by any of the ordinary risks of his employment, and that he was not himself guilty of contributory negligence in going to work upon the platform under the circumstances above stated. Certainly, unless the plaintiff knew, or ought to have known, of the danger to which he was exposed in working upon the platform where he was injured, he cannot be said to have recklessly exposed himself to such danger, or to have voluntarily assumed these risks. *Sanborn v. Trading Co.*, 70 Cal. 261, 11 Pac. Rep. 710. The court did not err in refusing to give the instructions requested by defendants. In so far as they correctly stated the law, they were embodied in the instructions given. The case was submitted to the jury upon instructions quite as favorable to defendants as they were entitled to, under the law, and of which, therefore, they have no right to complain. Judgment and order affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

(99 Cal. 440)

PEOPLE v. WONG AH LEONG. (No. 20,949.)

(Supreme Court of California. Aug. 31, 1893.)

CRIMINAL LAW—CROSS-EXAMINATION OF DEFENDANT—IMPEACHMENT.

1. On a prosecution for an assault with intent to commit murder with a knife, defendant testified as to his presence at the scene of the assault, and his arrest as the perpetrator thereof, but made no mention of anything happening after his arrest. *Held* that, under Pen. Code, § 1323, providing that a defendant who offers himself as a witness can be cross-examined only as to "matters about which he was examined in chief," defendant could not be cross-examined regarding a pistol which fell from his person just after his arrest.

2. Defendant, on a prosecution for assault with intent to commit murder, who testifies in his own behalf, cannot have his character impeached by evidence that he had a pistol on his person at the time of his arrest.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Wong Ah Leong was convicted of assault with intent to commit murder, and appeals. Reversed.

Robert Ferrall and Dorn & Dorn, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The appellant was charged with and convicted of the crime of an assault with an intent to commit murder, the charge being that he committed the assault "with a deadly weapon, to wit, a knife, upon the person of one Leong Ly Chuen," and he appeals from the judgment and from an order denying a new trial.

Appellant contends that the court erred in certain rulings touching the admissibility of evidence. The prosecuting witness testified that while he was going up a pair of stairs leading from the street to the upper story of a house, he was cut by the appellant, who had followed him; that he (the witness) made an outcry, and immediately turned and pursued the appellant down the stairs, and that appellant was arrested a few steps from the foot of the stairs by a man named Riordan. There was testimony on the part of defendant to the point that it was a third man who fled down the stairs, that the third man ran away and escaped, and that the appellant, who was passing along the street, had merely stopped near the foot of the stairs at the time of his arrest, because attracted by the outcry of the prosecuting witness. Riordan testified that he delivered the man whom he had arrested to some officers, and also testified, without objection, that, while the officers were taking appellant to the receiving hospital, a pistol fell from the person of appellant, and, going off, shot appellant in the leg. One of the officers, against the objection of appellant, also swore to the dropping of the pistol, and the pistol was admitted in evidence against appellant's objection.

The appellant was a witness in his own behalf, and in his testimony in chief merely gave an account of how he happened to be near the stairway at the time of his arrest. His narrative stopped at the point of his arrest. He said nothing about anything that occurred afterwards, and made no allusion to the episode of the pistol, but on cross-examination the prosecution immediately commenced asking him about the pistol; the very first question being, "Did you ever see that pistol before?" To this appellant's counsel objected as "not in cross-examination," and also as irrelevant and immaterial, and "calculated to convict the defendant of another and different charge." The objection was overruled, and appellant excepted. The ruling was clearly erroneous. By section 1323 of the Penal Code a defendant who offers himself as a witness can be cross-examined only as to "matters about which he was examined in chief." As the cross-examination was not as to a matter about which appellant had been examined in chief, and as it was not admissible for the purpose of impeaching his character, (Code Civil Proc. § 2051,) we cannot conceive of any theory

upon which it can be justified. See *People v. O'Brien*, 66 Cal. 602, 6 Pac. Rep. 695; *People v. Bishop*, 81 Cal. 116, 22 Pac. Rep. 477. The only plausible position that can be taken by respondent is that the matter inquired of in the cross-examination was not of sufficient importance to have been prejudicial to appellant. But, in the first place, the prosecution, after having persistently endeavored all through the trial to prove the fact that appellant had a pistol, can hardly be heard to say now that such fact was not important; and, in the second place, it is quite clear that evidence of the fact that appellant had a pistol, although he was only charged with having committed the crime with a knife, greatly prejudiced him in the minds of the jury. There is no escape, therefore, from the conclusion that for said error a new trial must be granted.

As to the other alleged errors in rulings on evidence, it is sufficient to say that no exceptions were taken at the proper time. The charge of the court to the jury is not upon its face erroneous. We do not think that the language of the charge prevented the jury from finding appellant guilty of a lesser crime included within the information, or apparently influenced them to find a verdict for the highest offense.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

99 Cal. 452

KIESSIG v. ALLSPAUGH et al. (No. 19,134.)

(Supreme Court of California. Aug. 31, 1893.)

CONTRACTORS' BONDS—ENFORCEMENT AGAINST SURETIES.

1. Code Civil Proc. Cal. § 1183, provides that a building contract which is not recorded before work is commenced thereunder, when the contract price exceeds \$1,000, shall be void, and no recovery thereon can be had by either party thereto. *Held*, that a bond for \$5,000 given by the contractor to the owner to secure the latter against claims and liens for labor on materials, and which refers to a written contract that has not been recorded, made between the principal and obligee, is not within the meaning of the statute, and may be enforced without violating the above section. *Kiessig v. Allspaugh*, 27 Pac. Rep. 662, 91 Cal. 234, followed. *Lumber Co. v. Neal*, 27 Pac. Rep. 192, 90 Cal. 213, overruled; *McFarland, J.*, holding that the cases are distinguishable.

2. The failure to record the contract did not increase the obligation of a surety on the bond.

Garoutte and Harrison, JJ., dissenting.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Kiessig against A. M. Allspaugh and M. S. Hall, as principals, and N. P. Lundeen, as surety, to recover on a building contractor's bond. From a judgment for plaintiff, defendant Lundeen appeals. Affirmed.

Parrish, Mossholder & Lewis, for appellant. Carl Schutze, for respondent.

DE HAVEN, J. The plaintiff in this action seeks to recover \$1,807.25 upon a building contractor's bond executed to him by the defendants Allspaugh and Hall as principals, and by the defendant Lundeen as surety. The bond sued upon was executed on October 15, 1887, and, after reciting the fact that the principals therein had upon October 14, 1887, entered into a contract with the plaintiff here to build for him a certain house, for the price and in accordance with the specifications contained in said contract, proceeds: "Now, therefore, we, A. M. Allspaugh and M. S. Hall, as principals, and H. V. Poser and N. P. Lundeen, as sureties, bind ourselves, our heirs, executors, and successors, in the sum of \$5,000, to forever save and hold harmless the said Charles Kiessig against any claims, demands, or liens of all characters whatsoever for material or labor expended or used in the building, constructing, and finishing of the said house." The original building contract was not recorded, and the price therein agreed to be paid for the construction of the building was \$8,000. Work under the contract was commenced after the execution of the bond just referred to, and the building was completed by the contractors in accordance with the plans contained in the original contract, but plaintiff was compelled to pay in addition to the contract price the amount sued for in this action for the purpose of discharging the liens for materials used in and labor performed on the building. Judgment was rendered in the superior court in favor of plaintiff, and the defendant Lundeen appeals.

It is provided by section 1183 of the Code of Civil Procedure that all contracts for the construction of buildings, when the amount agreed to be paid therefor exceeds \$1,000, shall be in writing, and filed in the office of the recorder of the county where the property is situated, before work is commenced under the contract; and, if not so filed with the recorder, "they shall be wholly void, and no recovery shall be had thereunder by either party thereto." The section further provides that in such case the labor and materials of all persons except the contractor "shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." The appellant, Lundeen, claims that the bond sued upon in this action is dependent upon the contract referred to therein, and that, as this contract is wholly void under the provisions of section 1183 of the Code of Civil Procedure just cited, because not filed with the county recorder, the bond is void also. The point thus presented was decided adversely to the contention of appellant in the case of *Kiessig v. Allspaugh*, 91 Cal. 234, 27 Pac. Rep. 662, in which the

validity of this same bond was attacked by one of the principals named therein, upon the ground now urged by appellant. In answering this objection to its validity, the court there said: "Although the original contract could not be enforced, because not recorded, the contractor might nevertheless perform, and the plaintiff could accept such performance, and neither be guilty of any wrong in so doing; and if, in performing, the appellant incurred a personal liability for labor or materials, which was discharged by the plaintiff in order to remove a lien from his own property, or at the request of the appellant, the obligation to repay plaintiff is created by law, and would exist independently of the building contract, and is not affected by any defect therein, and is a sufficient consideration to support the express undertaking of defendant to repay, and the bond may therefore be deemed so far an independent undertaking that the right to enforce it does not depend upon the subsequent or continued validity of the building contract. As already stated, this bond is not within the letter of section 1183 of the Code of Civil Procedure, and it may be added that it is not within its reason or spirit, and its enforcement is not in conflict with the policy of that section." The provision of section 1183 of the Code of Civil Procedure making wholly void, as between the parties thereto, a written contract for the construction of a building for a price exceeding \$1,000, unless the same is filed with the county recorder before the commencement of work thereunder, is an arbitrary one, and is not to be extended to any contract not falling strictly within its letter. It does not extend to a bond like that under consideration here, the very object of which is to provide for the payment of all those liens and claims which it is the chief object of the statute to secure.

Nor did the failure of plaintiff to record the building contract increase the obligation assumed by appellant as a surety for the principal obligors named in the bond. It is true that, if such contract had been filed, the liens upon the property of plaintiff could not have exceeded the contract price, and might have been discharged with the money which the plaintiff retained in his hands until the final settlement with the contractors, as provided for in the building contract. But the failure to file this contract with the recorder was not an omission to discharge any duty which the plaintiff owed to the defendant as a surety, and did not add to the obligation imposed upon him by the terms of the bond which he signed. Undoubtedly, the defendant might have stipulated in the bond that the building contract should be filed as a condition precedent to his liability as a surety; but he did not do so, and the court is not authorized to construe or interpolate such a condition into the bond, and in this respect to make a

new contract for the parties who executed it. The bond was executed in view of the fact that the contractors were about to commence the erection of a house for plaintiff in accordance with the written contract mentioned in the bond, and the sole purpose of the bond was to protect the plaintiff against the consequences of a failure of the contractors to pay the personal obligations which they might incur for labor and materials, in the event that they actually constructed for him the building referred to in the contract; and it is the duty of the court to enforce it according to its terms. The case of *Lumber Co. v. Neal*, 90 Cal. 213, 27 Pac. Rep. 192, cited by appellant, does sustain his contention; but, upon a more careful consideration of the question therein decided, we are not satisfied with the conclusion reached in that case. Judgment and order affirmed.

We concur: BEATTY, C. J.; FITZGERALD, J.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Justice DE HAVEN, except that I think the case distinguishable from that of *Lumber Co. v. Neal*.

We dissent: GAROUTTE, J.; HARRISON, J.

99 Cal. 472

In re BLYTHE'S ESTATE. (No. 14,837.)
(Supreme Court of California. Aug. 31, 1893.)

RES JUDICATA—PENDING RIGHT TO APPEAL.

Since, under Code Civil Proc. § 1049, by which an action is pending until the time for appeal has expired, or the judgment has been sooner satisfied, a judgment until then is not final, an unsatisfied decree, the time for an appeal from which has not expired, is no evidence of the facts thereby adjudged.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition, in the matter of the estate of Thomas H. Blythe, deceased, for a family allowance to Florence Blythe. Appeal from an order granting the same. Reversed.

H. S. Brown, John R. Jarboe, W. S. Goodfellow, and Edward R. Taylor, for appellants. W. H. H. Hart, Garber, Boalt & Bishop, Thos. I. Bergin, and W. W. Foote, for respondent.

GAROUTTE, J. This appeal is prosecuted from an order granting a family allowance to Florence Blythe. Upon the hearing of the petition for the allowance, counsel for the applicant introduced in evidence the findings of fact, conclusions of law, and the decree heretofore made and entered in the action of *Blythe v. Ayers et al.*, wherein it is found and adjudged that Florence Blythe is the lawful child and heir of Thomas H. Blythe,

deceased. The petitioner, aside from certain matters pertaining to property, rested her application upon the foregoing evidence. Appellants thereupon requested the court to grant a continuance for such reasonable time as would enable them to perfect an appeal to the supreme court from the judgment in *Blythe v. Ayers*, and stated that they intended in good faith to appeal from such judgment, and also asked for a continuance for the purpose of introducing testimony to prove that the petitioner was not, in fact, the child of said Thomas H. Blythe, deceased, or a member of his family. These motions being denied, appellants then moved the court to deny the prayer of said petitioner, upon the grounds that no evidence had been introduced that she was the child of said Thomas H. Blythe, deceased, or a member of his family, other than the findings, etc., (to which reference has already been made,) and that said findings of fact, conclusions of law, and decree show that petitioner never was the adopted child of Blythe, the deceased. This motion was denied, and the family allowance ordered.

We do not find it necessary to consider the claims of counsel that the court abused its discretion in not granting appellants a reasonable continuance for the purposes stated, as the decree must be reversed upon other grounds. Neither do we deem the contention of appellants sound wherein it is insisted that the court had no jurisdiction to make the order of allowance, because the petitioner's status as the child of Blythe was denied. That was a question of fact for the court to determine before denying or granting the application, and in no sense jurisdictional. The decree must be reversed because there is no evidence to support it. Appellants were present at the hearing of the application, and denied the allegation of the petition that Florence Blythe was the child and heir at law of Blythe, deceased. To prove that fact, findings, conclusions of law, and decree in the case of *Blythe v. Ayers* were introduced in evidence. We think them wholly insufficient to prove it. The findings and decree in that action were filed and entered October 22, 1890. The application for an allowance was filed and heard October 31, 1890. The judgment was but nine days old when offered in evidence, and, under the statute, the losing parties were entitled to an appeal from it at any time within 60 days from its rendition. By virtue of section 1049 of the Code of Civil Procedure, an action is pending until the time for appeal has expired, or the judgment sooner satisfied. This judgment, being but nine days old at the date of the hearing, and not satisfied, afforded no evidence of the facts therein found, for it was not a final judgment, inasmuch as the action was still pending. A judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final

judgment in the cause; and, if the action in which the judgment is rendered is still pending, necessarily the judgment is not final. As was said in *Hills v. Sherwood*, 33 Cal. 478: "Although a judgment may be final with reference to the court which pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected so long as it is subject to appeal, and liable to be reversed." The sound policy of a law which will not allow a decree to stand upon such evidence is well illustrated by the Blythe litigation. This judgment, which was introduced in evidence upon the hearing of the matter of family allowance to prove the paternity of the child, has since been attacked by appeal, and the matter is now pending in this court. Let us assume that the judgment will be reversed upon the findings, and the cause remanded, with directions to enter judgment for appellants; by such assumption the judgment upon which the decree of family allowance was based has gone forever. It has not only disappeared, but the evidence of the paternity of the child upon which the allowance was granted is declared by the court of last resort to be no evidence of such paternity. If this judgment was evidence of the fact of paternity, it was conclusive evidence of that fact,—it was *res adjudicata*. Yet that cannot be possible, for nothing is *res adjudicata* until it has reached final judgment. As was said in *Webb v. Buckelew*, 82 N. Y. 560: "It is therefore only a final judgment upon the merits which prevents further contest upon the same issue, and becomes evidence in another action, between the same parties or their privies. Until final judgment is reached, the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the question at issue." And, again: "Whenever it fails to fix and determine the ultimate rights of the parties, wherever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing. Until the judgment comes, no man can know what the ultimate decision will be." In *Harris v. Barnhart*, (Cal.; decision filed March 18, 1893,) 32 Pac. Rep. 589, it is decided that a judgment cannot be pleaded in bar where it has not been satisfied and the time for appeal has not expired. In other words, the judgment is not a final judgment if the action is still pending, and the plea should be in abatement. In *Naftzger v. Gregg*, (Cal.; decision filed July 21, 1893,) 33 Pac. Rep. 757, the doctrine is again declared, some of the justices holding that "when, upon the submission of the case, it appeared to the court that a year had not elapsed since the entry of the judgment, and no other evi-

dence upon that issue had been introduced, the court should have held that it did not constitute a bar, for the reason that under the provisions of section 1049, Code Civil Proc., the action was deemed to be still pending." Other members of the court went to greater lengths, and declared the judgment inadmissible as evidence for any purpose. For the foregoing reasons we conclude the evidence is wholly insufficient to support the order. Let the order be reversed.

We concur: McFARLAND, J.; FITZGERALD, J.; DE HAVEN, J.

99 Cal. 511

VON SCHMIDT v. WIDBER, Treasurer.
(No. 15,160.)

(Supreme Court of California. Sept. 11, 1893.)

COURTS—PRACTICE—ORDERS.

1. Under the present constitution, whenever a judge of the superior court is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts are the acts of the "court;" and therefore an order dispensing with an undertaking on an appeal, made and signed by a judge of the superior court of San Francisco county while holding a session of one of the departments of the court at its court room, is a sufficient compliance with Code Civil Proc. § 946, providing that the "court" below may dispense with an undertaking on appeal in certain cases.

2. Since there is no provision requiring orders of the superior court to be entered at length on its minutes, it is sufficient if an order dispensing with an undertaking on appeal be filed with the clerk.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by one Von Schmidt against one Widber, treasurer of the city and county of San Francisco. There was a judgment for plaintiff, and defendant appealed. Respondent moves to dismiss. Denied.

Harry T. Creswell, for appellant. Tilden & Tilden, for respondent.

HARRISON, J. Motion to dismiss the appeal. The appellant was sued in his official capacity, as treasurer of the city and county of San Francisco, and has appealed from the judgment against him. Section 946, Code Civil Proc., provides that the court below may, in its discretion, dispense with an undertaking on appeal "when the appellant is an executor, administrator, trustee, or other person acting in another's right;" and in *Scheerer v. Edgar*, 67 Cal. 377, 7 Pac. Rep. 760, it was held that this section applied to an action against a municipal officer in his official capacity. On the 19th of July, 1892, after the defendant had given his notice of appeal, the Honorable James M. Troutt, one of the judges of said superior court, and the presiding judge thereof, while holding a session of one of the departments

of the court at its court room, and engaged in the trial of a cause then pending in said department, upon the motion of the attorney for the defendant, made and signed an order dispensing with any undertaking upon said appeal, which he returned to said attorney, and it was on the same day filed with the clerk, but no record thereof was ever made in the minutes of the court. The respondent now moves to dismiss the appeal for the want of an undertaking, upon the ground that an order dispensing with an undertaking on appeal can be made only by the court, whereas the foregoing order was made by a judge, and not by the court.

A court is a tribunal presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law. Blackstone, following Coke, defines it as "a place where justice is judicially administered," (3 Bl. Comm. 23;) but it is also essential that this place be designated by law, and that the person or persons who are authorized to administer justice be at that place for the purpose of administering justice at such times as may be also designated by law. The times fixed by law for the transaction of judicial business are called "terms," and the periods between the end of one term and the beginning of the next are called "vacations." These "terms" vary in different jurisdictions according to the statutes by which they are fixed; in some states ending at fixed dates, and in others continuing until the commencement of a succeeding term. Formerly, in England, there were four terms of court in each year, and their duration was so fixed that there were only 91 days in each year during which the courts could be in session. As the judicial business increased, it became impossible to transact it all within these periods of time, and there grew up the practice of hearing many matters "out of court" with the same effect as if heard while the court was in session; but the matters which were thus heard were only such as pertained to causes pending in court, and which were of a nature to expedite or facilitate the judicial disposition of the pending cause, to which they were merely subsidiary or collateral. At a later day the practice arose of hearing and disposing of such matters at certain hours during "term time" while the court was not in formal session, and subsequently certain hours of each day were fixed, at which one of the judges would hear these matters while the court was actually in session. The motions and orders thus made were said to be heard and disposed of "at chambers," for the reason that they were heard by the judge at his chambers, rather than in the court room, but the term "chambers" finally became extended so as to include any place, either in or out of the court room, at which a judge may hear applications or make orders while the court is not in session, in matters pending in that

court. The distinction between those matters which could be heard in court and those which could be heard at chambers arose from convenience, rather than from any other cause, but they were limited to the subsidiary and incidental steps in practice and procedure, leaving to the court the judicial determination of the issues presented by the pleadings, and which formed a part of the record. The term "court," as used in the Code of Civil Procedure, means sometimes the place where the court is held, sometimes the tribunal itself, and sometimes the individual presiding over the tribunal, and in many cases is used synonymously, as well as interchangeably, with "judge;" and whether the act is to be performed by the one or the other is generally to be determined by the character of the act, rather than by such designation. Section 166 provides that a judge "may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application;" and section 1004 provides that orders made out of court may be made by the judge of the court in any part of the state. Prior to the adoption of the present constitution there were fixed terms in this state for the transaction of judicial business by the several district courts, and any act done by a court after its term had ended was void. *Bates v. Gage*, 40 Cal. 183. Upon the adoption of the present constitution, all terms of court were abolished, and by its provisions (article 6, § 5) the superior courts are always open, and (section 6) in San Francisco there may be as many sessions of said court at the same time as there are judges thereof; and "the judgments, orders and proceedings of any session of the superior court, held by any one or more of the judges of said courts respectively, shall be equally effectual as if all the judges of said respective courts presided at such session." Under the present constitution of this state, therefore, whenever a judge of the superior court is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts may be considered as the acts of the court of which he is a judge.

There is no provision, either in the constitution or by statute, which requires the presence of any other officer than the judge to constitute a court, or to authorize the transaction of judicial business, nor is there any provision of law which requires all the orders of a court to be entered at length in its minutes in order that they may be effective; and by section 1003, Code Civil Proc., every direction of a court or judge is an order, whether it be merely made in writing or entered in the minutes. If it is not entered it should, however, be filed, in order that it may form a part of the records in the case. The county clerk is ex officio the clerk of the superior court of his county, and his

duties are fixed by statute, and are defined in section 111 of the county government act, (St. 1891, p. 322.) This statute, however, is intended to define his duties as a political officer of the state, rather than to prescribe or limit the functions or judicial powers of the court. He is not, however, by this act, required to do more than to "enter a synopsis of all orders, judgments and decrees proper to be entered, unless the court shall order them to be entered at length." By section 1052, Code Civil Proc., he is required to keep a register of actions in which he must enter the title of the action, "with brief notes under it from time to time of all papers filed and proceedings had therein." He is also required to make in the minutes of the court an entry of certain acts and transactions had or done in the presence of the court by the parties to an action, such as their oral consent to a waiver of a trial by jury, (section 631,) or of findings of fact, (section 634,) or their agreement to a reference, (section 638;) and, in case of receiving a verdict upon the trial of a cause by a jury, he is to make an entry of the time of trial, the names of the jurors and witnesses, and to set out the verdict at length, (section 628.) These, however, are matters which form a proper connection between the pleadings and the judgment, and, as they are a digression in the progress of a trial from the general course of procedure designated for obtaining a judgment upon the issues presented by the pleadings, the legislature has deemed it proper that they should be evidenced by a permanent memorandum thereof. But these entries in the minutes are evidently intended for the guidance of the court in its further action in the cause, and cease to be of value upon the entry of the judgment, for they form no part of the judgment roll, or "record" of the judicial action of the court, (section 670,) and cannot be used to impeach that record. With the exception of orders in matters of probate, (section 1704,) there is no provision in the Code of Civil Procedure which requires the clerk to enter in his minutes any order of the court made during the trial of the cause, or at any time after issue and before judgment. The final action of the court upon the issue made by the pleadings, and which is a judicial determination of that issue, is to be recorded by the clerk in the judgment book. Section 668. It is essential, however, that the action of the court be made a matter of record, in order that there may be no uncertainty as to what its action has been, and for this purpose it is customary, as well as expedient, to have its acts entered in the minutes kept by the clerk; but if the order is formally prepared and signed by the judge, and made a matter of record by filing with the clerk, the same end is attained as if it were spread at length upon the minutes of its daily transactions. As was said in *Niles v. Edwards*, 95 Cal. 47, 30 Pac. Rep. 134: "The action of the court

does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made; and, whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk." We hold, therefore, that, as the order in question was made by a judge, who at the time was at the place designated for holding court, and in the exercise of his judicial functions as a court, it was a sufficient compliance with the provisions of section 946, and the motion to dismiss the appeal is therefore denied.

We concur: MCFARLAND, J.; PATERSON, J.

4 Cal. Unrep. 205

PALMTAG v. ROADHOUSE et al. (No. 15,018.)

(Supreme Court of California. Aug. 31, 1893.)

STATUTE OF LIMITATIONS — ESTOPPEL TO PLEAD — DEMURRER.

1. The fact that a mortgagor was the general attorney of the mortgagee in other matters does not make the position of the mortgagor a fiduciary one, or render it anything but adverse to the mortgagor's interest, as far as the mortgage is concerned, so as to estop him to set up the statute of limitations to an action of foreclosure.

2. Under the California practice, when all the facts that defendant would be required to prove to sustain his plea of the statute of limitations appear on the face of the complaint, defendant may take advantage thereof by demurrer; but, to uphold a demurrer, the complaint must show, not that the cause of action may be barred, but that it is barred.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county.

Action by Frederika Palmtag against George W. Roadhouse and Emma Roadhouse, his wife, to foreclose a mortgage. From a judgment for defendants, plaintiff appeals. Reversed.

James Hall and Cross & Hall, for appellant. S. F. Geil and John J. Wyatt, for respondents.

SEARLS, C. This is an action brought to foreclose a mortgage given by the defendants, George W. Roadhouse and wife, to secure a promissory note for \$1,550 and interest, made by said defendants, Roadhouse and wife. The note and mortgage were dated March 25, 1885, and the note was payable to Frederika Palmtag, or order, one year after date. The action was commenced July 9, 1890,—as may be seen, more than four years after the maturity of the note. Defendants demurred to the complaint upon the ground, among others, that the cause of action was barred by the provisions of section 337 of the Code of Civil Procedure of the state of California. Plaintiff, in her complaint, and with an evident view to avoid the apparent bar of the statute of four years, inserted in her complaint the following statement: "That said defendant George W. Roadhouse is an attorney and counselor at

law, and engaged in the practice of law at Salinas City, Monterey county, Cal., and that plaintiff is a widow woman, residing at Watsonville, Santa Cruz county, Cal., and that the facts set forth in this paragraph have existed for several years last past. That, for about five years last past, said defendant George W. Roadhouse has been acting as the attorney and confidential agent for this plaintiff, and plaintiff always had full faith in his honesty and uprightness, and placed implicit confidence in his declarations and advice to her. That at various and sundry times between March 25, 1886, and March 25, 1890, defendant George W. Roadhouse told plaintiff and wrote to plaintiff that she need not trouble herself about that note and mortgage, (meaning the note and mortgage set out in this complaint;) that he would pay it before it outlawed, or words to that effect; and various and sundry other statements of like import, all of which statements plaintiff fully believed and relied upon. That plaintiff is a woman not conversant with business affairs and matters, and relied implicitly on the aforesaid assertions of her agent and attorney. That defendant George W. Roadhouse was at all times herein mentioned the husband and agent of defendant Emma Roadhouse, and acted in that capacity in all matters pertaining to said note and mortgage. That said defendant Emma Roadhouse, as plaintiff is informed and believes, and therefore alleges, well knew each and every fact set out in this paragraph before March 25, 1890, and agreed thereto and acquiesced therein." The demurrer was sustained by the court, and, plaintiff declining to amend, final judgment was entered in favor of defendants, from which judgment the plaintiff appeals.

The doctrine of estoppel, invoked by appellant against the defendants, cannot be maintained. It is not made to appear that George W. Roadhouse occupied any fiduciary relation to plaintiff in the matter of the note and mortgage. His position as to that transaction was adverse to the plaintiff, and the fact that he was her attorney in other matters did not alter his status in this respect; at least, it cannot be presumed to have done so, in the absence of express averments on the subject.

2. The complaint stated facts sufficient to constitute a cause for action, and the demurrer was evidently sustained upon the theory that plaintiff's cause of action was barred by the provisions of section 337 of the Code of Civil Procedure, (statute limiting actions to four years.) The attempted averment of facts in avoidance of the statute is not explicit and clear, and the complaint would have been open, perhaps, to a demurrer upon the ground that the complaint was ambiguous, unintelligible, or uncertain; but a demurrer to a cause of action, upon the ground that it is barred by the statute of limitations, can only be sustained where

the pleading shows it clearly open to the objection. To uphold a demurrer for this cause, the complaint should show, not that the cause of action may be barred, but that it is barred. Where, from the pleading, the question is left in doubt, an answer setting up the plea should be resorted to. *Farris v. Merritt*, 63 Cal. 118; *Harmon v. Page*, 62 Cal. 448; *Smith v. Richmond*, 19 Cal. 477; *Barringer v. Warden*, 12 Cal. 311. At common law the statute of limitations can only be interposed by plea, and could not be urged upon demurrer to the declaration, although apparent upon its face. In equity the rule was that, if all the facts which a defendant would be required to prove to sustain his plea appeared upon the face of the complaint, the defendant might take advantage of it by demurrer. We have substantially adopted the equitable mode of pleading, and with it the practice of permitting the statute of limitations to be interposed by way of demurrer in a proper case. In the present case I am of the opinion that, admitting all the facts of the complaint to be true, including those defectively pleaded, but not objected to, defendants were not entitled to judgment upon the ground that the plaintiff's complaint showed her demand to be barred by the statute of limitations. It follows that the judgment of the court below should be reversed, and the court directed to overrule the demurrer to the complaint, with leave to defendants to answer.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the court below is reversed, with directions to overrule the demurrer to the complaint, and with leave to defendants to answer.

99 Cal. 552

DUNCAN v. GRADY et al. (No. 15,471.)

(Supreme Court of California. Sept. 14, 1893.)

APPEAL—TAKING FOR DELAY—DAMAGES.

When it appears by the uncontradicted affidavit of respondent, on an appeal from a money judgment, that the appeal was taken merely for delay, and that there was no pretense of any defense, the court, on dismissing the appeal for failure to file a transcript, will award respondent damages for appellant's abuse of the right of appeal.

Department 2. Appeal from superior court, Fresno county.

Action by one Duncan against W. D. Grady and others. From a judgment for plaintiff, defendants appeal. Dismissed.

W. D. Grady, for appellants. J. P. Strother, for respondent.

DE HAVEN, J. This is a motion to dismiss an appeal because of the failure of de-

defendants to file a transcript within the time prescribed by rule 2 of this court, and for damages. The appeal is from a judgment rendered against defendants for the sum of \$1,233.35, and was perfected by the filing of an undertaking on appeal on June 24, 1893, and no transcript on appeal has been filed in this court; and it further appears from the certificate of the clerk of the superior court, dated August 23, 1893, that the defendants have not requested him to certify to any copy of the record. Upon these facts, the appeal must be dismissed. At the time of giving notice of the motion to dismiss the appeal, the respondent also gave notice that he would ask for damages upon the ground that the appeal was taken only for delay. This notice was based upon an affidavit of respondent, a copy of which was duly served upon appellants. This affidavit of respondent states that after the rendition of the judgment appealed from "execution was duly issued in his favor for the levy and collection of the amount due by said judgment, and, after a levy by the sheriff upon sufficient property of defendants to have satisfied said judgment, defendant W. D. Grady, who was also the attorney for himself and the other defendants, C. A. Owen and R. T. Owen, proposed to this affiant to give a chattel mortgage to gain further time upon said debt; that he referred him to his (affiant's) attorney, and that said Grady told this affiant, if he did not consent to said proposition, that they would take an appeal upon the judgment, and keep him out of the money for a year, and that he (affiant) would only get seven per cent. interest upon the debt; that none of the defendants ever pretended to have any defense to the action, nor any offset to the debt or judgment; and that the only purpose of appeal in this case was for delay." This affidavit is not contradicted, and, for the purposes of this motion, the matters therein stated must be taken as confessed by the defendants. The facts stated in the affidavit are such as to entitle the respondent to a judgment against defendants for damages. *Buckley v. Stebbins*, 2 Cal. 149. Ordinarily, the rate of interest allowed by law upon a judgment will be deemed a sufficient compensation to the judgment creditor for any delay occasioned by an appeal, and the mere fact that, in the opinion of this court, an appeal is ill advised, will not justify the imposition of damages; but when it appears, as in this case, that there has been an abuse of the right of appeal, and an attempt to wrest the law in relation thereto from its true object, and to use it for a purpose for which it was never designed, damages will be awarded. Appeal dismissed, and judgment in favor of respondent and against appellants for the sum of \$100, damages and costs.

We concur: FITZGERALD, J.; McFARLAND, J.

CAMPBELL v. FREEMAN. (No. 18,135.)
(Supreme Court of California. Sept. 12, 1893.)
ABSOLUTE DEED AS MORTGAGE — RECORD ON APPEAL.

1. Where a purchaser of land verbally agrees with another that, if the latter will loan him the purchase price, the conveyance shall be made direct to the latter as security therefor and also for future advances, the conveyance makes the lender a trustee and also a mortgagee, and he has a lien for the amount advanced for the purchase and for the subsequent advances.

2. In order to obtain a review of a ruling on the refusal of the court to allow amendment of pleadings, the request and ruling must be incorporated in the statement, or brought up by bill of exceptions.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Campbell against Freeman, administrator of A. G. Anderson, deceased, to have a conveyance declared a mortgage. Judgment for plaintiff. Defendant appeals. Affirmed.

Frank H. Short and G. C. Freeman, for appellant. Gayle & Coldwell, for respondent.

HARRISON, J. In April, 1882, A. G. Anderson, the appellant's intestate, being about to purchase a tract of land, made a verbal agreement with the plaintiff that the plaintiff should loan him \$800 with which to make the purchase, and that the conveyance should be made by the vendor directly to the plaintiff, who should hold the title as security for the money so loaned, and also for all other moneys which he should thereafter loan to or advance for him, and that Anderson should take possession of the property so conveyed. In pursuance of this agreement the conveyance was made to the plaintiff, and the purchase money therefor was paid by the plaintiff to the vendor, and Anderson entered into the possession of the property, and remained in possession thereof until his death in 1889, making valuable improvements thereon. After the purchase the plaintiff loaned other sums of money to Anderson, and made payments on his account, in pursuance of the aforesaid agreement, amounting to \$2,419, for which, on the 6th day of June, 1889, he executed to the plaintiff his promissory note. After this date the plaintiff made still other payments for the account of Anderson, under the said agreement, and after his death presented to his administrator a claim against his estate, properly verified, for all of the aforesaid amounts, amounting to \$3,116.50, which was allowed and afterwards approved by the judge of the superior court, and filed with the clerk. The plaintiff brought this action against the administrator, alleging the agreement between himself and Anderson, and that by virtue thereof the land that had been conveyed to him was held in mortgage to secure the payment of the said indebtedness, and asking for the sale thereof, and payment of the said claim out of the

proceeds thereof. Judgment was rendered in his favor, from which the defendant has appealed; claiming that the only effect of the transaction and agreement between the plaintiff and Anderson was to create a resulting trust in favor of Anderson, by which the plaintiff held the land as security for only the amount advanced for its purchase.

The rule is familiar that when, upon a purchase of real property, the purchase money is paid by one person, and the conveyance is made to another, a resulting trust immediately arises against the person to whom the land is conveyed, in favor of the one by whom the purchase money is paid. The real purchaser of the property is considered as the owner, with the right to control the title in the hands of the grantee, and to demand a conveyance from him at any time. The same rule prevails if the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is made to the lender for the purpose of securing the loan; but in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced, and for which the land is held as security. In such a case the grantee holds a double relation to the real purchaser,—he is his trustee of the legal title to the land, and his mortgagee for the money advanced for its purchase, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security; and he may also enforce his lien by an action of foreclosure. The conveyance is none the less a mortgage because it was conveyed to him directly by a third party, to secure his loan to the purchaser for the amount of the purchase money, than if the conveyance had been made directly to the purchaser in the first instance, and the purchaser had then made a conveyance to him, as a security for the money that he had previously borrowed with which to make the purchase. He is regarded as holding the land in trust for the protection of the purchaser; but this rule is not to be so extended as to enable the purchaser to work him an injury. Equity looks beyond the forms of a transaction, and shapes its judgments in such a way as to carry out the purposes of the parties to the agreement, and to protect each of them against any unconscionable advantage to be derived from the apparent form in which their transaction has taken place. In the present case the title to the land which the plaintiff took from the grantor was held by him in trust for Anderson. This was a trust created by operation of law; but, contemporaneously with the creation of this trust, there was impressed upon the title, by virtue of the agreement between Anderson and the plaintiff, a lien in favor of the plaintiff for the money which he had loaned him with which to make the purchase, and also for such other moneys as he should afterwards loan or ad-

vance to him. It was competent for them to make such an agreement, and the agreement, when made, had the effect to render the conveyance to the plaintiff a mortgage to secure the loans advanced to Anderson. "Any interest in property which is capable of being transferred may be mortgaged," (Civil Code, § 2947;) and if the transfer is made as security for the performance of an obligation, it is, in equity, a mortgage, irrespective of the form in which it is made. A deed absolute in form may be given as a security for future advances, without any accompanying obligation in writing, on the part of the person giving the deed. *Husheon v. Husheon*, 71 Cal. 412, 12 Pac. Rep. 410.

We cannot consider the refusal of the court to allow the defendant to amend his answer. The statement on motion for a new trial does not show that he made such request, nor does it show any ruling of the court in reference thereto, and there is no bill of exceptions containing any action of the court thereon. The only mode in which it is brought to our attention is by certain documents printed with the transcript, but which do not purport to be authenticated, except by the affidavit of his attorney. If a review of this ruling had been desired, it should have been either incorporated into the statement, or brought here by a bill of exceptions.

The objection to the allowance of an attorney's fee is not well taken. The note contained an express provision for its payment, and the issue made by the answer of the defendant was limited to the amount for which it could be allowed. It appears from the statement that the evidence justified the finding by the court that this amount was reasonable.

The conclusion that we have reached makes it unnecessary to consider the motion to dismiss the appeal. The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.

99 Cal. 549

COLE v. WILCOX. (No. 19,168.)

(Supreme Court of California. Sept. 12, 1893.)

APPEAL—NEW TRIAL—APPLICATION—EXCUSABLE NEGLIGENCE—DISCRETION OF COURT.

1. The determination of whether the failure of a party to procure additional time to prepare a statement on which to apply for a new trial was the result of excusable neglect or mistake is within the discretion of the trial court, and its findings are conclusive.

2. The objection that the statement of the case prepared for settlement on which to move for a new trial, and the proofs in support of the objection, should be made when the proposed statement is presented for settlement by the court, rather than at the hearing of the motion.

3. Granting a new trial because the judgment is not supported by the evidence being within the discretion of the trial court, in the absence of an abuse of that discretion the order will not be disturbed on appeal.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by one Cole against one Wilcox, executor. Defendant had judgment, and from an order granting a new trial he appeals. Affirmed.

Wells, Monroe & Lee and Albert M. Stephens, for appellant. A. W. Blair and W. Cole, for respondent.

HARRISON, J. This action was brought to recover damages for the alleged diversion of water from a canyon onto the plaintiff's land, through an artificial channel constructed by the defendant's testator. The cause was tried by a jury, which rendered a verdict in favor of the defendant. A motion of the plaintiff for a new trial, upon the ground, among others, that the verdict was contrary to the evidence, was granted by the court, and from this order the defendant has appealed. The plaintiff gave notice of his intention to move for a new trial March 17, 1892, and on the 21st day of March obtained from the court 10 days' time, in addition to the time allowed by law, in which to prepare and serve his proposed statement of the case. On the 29th of March he went to the court for the purpose of procuring additional time in which to prepare the statement, and the application which he made was granted, but the order that was entered by the clerk was for a stay of execution, instead of giving him further time to prepare his statement, and he did not discover this fact until about April 4th, on which day he gave notice that he would make an application to the court for further time; and on the 11th day of April, in pursuance of this application, the court made an order reciting that "it appearing to the court that, through mistake and inadvertence, the plaintiff, upon the 29th day of March, 1892, applied to this court to procure an order for a stay of execution herein for ten days from that date; that it was his intention, when he came into court, to make an application to the court for ten days' time to prepare, serve, and file affidavits and statement on motion for a new trial; and that he supposed that he had made such application, and that such order had been granted, and so informed his counsel; and that, through said mistake, the time for filing said statement was by him permitted to expire, the same mistake not having been discovered until after said expiration,—it is therefore ordered that the plaintiff be, and is hereby, relieved from said mistake and inadvertence, and is given two days from this date, thirteen days from the 31st day of March, 1892, to prepare and serve and file the said statement."

1. If the failure of the plaintiff to procure the additional time was the result of an excusable neglect or mistake, the court

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had the power to relieve him from the effect thereof, (*Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. Rep. 332;) and whether it was the result of such mistake or excusable neglect was to be determined, in the exercise of its discretion, by the court to which the application was made. The facts stated in the order must be accepted by us as having been fully shown to the court by competent evidence, and upon these facts it must be conceded that the court acted in the exercise of a wise discretion in making the order.

2. When the motion for a new trial came on for hearing, the defendant objected to the court hearing the same, upon the ground that the statement of the case proposed for settlement by the court was not served upon him by the plaintiff within the time allowed by law, and that the court had lost jurisdiction to settle any statement in the case, and now urges that for this reason the court erred in granting a new trial. The correctness of the court's action in granting the new trial must be determined upon the record, on which it acted upon the hearing of that motion, and is not affected by any error which it may have committed in matters not connected with such action. The judge had settled and allowed the statement prior to this time, and had recited therein that it was "duly prepared and settled within due time and in the manner required by law;" and, also, that the "defendant objected to settlement of statement, upon the ground that the same was not served in time." If there were any reasons in support of this objection on the part of the defendant, the proper practice would have been to present them at that time, so that the judge could pass upon their sufficiency, and to have the objections, with the rulings of the judge thereon and any exception thereto, incorporated into the statement. A mere objection to the settlement of the statement, without pointing out the basis or the grounds of the objection, or presenting the facts upon which it was made, was not fair to either the judge or the opposite party; and, even if an exception had been taken to the ruling of the judge upon such objection, the party taking the exception would not have the right to its consideration upon appeal. When the motion for a new trial came on to be heard, the court, in its action thereon, was limited to considering the matters contained in the statement, and was not at liberty to go outside of the statement for the purpose of determining whether the new trial should be granted or refused.

3. The action of the trial court in granting a new trial, for the reason that the former verdict or decision was not supported by the evidence, is so much a matter of discretion that, unless it appears that there was an abuse of that discretion, this court will not interfere with its action. Although in the present case the plaintiff may have shown himself entitled only to nominal dam-

ages, yet a verdict for or against him would be decisive of a right which may be available in future litigation. The order is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

EXCELSIOR PAV. CO. v. LEACH et al.
(No. 19,174.)

(Supreme Court of California. Sept. 1, 1893.)
STREET-PAVING CONTRACTS—REPAIRS BY CONTRACTOR.

1. A requirement in a street-paving contract that the contractor shall keep the street in repair for five years imposes an additional burden on the property owners, and so vitiates the assessment, unless expressly authorized by statute. *Brown v. Jenks*, (Cal.) 32 Pac. Rep. 701, followed.

2. Testimony that the requirement of repairs did not enhance the amount of the successful bid is worthless against the objection of additional burden, since it may have enhanced other bids. *Brown v. Jenks*, (Cal.) 32 Pac. Rep. 701, followed.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the Excelsior Paving Company against Maggie Leach, personally and as executrix of the will of Wallace Leach, deceased, and others. From a judgment for plaintiff, defendants appeal. Reversed.

E. Parker and Haines & Ward, for appellants. Shaw & Holland and C. T. H. Palmer, for respondent.

PER CURIAM. Upon the authority of *Brown v. Jenks*, (Cal.; opinion filed March 27, 1893,) 32 Pac. Rep. 701, the judgment and order denying a new trial herein are reversed.

(99 Cal. 481)

TOWNSEND v. BRIGGS. (No. 14,889.)
(Supreme Court of California. Sept. 5, 1893.)
ASSAULT AND BATTERY—REMOVING TRESPASSER—INSTRUCTIONS—EVIDENCE.

1. In an action for assault by one who was trespassing when assaulted, plaintiff testified that defendant said to him, "You get out of here, or I will pound your head with a hammer." The jury was instructed that, "before defendant would have been authorized to use force to remove plaintiff, * * * he should have requested plaintiff to depart." Held, that the instruction was misleading, as it gave the jury to understand that the language used by defendant did not constitute a "request" to leave.

2. Defendant removed plaintiff from his shop as a trespasser for injuriously handling the machines, and, in an action for the assault, the jury was instructed that "if * * * plaintiff, at the time of the injury complained of, was not trying to injure defendant or his property, then any force used against plaintiff * * * was wrongful." Held error, as it was immaterial that plaintiff was not handling the machines at the moment the force was used.

3. In an action for personal injuries, plaintiff having adduced mortuary tables to prove his probable expectation of life, excluding evidence of his habits as to sobriety is error.

In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action for personal injuries by Charles Townsend against J. S. Briggs. Plaintiff had judgment, from which, and an order denying a new trial, defendant appeals. Reversed.

Brousseau & Thomas and Blackstock & Shepherd, for appellant. Barnes & Selby and H. L. Poplin, for respondent.

McFARLAND, J. After a consideration of this case upon a hearing in bank, we are satisfied that the judgment and order denying defendant's motion for a new trial should be reversed. This action is to recover damages for personal injuries caused by an alleged wrongful and malicious assault made by defendant upon the person of plaintiff. The jury rendered a verdict for plaintiff in the sum of \$9,000, upon which judgment was entered, from which, and from an order denying his motion for a new trial, defendant appeals. The main question in the case was whether the appellant used unnecessary force in expelling the respondent from a building in the possession of appellant; and we think that certain instructions of the court to the jury were misleading and prejudicial to appellant.

The undisputed facts are these: Appellant and his partner, Leach, were in the rightful and peaceable possession of a small workshop, in which they were engaged in making and experimenting with certain machines for pitting fruits. Respondent entered the shop at a time when appellant was in an adjoining rear room, and, after speaking to a young man in the shop, immediately commenced in a rude and wrongful manner to handle two of said machines with great force, and to whirl the wheels thereof, and to operate said machines with great violence, so as to put them in great danger of being destroyed or broken. The noise of the whirling wheels attracted the attention of appellant, who came into the shop, and in a peremptory manner ordered respondent to let the machines alone, and to leave the premises. Respondent replied that he had left the machines alone, but did not proceed to leave the shop. As to the details of what then immediately occurred there is some conflict of testimony; but appellant, with an oath, told respondent that if he did not leave he would pound him on the head, and respondent replied with an oath that he would like to see him pound him on the head; and appellant then picked up a mallet, and struck respondent on the head. Respondent was staggered by the blow, but rallied, and advanced towards appellant, who struck him once or twice more. Respondent, either from the effect of one of the blows, or from slipping on fruit pits and skins on the floor, fell on the knife of one of the machines, and was thereby seriously injured. Respond-

ent was at the time about 47 or 48 years old, weighed 170 pounds, and was apparently in good health. He testified that after the first blow he was dazed, and did not realize what afterwards happened. The appellant was over 60 years old, weighed 128 pounds, was in bad health, and subject to hemorrhages of the lungs. He testified that he was nervous and excitable; that respondent was "fighting drunk;" that he thought respondent wanted to fight, and, as he (appellant) was too old to fight respondent with his fists, he thought he would pick up something that he could defend himself with.

Whether or not the business and shop of appellant were of such a character as to carry an implied invitation to the public to enter the shop for business purposes need not be determined, for it is clear that respondent did not enter for any purpose of business. He was clearly a trespasser, at least from the moment he commenced to unlawfully and violently manipulate the said machines. The case, then, is within the rule that a man's house is his castle, and that he has the right to defend it against an intruder with all the force reasonably necessary to the defense. Of course, in such a case, a man would be liable for the result of a brutal use of force clearly beyond what the occasion warranted; but, in determining such a question, due allowance should always be made for the difficulty which a reasonable man would have in measuring, under exciting circumstances, the exact amount of force necessary; and it is extremely important that a jury, in passing upon such a case, should not in any way be misled by an instruction of the court.

We think that the jury were misled by instructions 4 and 5 given at request of plaintiff. In instruction 5 the court told the jury that, "before the defendant would have been authorized to use force to remove plaintiff from his place of business, he should have requested plaintiff to depart, and then," etc. Now, this instruction either assumes that the evidence left some doubt as to whether appellant told respondent to leave before any force was used; or else the jury were given the impression that there should have been a "request" couched in some polite and mild-mannered language different from that used by appellant. But there was no conflict at all in the evidence on the point. Respondent himself testified as follows: "While I was in there, Mr. Briggs came in, and ordered me out of the shop;" and then, after some conversation, "he said, 'You get out of here, or I will pound your head with a hammer,' or something of that sort." The jury, therefore, may well have thought that the language used by appellant did not constitute a "request," within the meaning of the said instruction; and it is difficult to perceive what other meaning they could have attached to it; and, indeed, the respondent seems to insist that he was not called upon to leave

because appellant had not requested him in gentler tones to do so. But, whatever might be thought of appellant's language in a school of politeness, it was sufficient in a court of law if it plainly told respondent to go.

We think, also, that instruction 4 was erroneous and misleading. By that instruction the jury were told that "if the jury finds from the evidence that the plaintiff, at the time of the injury complained of, was not trying to injure the defendant, or his property, then any force used against plaintiff * * * was wrongful." From this instruction the jury might well get the impression that if, when the force was used, the respondent was not, at that very moment, engaged in the act of injuring appellant's property, that appellant had no right to use force, and such impression would have been a wrong one. When respondent went into the room, and commenced endangering appellant's property, as above stated, he became a trespasser, and appellant had a right to put him out, and to use sufficient force to do so; and the fact that, at the moment when the force was used, respondent was not then handling the machines, was of no consequence.

We think, also, that the court erred in a ruling upon the admissibility of evidence in a matter affecting the amount of damages. The respondent introduced as evidence tending to prove the probable future duration of his life certain mortuary tables, which, under the authorities, were admissible for that purpose. The witness who identified the tables was asked by appellant the question, "Can you tell what insurable persons are?" and the objection by respondent that it was not in cross-examination was properly sustained. But we think that the court erred in sustaining the objections of respondent to appellant's question to his own witnesses, as follows: "Do you know his [Townsend's] habits as to sobriety?" The mortuary tables had been introduced by respondent as evidence tending to show what was the probable expectation of life of persons of his age. These tables, as we understand it, are based upon what experience shows to be the average expectation of life of all persons of that age; and therefore, in rebuttal of that evidence, appellant was entitled to prove any fact tending to show that respondent's expectation of life was below such average. We apprehend that an insurance company would not take the same risk upon every man of respondent's age without particular inquiry as to his condition, upon the theory that the average expectation of life of persons of his age was a certain number of years. If we assume that the tables established a prima facie case of respondent's expectation of life, the appellant clearly had the right to overcome that prima facie case by showing facts which lessened that expectation; and the fact that respondent had the habit of drinking liquor to excess, or was

a drunkard, was certainly a fact proper to be proved in that connection. It is contended that the question was properly excluded because it did not refer to the time of the alleged injury, which was about two years before the trial; but we see nothing in that contention. As "habits" are not formed hurriedly, it is probable that the question would have been proper as a preliminary one, even if the inquiry should have been confined to the date of the injury; but we do not see why it should have been so confined. The mortuary tables were introduced to show what, at the time they were introduced,—that is, at the time of the trial,—respondent's probable expectation of life was; and any fact which, at that time, lessened that expectation, was admissible. Suppose that after the date of the injury respondent had been attacked by some disease which is generally fatal, such as cancer or consumption; would not that fact have been admissible in evidence? We see no other points necessary to be specially noticed. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.; FITZGERALD, J.; HARRISON, J.

4 Cal. Unrep. 208

HINCKLEY v. KRUG. (No. 19,161.)

(Supreme Court of California. Aug. 31, 1893.)

ATTORNEY—ACTION FOR SERVICES—DAMAGES FOR NEGLIGENCE—UNPROFESSIONAL CONDUCT—INCORRECT ADVICE.

1. A client cannot recover of his attorney damages on account of negligence, in the absence of any injury to the client caused by such negligence.

2. In an action by an attorney to recover for professional services, defendant claimed damages for incompetency and negligence, and there was evidence that he employed plaintiff to prosecute certain actions to judgment for a fixed sum in each case, and that plaintiff was discharged before judgment for negligence and incompetency, in failing to file his pendens in two foreclosure suits. *Held*, that evidence that plaintiff explained to defendant the effect of filing and failure to file such notices, and the probable expense, and that defendant said he did not want to spend the money for filing them, was admissible.

3. In such case it is not error to exclude evidence that part of the property covered by one of the mortgages plaintiff was employed to foreclose was conveyed by the mortgagor before, but the deeds were not recorded until after, the foreclosure suit was commenced, where it appears that the remaining property sold for enough to satisfy defendant's judgment.

4. Where part of the services for which plaintiff seeks to recover consisted in examining the title to a lot, it is error to exclude evidence that, through the advice of plaintiff that the title was clear, defendant purchased the lot, and was afterwards compelled to redeem it from a prior tax lien.

5. It is not unprofessional conduct on the part of an attorney to bring an action on a just claim against a nonresident, and serve summons by publication, when employed to do so, with the hope that possibly the defendant therein will pay the judgment obtained, on its being sent to the place where he resides, though

such attorney knows such action cannot be maintained, for want of jurisdiction.

6. But if the attorney advised his client, in such case, that the service by publication was good, and a valid judgment could be obtained, such attorney cannot recover for services rendered therein.

7. Where an attorney renders services in various matters, and the client makes a partial payment "on account of fees for legal services," the attorney cannot credit the money on certain items of his account, so as to place them beyond controversy.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by A. G. Hinckley against August Krug on an account for professional services rendered by plaintiff, as an attorney, for defendant. From a judgment entered on the verdict of a jury in favor of plaintiff, and from an order denying his motion for a new trial, defendant appeals. Reversed.

Lacey & Trask and D. K. Trask, for appellant. A. G. Hinckley and Calvin Edgerton, for respondent.

TEMPLE, C. This appeal was taken by the defendant from the judgment, and from the order refusing a new trial. It is an action to recover \$675 for services as attorney at law, alleged to have been rendered defendant "between the 1st day of June, 1889, and the 1st day of June, 1891, in prosecuting and defending suits, and for like services, at his request, in drawing, copying, and engrossing of divers conveyances, deeds, and other paper writings, and for divers journeys and other attendances," etc. The defense consists of a general denial and of six counterclaims for damages alleged to have been caused by the negligence and incompetency of plaintiff as attorney, and of a demand for \$125, money due from plaintiff to defendant. The case was tried with the aid of a jury, which rendered a general verdict against defendant for \$325. The defendant not only attempted to recoup damages resulting from alleged negligence and incompetency of the plaintiff, but he claimed at the trial that such negligence and incompetency justified defendant in discharging plaintiff as his attorney, and that he was compelled to and did discharge him before the services were completed, and, further, that plaintiff had contracted to perform the services for a stipulated compensation for the entire services. Upon this point the court properly instructed the jury that under such circumstances, the contract being an entirety, plaintiff could not recover for his services. It is important to bear in mind, therefore, that the question of negligence is presented in two ways: First, on a claim to recover damages, and as a justification for the discharge of plaintiff as his attorney before the completion of the stipulated service. An action could not be maintained on account of the negligence or incompetency unless injury had resulted to the client, but the same negli-

gence might justify and necessitate the discharge of the attorney, to avoid damage.

The first alleged error consists in an order striking out the first claim for damages, on the ground that the averments show that defendant was not injured. I think this ruling correct. It was averred that, in an action to foreclose a mortgage, plaintiff, through negligence, failed to file a notice of the pendency of the action. It appeared that no one acquired any interest in the mortgaged premises during the pendency of the suit; that defendant purchased the premises at the mortgage sale, paying the full amount of his debt and costs. It was not alleged that he was ignorant of the defect, if it was a defect. Not having been injured, he could not maintain an action for the alleged negligence. There was evidence at the time tending to show that defendant had employed plaintiff as his attorney to prosecute certain actions to final judgment, for a fixed and stipulated fee in each case, and that plaintiff had been discharged as such attorney, before the actions had been brought to judgment, for alleged negligence and incompetency, consisting partly in his failure to file such notices in two actions to foreclose mortgages for defendant. In regard to the matter the testimony of plaintiff and defendant was conflicting. Plaintiff testified: "Krug did not want to spend the money for filing them. I explained to him that, if no notice of action was filed, people who bought interests in the property could come in at any time and redeem. He said he did not want any such paper filed; the more people came in and redeemed, the better. I told him the expense in the Eddy suit would probably be four or five dollars for the lis pendens. I explained to him that he would have to have the title searched again before he took the decree, to see that nothing appeared of record, and if he decided not to file his lis pendens he would put me to that much extra trouble." The defendant testified positively that no such conversation occurred, and that nothing was said upon the subject; that he did not know that such a notice was required. Defendant objected to the testimony of plaintiff in regard to the conversation, and assigns the ruling admitting the testimony as error. The evidence was mainly directed to the question as to whether defendant was justified in discharging plaintiff as his attorney. While it may be doubted whether plaintiff sufficiently excused himself, I think the evidence was competent. Defendant complains, also, of certain instructions in regard to this matter, but the statement fails to show that any exception was reserved to the instructions at the trial.

At the trial, defendant offered in evidence a certificate of sale for taxes of a certain lot assessed to one Lossing, in which it appeared that taxes had not been paid upon the lot for the fiscal year 1887; also, a tax deed to one Tring for the lot, on failure to redeem;

also, to show that defendant held a mortgage upon this lot; that the mortgagor proposed to convey the property to defendant in full payment, which offer the defendant accepted, provided he could get a good title, and employed plaintiff to examine it for him and to attend to the conveyance; that, through the advice of plaintiff that the title was clear, he took the deed, and then had to purchase the tax title, at a cost of \$50. Plaintiff objected to this evidence on the ground that Lossing, the mortgagor, was admitted to be insolvent, and the tax lien was superior to the lien of the mortgage, and therefore defendant would have been compelled to redeem from the tax sale, even if he had foreclosed his mortgage. The objection was sustained, and defendant excepted. It is not necessary to say whether this evidence was inadmissible to prove the claim for damages founded upon this charge of negligence. It was clearly admissible, as going to the value of plaintiff's services. The service was within the allegations of the complaint.

Defendant also offered to show that a portion of the property included in one of his mortgages which he employed plaintiff to foreclose, for which service plaintiff is seeking compensation in this action, had been conveyed before the suit to foreclose was commenced, but that the deeds had not been recorded. This evidence was offered to show damage from failure to file notice of the action. But under the supposed conditions, as the remaining property was sold for enough to satisfy the defendant's judgment, the notice would have had no effect upon the alleged purchasers before the institution of the suit. Section 726, Code Civil Proc. The evidence was properly excluded.

The defendant asked the court to give the following instruction: "If an attorney brings an action that he knows cannot be maintained, merely for the purpose of 'bluffing' and 'bulldozing' the defendant, he is guilty of unprofessional conduct, violates his oath as an attorney, and cannot collect any compensation for services rendered in such action,"—which instruction the court refused to give, and defendant duly excepted. Such refusal is assigned as error. Defendant had a money demand against Thacker, who was residing in Seattle, Wash. Thacker had no property in this state. A suit was commenced against Thacker by plaintiff, as defendant's attorney, and a summons was taken out and published. Plaintiff had agreed to prosecute the action to judgment for \$50, but was discharged before judgment was entered. Both parties testified in regard to the institution of the suit. Defendant said that plaintiff told him that such service would be good, and that the judgment could be sent to Seattle, and collected there. Plaintiff said: "I never intimated that we could get service of summons on them by publication when they were out of the state. There being no property in this state

that we could levy upon, no attachment proceedings could be brought. I advised Mr. Krug against bringing the Thacker suits. I told him he could not recover anything on any judgment he might obtain. But, as he insisted on bringing the suit, I did the best I could. The object of the suit was not to recover any property, but was for a bluff,—to bulldoze, embarrass, and confound those defendants,—and the publication of summons in that case was not for the purpose of getting service on the parties." And again: "I made as much fun of it at the time as I could; tried to persuade him from it, saying that I didn't believe that it would have any effect whatever." Now, disregarding the motives stated by the witness, what was there in this that could "bulldoze" or confound the defendants? The action was believed to have been upon a just demand,—a fact contrary to the first assumption in the instruction asked. There was a possibility that the defendants would appear, and perhaps other suppositions might be made which would justify the proceeding. But, even if it were thought possible that, upon sending such a judgment to Seattle, defendants might pay it, it being a just demand, and no deceit being practiced, I see nothing unprofessional about it.

Defendant also asked another instruction which the court refused to give, and such ruling is also assigned as error. It was as follows: "The court instructs you that the attempted service of summons on the defendants by publication, where defendants reside out of the state, and when no property is brought within the jurisdiction of the court by attachment or otherwise, or when the action is not brought to determine the status of a person, is ineffectual, and judgment thereunder is void; and if you find from the evidence that the plaintiff attempted to serve said defendants in said Thacker suit by publication, and brought no property under the jurisdiction of the court thereby, and if you believe from the evidence that plaintiff advised defendant that such service was good, you must find against the plaintiff on his demand in said Thacker suit." I think this instruction should have been given. It is true an attorney is not always liable for mistakes, but here the plaintiff admits that he knew a judgment, under the circumstances assumed, would be invalid. The witnesses differ as to the facts, but the defendant had a right to have an instruction based upon the supposition that the jury would adopt his testimony. Plaintiff's counsel says they are not seeking to recover compensation for this service. But I think they are. It is clearly included in the complaint, and is found in the bill of particulars furnished by plaintiff. It is there marked "Paid."

It seems defendant made a payment of \$125 generally "on account of fees for legal services." Plaintiff, in his bill of particulars, appears to have credited this upon certain

items. He could not do this, and thus retain the money, and place those items beyond controversy. Besides, defendant claims to recover this money on a counterclaim. It would be a matter in controversy, even if in no other way. I think the judgment and order should be reversed, and a new trial had.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

120 Cal. 675

ROBINSON v. THORNTON et al. (No. 14, 819.)

(Supreme Court of California. Aug. 31, 1893.)

EJECTMENT—DEFENSES—OUTSTANDING TITLE.

1. After foreclosure sale, but before execution of sheriff's deed, the mortgagor's interest in the land was attached. Judgment was not rendered till nine years later, and the land was sold a year after that. Four months after attachment, the judgment debtor, being still in possession, deeded the land to defendant, who thereupon took and kept possession, and paid taxes regularly thereafter. *Held*, that defendant could plead adverse possession running from the time he took possession, against plaintiff claiming under the sale in the attachment suit. This defense was not in effect a plea of outstanding title under the foreclosure sale, within the rule that in ejectment for lands purchased on execution against a debtor in possession when the lien attached defendant and his vendees cannot show that he had no title, or that the true title is outstanding.

2. Plaintiff could not introduce a deed from the assignee of the purchaser on the foreclosure sale, executed after this suit was begun, on the ground that defendant had put the foreclosure in evidence as an outstanding title. There was no issue of outstanding title, and the foreclosure was only introduced to show that the lien on which plaintiff's title was based had been extinguished.

McFarland and Garoutte, JJ., dissenting.

In bank. Appeal from superior court, San Mateo county; John Reynolds, Judge.

Ejectment by C. P. Robinson against R. S. Thornton and Hannah Green. Judgment for plaintiff. Defendants appeal. Reversed.

Edward F. Fitzpatrick, (Fox, Kellogg & Gray, of counsel,) for appellants. T. M. Osment and D. M. Delmas, for respondent.

HARRISON, J. Ejectment for land in San Mateo county. A certificate of purchase for the lands involved herein was issued to Benjamin S. Green by the register and receiver of the land office of the United States March 5, 1863, and a patent therefor was issued to him August 1, 1871. April 21, 1869, Green and wife mortgaged the land to C. C. Wilson and J. P. Jourdon, and in an action for the foreclosure of this mortgage, commenced September 6, 1870, a judgment was rendered under which the land was sold January 2, 1872, and on the same day the sheriff's certificate therefor filed in

the office of the county recorder. July 3, 1872, the sheriff executed his deed to the purchaser, who, on the 26th day of September, 1872, conveyed his interest in the land to William Ford. April 1, 1872, John McCombe commenced an action in the fifteenth district court in and for the city and county of San Francisco, against Green and wife, and a writ of attachment was issued therein, under which the sheriff of San Mateo county on the next day purported to levy upon all the right, title, and interest of Green and wife in the land. Judgment was rendered in this action in favor of plaintiff November 5, 1880, and by virtue of an execution issued thereon the sheriff on December 10, 1881, sold the land to Alexander Forbes. June 4, 1887, the sheriff who made the sale executed a deed for the land, and on June 8, 1887, the sheriff then in office executed another deed therefor. The plaintiff claims title by virtue of these deeds, and on the 8th day of June, 1887, commenced the present action. August 17, 1872, B. S. Green executed a conveyance of the land to the appellant Thornton, who on the next day entered into the possession thereof, and has since remained in adverse possession and paid all the taxes levied thereon from the year 1872 until the time of trial. The plaintiff had judgment in the court below, from which, and an order denying a new trial, the defendant has appealed.

Whether there was sufficient evidence before the court to authorize it to find that the sheriff made an effective levy on the land by virtue of the writ of attachment issued in the action of McCombe v. Green need not be determined; but, assuming that such levy was made, it affected only the interest in the land which was then held by the defendants in the attachment. Prior to that date their interest in the land had been sold under the judgment in foreclosure against them, and the deed which was subsequently executed to the purchaser at that sale vested him with all the title to the land that the Greens had on the 21st day of April, 1869, (the date of the mortgage,) or which they had subsequently acquired therein, (Sichler v. Look, 93 Cal. 610, 29 Pac. Rep. 220,) and the interest or estate which the Greens had at the date of the attachment was thereby extinguished. The execution of the deed gave to the purchaser at the sale no new title to the land purchased by him, but was merely evidence that his title had become absolute. Upon the sale he acquired "all the right, title, interest, and claim of the judgment debtors thereto," (Code Civil Proc. § 700,) subject to be defeated by a redemption within six months, and to the right of the judgment debtors to remain in the possession of the land until the execution of the sheriff's deed, and all that remained in the Greens was this right of redemption, and to retain possession of the land until the expiration of the time therefor. "Dur-

ing the period which elapses between the sale and expiration of the time for redemption the statute regards the purchaser as the owner in equity, and gives him the rents and profits or the value of the use and occupation. In short, it gives him the entire beneficial interest in the property, except the actual possession." Page v. Rogers, 31 Cal. 302.

Judgment was not rendered in the action of McCombe v. Green until November 5, 1880, and at the date of the sale thereunder in December, 1881, the judgment debtors had no interest in the land upon which the judgment could be a lien; and, as their interest in the land that was attached had been extinguished, and with its extinguishment the lien of the attachment upon that interest was also extinguished, the land was not subject to a sale in satisfaction of the judgment. The conveyance by Green to Thornton August 17, 1872, did not transfer to him any title to the land, for the reason that at that date Green had no title or interest in the land. Thornton, however, took possession of the land on the 18th of August, 1872, and the record shows that since that date he has maintained such an adverse possession thereof as to vest him with a prescriptive title thereto, unless the other facts shown in relation to his possession of the land preclude him from acquiring such title or making this defense. In an action of ejectment to recover lands purchased at a sale under an execution issued upon a judgment against the defendant, and of which he was in possession at the time of the sale, or at the date of the lien of the judgment or attachment, (if there was an attachment,) the defendant cannot defeat the plaintiff's right to recover by showing that he had no title to the land, or that the true title is outstanding. Jackson v. Graham, 3 Caines, 188; Cooper v. Galbraith, 3 Wash. C. C. 550; Den v. Winans, 14 N. J. Law, 6; McDonald v. Badger, 23 Cal. 393; Blood v. Light, 38 Cal. 658. The same rule applies to the vendee of the judgment debtor, or any other person coming in under him subsequent to the creation of the lien, and who has no other title or claim to the lands than that which he derived from the judgment debtor, or whose title is, in effect, the same as that which was sold under the execution. Jackson v. Bush, 10 Johns. 223; Green v. Watrous, 17 Serg. & R. 398. As against the judgment debtor, the production of the judgment execution, and sheriff's deed is prima facie evidence of the plaintiff's right to recover; but, if the action is against a stranger to the judgment, the plaintiff must also show that the judgment debtor had the title or possession of the land at the date of the lien or of the sale. This prior possession will then be prima facie evidence of a right to recover as against the mere possession of the defendant, which will be deemed to have been taken subsequent to

the sale. The sheriff's deed does not, however, transfer any after-acquired interest in the land, and the judgment debtor is not estopped from showing in an ejectment suit against him that, subsequent to the execution of the sale, he has acquired a different title from that which was sold under the judgment, (*Emerson v. Sansome*, 41 Cal. 552; and in an ejectment suit against the vendee of the judgment debtor he may also show, not only that he has acquired a different interest or right of possession, but also that the judgment debtor himself had no interest in the lands at the time of the sale. In one sense the grantee of land may be said to come into possession under his grantor, but his entry under his grantor is not in subordination to the title which he receives from him, or of that character which estops him from disputing the validity of the title under which he entered, as a tenant is estopped from disputing his landlord's title, or the vendee in possession under a contract of sale the title of his vendor. Even a tenant is not estopped from showing that his landlord's title under which he entered has terminated. *Tayl. Landl. & Ten.* § 629. The grantee does not by his entry assume any obligation towards his grantor, nor is there any relation of trust or confidence between them which is forfeited by his repudiation of the title under which he entered, or by his acquisition of another outstanding title. By entering under the title he assumes it to be prima facie good, but he is not estopped thereby from showing otherwise, or from showing in any controversy another and independent title in himself. *Hill v. Robertson*, 1 Strob. 1. "The vendee claims the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has the right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is the letter or spirit of the contract violated by it." *Blight's Lessee v. Rochester*, 7 Wheat. 548. Delivering of possession under a deed of the fee does not, in the absence of any other recitals, raise an estoppel, since the possession then becomes wholly the possession of the grantee, and there is no obligation on his part to return it to the grantor. He may therefore dispute his title. 3 Washb. Real Prop. (5th Ed.) 99; *Gardner v. Greene*, 5 R. I. 110; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. Rep. 407; *Sparrow v. Kingman*, 1 N. Y. 242; *Osterhout v. Shoemaker*, 3 Hill, 513. In the case last cited, *Bronson, J.*, giving the opinion of the court,

said: "Although a tenant cannot question the right of his landlord, a grantee in fee may hold adversely to the grantor, and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel when the occupant is under no obligation, express or implied, that he will at some time, or in some event, surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title." The rights of the grantor are extinguished by the sale, and, as the property has thereby become the property of the grantee, he holds it with all the attributes of ownership, and is under no more accountability to his grantor for his estimate of the title taken from him than he is for the use to which he shall apply the land; and he may fortify his possession by the acquisition of any other title which may protect him in its enjoyment. "He holds adversely to all the world, and has the same right to deny the title of his vendor as the title of any other party." *Merryman v. Bourne*, 9 Wall. 600; *Winlock v. Hardy*, 4 Litt. 262; *Voorhies v. White*, 2 A. K. Marsh. 276. His possession becomes adverse to his grantor immediately upon his entry under the grant, and by this adverse possession he may acquire a title by prescription which will be as available for the protection of his possession as one acquired by grant. *Croxall v. Shererd*, 5 Wall. 268. Whether the possession which Thornton took of the land in August, 1872, is to be regarded as having been taken by virtue of the grant from Green, or without any color of title, it immediately became adverse to the whole world. Green himself would be estopped by his deed from claiming any title in the land, and as whatever title Green had at the date of the attachment had been extinguished prior to the time when Thornton took possession of the land, the lien of the attachment against his interest was terminated, and could no longer form a basis for the support of any sale that might be made under the judgment afterwards obtained in the action. At the date of the sale in 1881, Thornton had acquired a title by prescription which gave him the right to the possession of the land (Civil Code, § 1007) superior to any claim of the plaintiff resting upon the prior possession of the Greens.

The rule that the statute of limitations does not begin to run against the judgment debtor, or one claiming under him, until the execution of the sheriff's deed, has no application to the present case. That rule rests upon the proposition that the sher-

iff's deed is the deed of the defendant under the execution, and that the defendant's possession after the sale cannot be adverse to the purchaser until the execution of his own deed by the sheriff. The rule has no application to a stranger to the judgment, or one whose title is not derived from the judgment debtor. In *Jefferson v. Wendt*, 51 Cal. 573, the defendants were only the tenants of the judgment debtor, whose interest had been sold by the sheriff; and in *Leonard v. Flynn*, 89 Cal. 535, 26 Pac. Rep. 1097, the defendant had no title other than that which he had received from the judgment debtor, and had acquired this title within five years prior to the commencement of the action.

The court erred in permitting the plaintiff to offer in evidence the deed of the land executed to him by the assignee in bankruptcy of Ford, subsequent to the commencement of the action. The respondent seeks to sustain this ruling upon the theory that the defendant had shown that this title was outstanding, and that it was competent for the plaintiff to show that it was not an available title against the plaintiff for the reason that he had acquired it. The defendant, however, did not offer evidence of the sale under the foreclosure for the purpose of showing an outstanding title, for there was no such issue before the court, but for the purpose of showing that the lien which the plaintiff claimed as the basis of his own title had been extinguished thereby. That the introduction of the deed was injurious to the defendant is evident without any discussion.

The appellant Hannah Green, by her answer, admitted all the allegations of the complaint, and consequently is not entitled to a reversal.

The judgment and order denying a new trial are reversed as to the appellant Thornton, and affirmed as to the appellant Hannah Green.

We concur: BEATTY, C. J.; FITZGERALD, J.; DE HAVEN, J.

McFARLAND, J. I dissent.

GAROUTTE, J., (dissenting.) Green was the owner of certain land. It was sold under foreclosure proceedings by his mortgagee. Pending the issuance of the sheriff's deed, and during Green's possession, it was attached as Green's property. Subsequent to the attachment, Green deeded it to the defendant Thornton, who entered into the possession thereof. The attachment proceedings ripened into a judgment, sale under execution, and deed by the sheriff. Plaintiff, as the holder of such deed, brings an action of ejectment against Thornton, who entered under his deed from Green. Thornton pleads the statute of limitations, claiming to have held possession adversely to the world for the statutory period.

I premise a short statement of my views by suggesting that the rule so often declared in the decisions of courts that the plaintiff must recover in ejectment upon the strength of his own title is not without exception. The principle of estoppel is often invoked in such cases, and the defendant debarred from attacking plaintiff's title by showing a better title in a stranger. This is always true where the claims of both parties arise from a common source. If the leading opinion in this case holds that the grantee of the attachment debtor may enter under his grant, and then successfully plead the statute of limitations as against the holder of the sheriff's deed, which is in due course procured by virtue of the attachment suit, (and such appears to be the reasoning,) I dissent. This identical principle was before the supreme court of the United States in *Pratt v. Pratt*, 96 U. S. 710, and was there carefully considered and declared unsound. In that opinion the court used the following illustration, which is both simple and conclusive: "If this be established to be the law, the owner of real estate may borrow money on ten years' time to the value of that estate, and give a mortgage on it to secure payment, and by a sale and conveyance of the land to a third person, with delivery of possession a week afterwards, the lien is utterly defeated; for, according to this doctrine, the statute of limitation begins to run against the mortgagee the moment the title and possession are vested in the purchaser, and the bar of the statute becomes perfect against all the world by seven years' possession; whereas the mortgagee can take no steps to foreclose his mortgage until his money comes due three years later." In the present case the defendant can hardly be said to plead the statute of limitations. His plea is little more than a denial of plaintiff's title. The plea of the statute of limitations presupposes a right of action in the plaintiff at some time in the past, but that, owing to his laches, it has lapsed. In the present case it is not contended that plaintiff's right of action has lapsed, but it is insisted that he never at any time had a right of action. We have held in *Jefferson v. Wendt*, 51 Cal. 573, and *Leonard v. Flynn*, 89 Cal. 536, 26 Pac. Rep. 1097, that a plaintiff's right of action accrues upon the delivery of the sheriff's deed. Eliminating for the moment the foreclosure proceedings from the case, it seems to me very plain that defendant Thornton could not create in himself a title by adverse possession, for no one had a right of entry as against him. Green had no right of entry, for he was his grantor; plaintiff none, for he had not as yet obtained his sheriff's deed. As is said in *Pratt v. Pratt*, supra: "In the just sense of the term his possession is not adverse to this lien. There can be no adversary rights in regard to the possession under the lien and under the defendant's purchase from the judgment debt-

or until the lien is converted into a title conferring the right of possession. The defendant's possession after this is adverse to the title of plaintiff; and then, with the right of entry in plaintiff, the bar of the statute begins to run."

Let us assume that plaintiff, Robinson, secured his sheriff's deed within five years from the date of Thornton's entry under his deed from Green, and that he then brought his action. I know of no way that Thornton could have defeated plaintiff's claim. The statute of limitations could not have availed him, as his possession had not extended for sufficient length of time, and, as we have seen, this is his only defense. Now, it seems strange that plaintiff should be defeated because, without fault of his, he was unable to secure his deed within five years from Thornton's entry. If he had secured his deed at the end of four years from the entry of Thornton, his cause of action would then have accrued, and, as we have seen, he could have recovered possession of the land. If he had a cause of action at that time, and not till that time, the statute did not begin to run against him until then, and he could not have lost his right to bring suit until five years thereafter. If such were not the fact, plaintiff had a cause of action for the recovery of real estate which became barred within one year after it accrued. That result would be novel in the extreme.

Again, instead of foreclosure proceedings against Green, let us assume that he deeded outright to a stranger, then deeded to plaintiff, and then, while in possession, deeded to defendant, who took possession under the deed. If plaintiff had brought this action under these circumstances within five years from the date of his deed, there would have been no defense to the action on the part of this defendant. Let us assume the deed to a stranger in lieu of the foreclosure proceedings, and then the levy of the attachment, followed by the deed to the defendant and the sheriff's deed to plaintiff. Plaintiff's sheriff's deed related to the date of the levy, and when he received it he occupied the same position as if it had been a deed from Green of the date of the levy; and we have seen that if it had been Green's deed of that date plaintiff could recover. As already suggested, defendant's plea of the statute of limitations in this case is almost a misnomer, as it is practically a plea of no title in plaintiff. Let us see if such is not the fact. We will assume that the foreclosure proceedings were fatally defective, and the deed thereunder void, what is plaintiff's status in the case then? Why, the title was in Green at the date of the levy, and the sheriff's deed vested it in plaintiff, Robinson, under which he would have a cause of action that defendant could not contest for a moment. It follows that, if the foreclosure proceedings are void, then plaintiff's cause of action accrued when he received his deed

from the sheriff, and defendant's plea of the statute would be in vain. Upon the contrary, if those proceedings are valid, plaintiff has no cause of action, and the plea of the statute can be successfully invoked. In other words, if the legal title is in the plaintiff, the statute cannot be pleaded; but if the legal title is in a stranger, it can be pleaded. I fail to see the distinction, and do not think the successful plea of the statute is dependent upon any such test.

For the foregoing reasons it is apparent to me that the so-called "plea of the statute of limitations," as far as practical results are concerned, is nothing more than a plea of outstanding title in a stranger under the deed in foreclosure, and it must be conceded, if such be the fact, the plaintiff is entitled to recover. Defendant offered the foreclosure proceedings in evidence. The prevailing opinion says for the purpose of showing that at the date of the levy of the attachment Green had no interest in the land, and that consequently plaintiff got nothing by his deed. I would suggest those proceedings fall to show it, for Green had the lawful "possession" at the date of the levy, and if he had still been in possession when plaintiff received his deed there could be no question as to plaintiff's right of recovery. But, aside from that, these proceedings simply show an equitable title in a stranger at the date of the levy, and the result was simply an outstanding title when this litigation began. It cannot be possible that plaintiff's cause of action would be stronger if the sheriff's deed under foreclosure had issued prior to the levy of the attachment; yet such would seem to follow from the reasoning of the prevailing opinion. The foreclosure proceeding, as an element in this case, in no way aids the defendant as to his plea of the statute of limitations; and, omitting that element of the case, we then have an exact photograph of *Pratt v. Pratt*, and the reasoning there found leaves the defendant with no prop to support him. The title under the foreclosure being an outstanding title, it availed defendant nothing. Perhaps he was estopped from setting it up, having entered under a deed from a common grantor with the plaintiff. But, aside from that, at the trial plaintiff showed that such title was then vested in him, and for that reason its efficacy as a defense was entirely gone. See *Sedg. & W. Tr. Title Land*, § 831; *Sharp v. Johnson*, 22 Ark. 79; *Perryman's Lessee v. Callison*, 1 Overt. 516.

4 Cal. Unrep. 214

TOBIN v. OMNIBUS CABLE CO. (No. 15, 162.)

(Supreme Court of California. Aug. 31, 1893.)
STREET-CAR COMPANIES—INJURY TO PASSENGER—
ALIGHTING FROM CAR IN MOTION—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. In an action against a cable-car company for injuries received in alighting from a

car alleged to have been prematurely started, after instructing the jury that common carriers of passengers must use such vigilance and foresight as they can, under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents, it was not improper to instruct that "it was the defendant's business to know, before starting up the car, whether passengers getting off or on the car were in a position to be injured, and it would be negligence to start the car suddenly, under such circumstances, without exercising every precaution for the safety of those who might be getting off or on."

2. One is guilty of contributory negligence if he is guilty of want of ordinary care, and the want of extraordinary care, merely, is no defense.

3. Negligence on plaintiff's part, amounting to absence of ordinary care, which, concurrently with the negligence of defendant, proximately contributes to the injury, is a good defense, whether or not defendant, with ordinary or extraordinary care, could have guarded against it.

4. In an action against a street-car company for personal injuries, plaintiff claimed, and the evidence tended to prove, that a car was started while she was alighting therefrom, while defendant claimed, and gave evidence to show, that the car was started before plaintiff left her seat, and that she tried to get off while the car was in motion. *Held*, that an instruction making the defense of contributory negligence dependent on whether defendant could have guarded against such negligence was rendered harmless by subsequent instructions that the verdict must be for the defendant if the injuries were caused either solely by plaintiff's negligence, or, jointly and concurrently, by the negligence of plaintiff and defendant or its servants, and that if plaintiff, knowing the car was in motion, chose to run her chances, and get off by stepping directly out from the car, she must abide the risks she took.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Mary Tobin against the Omnibus Cable Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

C. H. Wilson, for appellant. Henley & Swift, for respondent.

VANCLIEF, C. The defendant is an incorporated cable railway company, operating on Post street and certain other streets in the city of San Francisco. The plaintiff was a passenger on one of defendant's cars, and, while attempting to alight from the car at the junction of Post and Kearny streets, was thrown upon the pavement by the movement of the car, and personally injured. This action was brought to recover \$30,000 damages for the injury, which, it is alleged, resulted solely from the negligence of the defendant. A trial by jury resulted in a verdict for plaintiff, assessing the damages at \$10,000. On defendant's motion for a new trial the court ordered that if, within 10 days, the plaintiff remit \$3,000 from the damages assessed by the jury, the motion for new trial "will be denied; otherwise it will be granted." The plaintiff accordingly remitted \$3,000, and a new trial was denied, and judgment entered for \$7,000.

The defendant appeals from the judgment, and from the order denying a new trial.

1. Counsel for appellant contends that the evidence is insufficient to justify a verdict of negligence on the part of the defendant, and, if it is, that it shows contributory negligence of the plaintiff. As to each of these issues, there is a substantial conflict of evidence, and therefore the verdict should not be disturbed on either of these grounds. Whether there was negligence of defendant, or contributory negligence of the plaintiff, ultimately depends upon whether the car was started while plaintiff was in the act of getting off, under such circumstances that, with due care for her safety, the gripman could and would have discovered that she was in the act of alighting before he started the car, by the movement of which, it is admitted, she was thrown down and injured. The plaintiff was seated on the left-hand side of the open section of the car, (the dummy,) in the middle compartment of that seat; there being three compartments, each sufficient to seat two passengers. She occupied the rear of the apartment, so that her right side adjoined the middle of the seat. The gripman stood at or near the center of the dummy while gripping the cable, and as nearly to the plaintiff's seat as to any other seat on the dummy. The plaintiff testified: "I was alongside of the gripman. My right shoulder was right together with his arm,"—and this was not disputed. The gripman, Mr. Huntly, testified: "I do not pay any attention to the passengers upon the inside of the car. The conductor looks after them. It is my duty to look after the passengers that are on the open section, with reference to their getting on or off." There are two steps below the seat, and plaintiff's feet, while sitting, rested on the upper step, so that in getting off she must have descended two steps. The evidence on the part of plaintiff tends to prove that she was making the second step, having one foot on or near the ground, the other upon the lower step, and holding to the stanchion with her left hand, when the gripman suddenly started the car, and also tends to prove that with ordinary care the gripman would have seen that plaintiff had risen from her seat, and was stepping down, before he gripped the cable. To these points the testimony of the plaintiff and Mrs. Meyers is quite positive, and to some extent is corroborated by Morris Sperling, a witness on the part of defendant. It appears that the plaintiff was 64 years of age, and that by the fall she was permanently injured, by a fracture of the neck of the femur.

2. It is claimed that the court erred in instructing the jury that "it was the defendant's business to know, before starting up the car, whether passengers getting off or on the car were in a position to be injured; and it would be negligence to start the car suddenly, under such circumstances,

without exercising every precaution for the safety of those who might be getting off or on." As applied to the cable street cars of the defendant, and to the facts of this case, in connection with other instructions given, the instruction seems to be correct. It does not, as contended by counsel, instruct that it would be negligence on the part of the defendant not to know absolutely, under all circumstances, that passengers getting off or on are not in a condition to be injured, but that "it would be negligence to start the car suddenly, under such circumstances, (the circumstances of this case,) without exercising every precaution for the safety of those who might be getting off or on," and that it was defendant's "business" to know (not that it must absolutely know under all circumstances) that passengers were not in a condition to be injured by starting the car. The court had before defined the degree of care required of common carriers of passengers as follows: "Common carriers of passengers are required to do all that human care, vigilance, and foresight reasonably can, under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents to passengers." Read in connection with this, the instruction in question could not have been understood to mean that the failure of the defendant to know, under all circumstances, whether passengers are in condition to be injured by starting the car, is negligence.

3. The court, of its own motion, gave the following instruction as to the law of contributory negligence, in addition to instructions upon the same subject before given at the request of counsel for defendant: "Now, here is an instruction—a definition of this matter of contributory negligence—which is sometimes confusing to a jury, and which I will give you as follows: 'Contributory negligence' is defined to be, not any degree of negligence, however slight, which concurs in producing an injury, but it must be negligence amounting to the absence of ordinary care, and which contributes proximately or directly to the injury complained of, and against which negligence the defendant, being aware of it, could not have guarded." Immediately after this instruction was given, counsel for defendant asked if it was given by the court of its own motion, saying, if it was, he would like to except to it. Upon being informed by the court that it was given by the court, counsel said: "Then I desire to take an exception as to that. I understand I have to do that now,"—but stated no ground of objection to the instruction, though he seems to have understood that it was oral. In his brief here, for the first time, counsel states two grounds of objection to this instruction: First, that it defines the degree of contributory negligence necessary to constitute a defense to be a want of only ordinary care on the part of the passenger, whereas it is claimed that a want of extraor-

dinary care, contributory to the injury in the slightest degree, is sufficient to constitute a defense. I think this objection is answered in the opinion of this court, by Mr. Justice McKinstry, in the case of *Robinson v. Railroad Co.*, 48 Cal. 422, 423, where it was said: "The law regards the plaintiff as innocent * * * unless the evidence shows a want of ordinary care and prudence on his part. His failure to take great care is no defense. *Shear. & R. Neg.* § 29. The formula is, not that any degree of negligence on the part of the plaintiff, which directly concurs in producing the injury, (however slight,) will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, proximately to the injury, the plaintiff shall not recover." This was repeated in the case of *Strong v. Railroad Co.*, 61 Cal. 328, wherein the court, by the same learned justice, said: "Plaintiff had a right to rely upon the performance, by those on the locomotive, of every act imposed by law upon them when approaching a crossing. In a legal sense, he was innocent of negligence unless there was a want of ordinary care and prudence on his part. The rule is not that any degree of negligence, however slight, which directly concurs in producing the injury, will prevent a recovery; but if the negligence of the plaintiff, amounting to the absence of ordinary care, shall contribute proximately, in any degree, to the injury, the plaintiff shall not recover." See *Beach, Contrib. Neg.* § 20.

The second objection to the instruction is that the last clause of the instruction, in these words, "and against which negligence the defendant, being aware of it, could not have guarded," is erroneous, in that it requires of the defendant more than ordinary care to guard against injurious consequences from negligence of the plaintiff of which defendant was aware; it being claimed that this last clause of the instruction should have been qualified by adding thereto the words, "by the exercise of ordinary care,"—that is to say, that the carrier, though notified of such negligence of the passenger as exposes the latter to danger of personal injury, is required to exercise only ordinary care to avoid or avert the impending injurious consequences of such negligence, and not that extraordinary degree of care which would have been required but for the negligence of the passenger. Contributory negligence of the plaintiff, as a defense, in cases of this kind, implies negligence of some degree on the part of the defendant, and is consistent with any degree of mere negligence of the defendant. Therefore, whenever it is found that the negligence of the plaintiff—that is, want of ordinary care on his part—proximately contributed to his injury in any degree, then the degree of care or negligence on the part of the defendant becomes wholly immaterial. *Holmes v. Railway Co.*, 97 Cal. 161, 31 Pac.

Rep. 834; Beach, Contrib. Neg. § 26. The instruction purports to be a definition of that species of contributory negligence which constitutes a defense, and states all the essential attributes of that species, namely, "negligence amounting to the absence of ordinary care, and which contributes proximately or directly to the injury complained of," but erroneously added that it must be such negligence as the defendant, if aware of it, could not have guarded against. This additional attribute perverts the definition; and the qualification of it asked by appellant does not rectify the error, since negligence of the plaintiff, amounting to absence of ordinary care, which, concurrently with the negligence of defendant, proximately contributes to the injury complained of, is a good defense, whether the defendant could or could not, with ordinary or even extraordinary care, have guarded against it. Beach, Contrib. Neg. §§ 14, 35. It should be observed, however, that the negligence of defendant in such case is mere negligence, in the proper sense of the word, exclusive of malice, and consequently exclusive of such reckless conduct of defendant as would be sufficient proof of malice. Whart. Neg. §§ 14, 22. In a definition of the degree of care required of defendant in cases where the negligence of the plaintiff contributes to his injury only as a condition precedent, and remotely, and therefore does not constitute a defense, as in the line of cases of which *Davies v. Mann*, 10 Mees. & W. 545, *Needham v. Railroad Co.*, 37 Cal. 409, and *Meeks v. Railroad Co.*, 56 Cal. 513, are examples, the qualification asked by appellant of the last clause of the instruction might have been material, and perhaps proper. But, in a definition of "contributory negligence" as a defense, the last clause of the instruction, either as given, or with the qualification asked by appellant, had no proper place. It follows that, if the trial court had qualified the instruction as here proposed by appellant, the result would have been only to substitute one error for another, the refusal to do which, even at the special request of the defendant, would not have been error. But conceding that the exception, as taken in the lower court, is a sufficient foundation to support any objection to the instruction that counsel may desire to make here, still the only objection made here is that the court failed to qualify the instruction in the respect above stated, so that the error, such as it is conceded to be, is not pointed to or complained of here, and as a general rule this court will not reverse a judgment on account of error not pointed out or complained of by the appellant; the reason for this being that, counsel for appellant having specified the errors of which he complains, it is presumed that he deems others, if such there be, either harmless, or favorable to his client. If there is any exception to this rule, it will be found only

in cases wherein it appears that the error not objected to was at least probably prejudicial to the appellant, and this case is not of that class. Indeed, I cannot conceive how the defendant could have been injured by the instruction in question. It was not questioned that plaintiff was guilty of contributory negligence, and therefore could not recover, if she started to alight after the car had started; and the very concrete instructions given at request of defendant were to this effect, and quite as favorable as defendant was entitled to ask. Among these were the following: "Fourth. The jury are instructed that if they find from all the evidence that the injuries in question were occasioned either solely by the negligence of the plaintiff, or, jointly and concurrently, by the negligence of the plaintiff and the defendant or its servants, then the verdict should be for the defendant;" and again: "* * * Eighth. If the jury believe from the evidence that the plaintiff, knowing that the car was in motion, chose to run her chances, and get off by stepping directly out from the car, she must abide the risks that she took." The plaintiff claimed, and the evidence on her part tended to prove, that the car was started while she was in the act of alighting; and, on the other hand, defendant claimed, and gave evidence tending to prove, that the car was started before plaintiff moved from her seat, and that she started to get off while the car was moving. There was no evidence, and appears to have been no claim, that the defendant, by any degree of care, possibly could have avoided the accident after the car started. Under the instructions given at defendant's request, the verdict must have hinged solely upon the questions whether the plaintiff was in the act of alighting before the car started, and whether, with due care, the gripman would have known that fact before he started the car; and, upon conflicting evidence, the jury resolved both these questions against the defendant. In respect to whether the conceded error was harmless or not, this case seems entirely analogous to that of *Craven v. Railroad Co.*, 72 Cal. 345, 13 Pac. Rep. 878, in which an instruction defining "contributory negligence" was excepted to on a valid ground, and conceded to be erroneous, but held to be harmless, and therefore not a sufficient cause for a reversal of the judgment.

4. It is contended that, when the court found that the damages assessed by the jury were excessive, it should have granted a new trial on that ground, and had no authority to refuse it on the condition that plaintiff would remit \$3,000. After the remittal of \$3,000, no legal ground appears for holding the damages recovered (\$7,000) excessive. That the trial court had authority to make the conditional order complained of, and did not err in making it, is too firmly established

in this state to be questioned. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

99 Cal. 431

EDWARDS v. SAN JOSE PRINTING & PUB. CO. et al. (No. 14,997.)

(Supreme Court of California. Aug. 31, 1893.)

LIBEL — WHAT CONSTITUTES — JUDICIAL NOTICE — EVIDENCE — MITIGATION — INSTRUCTION — NOMINAL DAMAGES.

1. Defendants, on the day of a local election, published concerning plaintiff, E., the following: "Venality. It is understood that the Electric Improvement Company will put a large sum of money into the fight to-day to corrupt voters. There are scores of voters in every community that money can buy. * * * It is also reported that E. is to have charge of the sack." *Held*, that the article was libelous per se.

2. In an action for publishing such article, the court will take notice of the meaning the word "sack" has acquired in newspaper literature, when used in connection with election corruption funds, and it is unnecessary for plaintiff to allege or prove such meaning, or how it was intended to be, or was, understood by persons reading the article.

3. Evidence by the editor of defendants' paper, in which the article was published, that rumors and reports of the facts published came to him from dozens of persons, and that he published the article in good faith, to prevent what it was feared would occur, is not admissible in mitigation, in the absence of the names of the persons giving him the information, and of evidence to show that the informants possessed such character as would command a belief in the truth of their utterances.

4. Nor is evidence admissible to show particular acts of plaintiff in relation to the use of money in elections prior to such publication, without showing, or offering to show, that defendants had knowledge of such acts at the time of publication, even if otherwise competent.

5. There was evidence that plaintiff's reputation was that of a person having money under his control for the purpose of corrupting voters, and also evidence to the contrary. *Held*, that the court properly refused to charge that if plaintiff's reputation was bad, prior to the publication, as to the point wherein he claimed to be damaged, the jury might fix nominal damages only.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by H. J. Edwards against the San Jose Printing & Publishing Company and others to recover damages for libel. From a judgment entered on the verdict of a jury in favor of plaintiff, defendants appeal. Affirmed.

S. G. Tompkins and Frs. E. Spencer, for appellants. Richards & Welch, for respondent.

DE HAVEN, J. The complaint in this action alleges that the defendants published

in a certain newspaper, of and concerning the plaintiff, a false and malicious writing, in the words following: "Venality. It is understood that the Electric Improvement Company will put a large sum of money into the fight to-day to corrupt voters. There are scores of voters in every community that money can buy. * * * It is also reported that Edwards is to have charge of the sack." The plaintiff further alleges that, on the day of the publication of this article, there was held an election in the city of San Jose, for the election of certain officers of the city, and that there was an active contest between the several political parties for the success of their respective candidates, and that by the words, "into the fight to-day," in the said publication, the defendants meant to say, and were understood to mean, "into the election contest to-day." The complaint contained the further allegation: "That by the sentence and expression in the above publication, 'that Edwards is to have charge of the sack,' the said defendants, and each of them, intended to be understood, and were understood, to mean that the plaintiff herein was to expend, and direct the expenditure of, a large sum of money, of the said Electric Improvement Company of San Jose, to buy votes and corrupt the voters of said city in said city election." The answer of defendants contained, among other matters, a denial of this allegation of the complaint, and also alleged, by way of further defense to the cause of action stated in the complaint, that prior to the publication of the alleged libel there was a report or rumor current in the city of San Jose, "and the same came frequently to the ears of the defendants, that the Electric Improvement Company, in plaintiff's complaint mentioned, was to place a large sum of money in said fight or election contest in the city of San Jose for the purpose of corrupting voters, and that H. J. Edwards was to have charge of the sack, and that defendants in good faith believed the report to be true, for the reason, among others, that plaintiff's reputation for having charge of money for the purpose of manipulating politicians or corrupting voters was bad, and for the further reason that plaintiff had on various previous occasions control of large sums of money to be used for the purpose of manipulating politicians and corrupting voters in elections;" and then the answer proceeded to specify the dates when, and the different amounts in the hands of the plaintiff for such purposes upon the dates given. The defendants further alleged that the publication complained of was made by them in good faith, and in the interest of good government. The case was tried by a jury, and the plaintiff recovered a judgment for the sum of \$750 and costs, and the defendants appeal. The plaintiff introduced no evidence to show the

meaning of the sentence, "It is also reported that Edwards is to have charge of the sack," contained in the alleged libel, or that defendants thereby were understood to mean that plaintiff was to expend, and direct the expenditure of, money to buy votes and corrupt voters in the election mentioned in the complaint, and the defendants moved for a nonsuit upon this ground, which motion was denied; and the court, in submitting the case to the jury, instructed them that the article complained of was a libel per se, and that upon its face it imputed "to the plaintiff conduct or the possession of a character which would lead him to commit acts, and that he was about to commit acts, which if true, would subject him to obloquy in the community." The defendants insist that this instruction was erroneous, and that their motion for a nonsuit should have been granted, and in support of their position contend that the word "sack," according to the ordinary definition given by lexicographers, does not import a corruption fund, and that, if it has any such peculiar meaning attached to it as a slang phrase, it was incumbent upon plaintiff, not only to so allege, but also to prove such meaning, and that the word was understood to have such meaning by persons reading the article complained of.

There can be no doubt that when a slander or libel is couched in language having a covert meaning, not apparent upon its face, or in words or phrases not used otherwise than as slang, or cant terms, it is necessary for a plaintiff not only to allege and prove the slanderous or libelous sense in which the words were used by the defendant, but also that they were understood in the same sense by those to whom they were addressed. The following cases may be cited to sustain this proposition: *Maynard v. Insurance Co.*, 34 Cal. 48; *Id.*, 47 Cal. 207; *Andrews v. Woodmansee*, 15 Wend. 232. But we are of the opinion that this case does not fall within the rule just stated. Courts cannot affect to be ignorant of the recent meaning which the word "sack" has acquired in the current newspaper literature of the day, when used in the connection in which it appears in the publication complained of. As thus used, it signifies a fund in hand to be used for purposes of corruption; and to say that a person has charge of such a fund to be used on a given occasion is, in effect, to say that such person is to disburse the fund for the purposes of corruption. This meaning was doubtless first given to the word by vile and corrupt persons engaged in distributing and receiving such funds, and, when first used in that sense, might well have been regarded as a slang expression, of the meaning of which courts would not then have taken judicial notice; but it is now so frequently used to convey this particular meaning that it can hardly be considered, when employed for that purpose, as simply the language of

slang, and understood only by the vulgar. In the case of *Bailey v. Publishing Co.*, 40 Mich. 251, the plaintiff, a minister, brought an action for the recovery of damages for a libel couched in the following words: "Then there was that Iowa Beecher business of his, which beat him out of a station at Grass Lake. But pshaw! These reformers are pretty much all alike." The trial court left it to the jury to determine whether this language involved a charge of adultery, and the court, in speaking of this, said: "It was set forth in the declaration as intended to charge adultery, and the justificatory notice did not except it. Moreover, inasmuch as courts have no right to be ignorant of the meaning of current phrases, which everybody else understands, it can hardly be seriously urged that such a charge, coupled with an averment that it lost a minister his situation, and backed with a justification, should be assumed, without some explanation, to be capable of an innocent meaning. Defendant was bound to show a loss of position at Grass Lake upon some charge of immoral conduct affecting the plaintiff's clerical character, in order to justify this charge." Indeed, the law may now be considered as settled that courts will understand words in general use in the same sense in which they are usually understood by the masses of men, and that no allegation or proof of such meaning is necessary; and under this rule the plaintiff was not required to allege or prove the meaning of the word "sack," as used in the alleged libel, or how it was intended to be, or was, understood by persons reading it, the word having a well-understood meaning in the connection in which it is there used.

The editor of the newspaper in which the alleged libel was published, and one of the defendants in the case, was a witness upon the trial, and testified as follows: "These reports came to my ears from various parties, whom I cannot mention. I know that many people said to me that Mr. Edwards was a political manipulator, and that he would use money as he had done heretofore. It was from a knowledge of these facts that I have hinted at that told me,—rumors that reached me from various parties that led me to the proposition. But you will notice that I did not charge Mr. Edwards with the use of money, but only stated that it was expected—reported—that he was to have charge of the sack. The whole libel lies right in that, and I used the license and liberty which I had, as editor of the paper, to announce it. * * * As to the names of the parties who reported these rumors, I presume there were dozens of them. I do not know. * * * I used my editorial prerogative to announce that fact, and I did it for the purpose of warning the company against anything of that kind. * * * I did it for a good purpose, and to prevent the very thing which it was feared would occur."

This testimony was, on motion of plaintiff, stricken out, and the ruling of the court upon the motion is assigned as error by the defendants. It is claimed by them that this evidence was admissible in mitigation of damages, and that it tended to show good faith, and want of malice, in the publication. We think, however, that the evidence was properly excluded. The mere belief of the editor of a newspaper in the justice and truth of an attack which he makes upon the private character of a citizen is no defense to an action brought by the person assailed for the damages sustained by such attack, nor can such belief be considered in mitigation of damages, unless it is shown to have been based upon information derived from a reliable source. It must be shown that the charge was only made after due investigation of the matter to which it relates. In the case of *Bronson v. Bruce*, 59 Mich. 475, 26 Pac. Rep. 671, it is said: "If the charges were false, and made in an honest belief of their truth, after reasonable and proper investigation, such fact would go to mitigate damages, and under certain circumstances * * * the jurors would be warranted in reducing the damages to a minimum." And in *Wilson v. Fitch*, 41 Cal. 383, this court said: "Nor can a defamatory publication in a public journal be said to be privileged simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives. No adjudicated case, that I am aware of, has ever gone so far. But whilst such publications cannot be deemed privileged, so as to require proof of express malice, the publisher, in order to rebut the presumption of malice, should be allowed the fullest opportunity to show the circumstances under which the publication was made, the sources of his information, and the motives which induced the publication. The public interest, and a due regard to the freedom of the press, demands that its conductors should not be mulcted in punitive damages for publications on subjects of public interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true." The testimony stricken out did not tend to bring the defendants within the protection of this rule, which permits the mitigation of damages when a publication reflecting upon the character of another has been made in good faith. It only tended to show that others, whose names the witness did not give, believed or suspected that the plaintiff would be guilty of using money to influence the election then pending. The witness did not state that any reliable person, professing to have any knowledge of the fact, gave him any information to the effect that plaintiff was to corruptly disburse money for the purpose of bribing voters in the election then to occur. If he received any such information, it was also important to state

the name of the informant, that the jury might judge whether his character was such that the defendant might reasonably have placed reliance upon his statements. The last sentence of the publication, "It is reported that Edwards is to have charge of the sack," imports something else than that there was an idle rumor to that effect, not entitled to credit or consideration. It is equivalent to the assertion that there was a well-founded report to that effect, and one which the publishers, after due inquiry and investigation, believed to be true, and, in effect, was the same as a direct charge of the fact; and, to enable defendants to mitigate the damages resulting from such a statement, it was incumbent upon them to give the sources of their information, and to show that their informants were possessed of such character and standing as would command a belief in the truth of their utterances. The liberty of the press is not more under the protection of the constitution than the liberty of speech, and the publisher of a newspaper can only defend an action for libel, or mitigate the damages to be recovered therefor, upon precisely the same grounds as any other individual could defend an action for slander in uttering the same words upon the street. "The liberty of the press, as the law now stands, is only a more extensive and improved use of the liberty of speech which prevailed before printing became general; and, independently of certain statutory provisions, the law recognizes no distinction in principle between a publication by the proprietor of a newspaper and a publication by any other person. A newspaper proprietor is not privileged, as such, in the dissemination of the news, but is liable for what he publishes in the same manner as any other individual. *McAllister v. Free Press Co.*, 76 Mich. 338, 43 N. W. Rep. 431.

The court did not err in excluding the testimony of the witnesses Willey and Savage, which was offered for the purpose of proving particular acts of plaintiff in relation to the use of money in elections prior to the publication of the libel set out in the complaint. Assuming that evidence of such acts was otherwise competent, it would not be admissible without showing, or offering to show, that the defendants had knowledge of such acts when they made the publication complained of, and there was no offer upon the part of the defendants to show such knowledge. *Hatfield v. Lasher*, 81 N. Y. 246; *Morey v. Association*, 123 N. Y. 207, 25 N. E. Rep. 161; *Lothrop v. Adams*, 133 Mass. 471; *Willover v. Hill*, 72 N. Y. 36.

The defendants introduced evidence tending to show that the plaintiff's reputation was that of a person having money under his control for the purpose of corrupting voters, and the plaintiff offered evidence tending to show the contrary. Upon this state of the evidence, the defendants requested the court to give the following in-

struction, which was refused: "In fixing the amount of damages, it is proper that you take into consideration the reputation of the plaintiff at and prior to the time of the alleged publication, as to the point wherein he claims to be damaged; and in case you find that plaintiff, prior to the publication, bore a bad reputation as to the point wherein he claims to be damaged, you may fix nominal damages only." The court did not err in refusing to thus instruct the jury. The defendants were entitled to an instruction, if they had requested it, that in fixing the amount of damages the jury might consider the previous character of the plaintiff, as they might believe it to be from the evidence. But the jury, even if they found the character of the plaintiff to be bad, could not be restricted to nominal damages in their verdict unless they believed that such damages would fully compensate the plaintiff for the wrong suffered by the publication of the matter alleged in the complaint, and that exemplary damages should not be given. Judgment and order affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

(4 Cal. Unrep. 240)

REMY v. OLDS et al. (No. 18,114.)

(Supreme Court of California. Sept. 28, 1893.)

CONTRACTS—ACTIONS ON—PLEADING—EVIDENCE—INSTRUCTIONS.

1. A cause of action may be stated in different counts in order to meet any possible phase of the evidence, and the pleader will not be required to elect on which count he will proceed.

2. Where plaintiff, in an action for breach of contract, must show performance on his part before he can recover, nonperformance by him cannot be excused on the ground that it was caused by the act of God; and Civil Code, § 1511, providing that want of performance is excused "when it is prevented or delayed by irresistible superhuman cause," does not apply to such cases.

3. Where a contract requires a party to plant "grape vines," and the word "vines" does not appear to have been used in any special or local sense, expert evidence is not admissible to show its meaning, but it will be held to mean indifferently either cuttings or rooted plants, according to common usage.

4. In an action for breach of a contract to furnish water for irrigation, whereby a large number of grape cuttings planted by plaintiff died, testimony of a witness for defendants that he (witness) procured 15,000 cuttings from the lot from which plaintiff procured his, planted them on similar land, and watered and cared for them well, and yet nearly all of them died, though it relates to a collateral matter, is relevant, as tending to prove a fact from which it could be inferred that the loss of plaintiff's vines was not caused by defendants' failure to furnish water.

5. Where one of the issues in an action on a contract is as to whether there was such performance by plaintiff as would entitle him to recover, an instruction that, if the jury believe that defendants did not perform their part of the contract, they must find for plaintiff, is erroneous, as it takes from the jury the issue as to performance by plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Merced county; Joseph H. Budd, Judge

Action by Thophile Remy against E. J. Olds and George H. Barfield for breach of contract. There was a judgment in favor of plaintiff, and defendants appeal. Reversed.

J. W. Knox, for appellants. James F. Peck and T. C. Law, for respondent.

TEMPLE, C. Defendants take this appeal from the judgment and an order denying a new trial. This case has been here before. 88 Cal. 537, 26 Pac. Rep. 355. In the opinion on the first appeal the substance of the complaint and the contract sued on are fully stated. The answer denies the existence of the contract, but admits that such a contract was agreed upon, and avers that it was to have been reduced to writing and signed by

all parties; that it was reduced to writing, signed and acknowledged by defendants, and sent to plaintiff, who was to sign, acknowledge, and have it recorded. This was October, 9, 1888. It appears that plaintiff did not then sign it, but had it recorded. Afterwards, on being informed that his signature was necessary, he did sign it, and had it re-recorded. Meantime he had taken possession of the land, and commenced performance. Defendants consented to his acts, believing that he had signed the contract, but, discovering that he had not done so, they notified him in writing in June, 1889, that they would not be bound by it, and considered him a trespasser on the land. Apparently, however, although that is not made very certain by the evidence, the plaintiff had executed it before the notice was given. Upon receiving the notice, plaintiff withdrew from the land, and commenced this action.

The complaint, as was said on the former appeal, contains two counts,—one for damages on the contract; and the other to recover materials furnished, money laid out and expended, and labor performed, all furnished and done under the contract, and in performance of it, before the notice from defendants. After a jury had been impaneled, defendants requested the court to require plaintiff to elect upon which count or cause of action he would rely, and that thereupon the other cause of action be dismissed. This the court refused to do, and the ruling is assigned as error. Conceding that this is a case in which the same cause of action is differently stated in two separate counts, still I think the ruling correct. The right to so plead is well established here. *Wilson v. Smith*, 61 Cal. 209; *Katz v. Bedford*, 77 Cal. 319, 19 Pac. Rep. 523; *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. Rep. 937; and many earlier cases. Since it is allowable to state the cause of action in the alternate, using different counts in order to meet any possible phase of the evidence, a party cannot be deprived of the privilege by being compelled to strike out all causes of action save one before the trial commences. It would render the privilege a barren one. But the two causes of action here are not the same. The second count only enumerates other damage, not specially set out in the first count. Perhaps all should have been in the one count, but there can be no doubt of the right of plaintiff to join all in one suit, and he cannot be compelled to abandon any part of his claim.

The next point relates to the ruling admitting the contract in evidence on the ground that it had not been executed by plaintiff. The facts in regard to this have already been stated. This ruling was clearly correct. It is convenient to refer to the concise statement of the provisions of the contract in the opinion rendered on the last appeal. Plaintiff did not level and prepare the land in the fall of 1888, but claims that he

did in the following February, and in March he set out grape cuttings upon lots 49 and 50, and also a nursery of about four acres for himself on lots 71 and 72. The vines nearly all died, as plaintiff maintains, because defendants did not furnish water for irrigation. Plaintiff seeks to recover as damages the cost of the cuttings and his labor in preparing the land and planting. To this claim on the part of plaintiff the defendants interpose several objections. (1) They contend that he cannot recover damages in a suit upon the contract because he has himself failed to perform his obligations under it, in that he did not plow, level, or prepare the land for planting in the fall of 1888. They contend and produce evidence in support of the proposition that, unless the land were plowed in the fall before the rains, it would not be in good condition for planting in the following spring. (2) That the vines were not properly planted, and would not have survived if water had been furnished. (3) That the vines, when planted, were not protected by a rabbit-tight inclosure, and that the rabbits gnawed the bark from the cuttings, and nibbled the buds, and prevented their growing. There was no evidence that rabbits did injure the vines, but there was that rabbits were very numerous there, and that protection against them was necessary to enable vines to grow as soon as planted. And (4) the cuttings were dead, or at least not suitable for the purpose when planted. Defendants also contend that they did furnish water as soon as it was required; if not on Hartley avenue, still, where it was equally convenient, and where plaintiff had consented to receive it. It was incumbent upon the plaintiff, since he seeks to recover upon the contract, to show full performance on his part, so far as he was not prevented from performing by defendants. He did not claim that he had plowed, leveled, or prepared the land in the fall, but he contended that the provision as to time was waived by defendants, and that they consented to his doing this work in February; also that the delay was excused because performance at the time was prevented by act of God, to wit, a heavy storm or fall of rain, which rendered the land unfit to be plowed in the fall.

Defendants objected to the evidence, (1) because the complaint avers that plaintiff had performed the contract as made and does not show an alteration; (2) in effect, though not so stated, because the act of God would not excuse delay. As to the first, it is enough to say that the position of plaintiff does not assume that there had been any alteration of the contract, but that the defendants agreed to accept what was done as performance. The contract as made was fully performed, if plaintiff is correct, though not at the time stipulated. But, regarding it as an alteration of the contract, it is evident that defendants have not been

injured. As to the ruling permitting evidence that it was impossible to plow, level, and prepare the land in the fall of 1888, further consideration is necessary. The jury were also instructed upon this matter, and all may as well be considered together. Plaintiff, testifying in his own behalf, was proceeding to state that he attempted to plow, level, and prepare the land in October, when the rains came, and he could do no more. Defendants here objected that it was immaterial whether the rain rendered it impossible or not, when the court remarked, in the presence of the jury: "I would like to see the decision that, where the act of God prevents a man, because of that act of God he shall lose all of the results of his labor. Objection overruled." Upon the conclusion of the evidence, the jury was instructed as follows: "Time is of the essence of the contract in controversy in this action. This means that, unless every act meant to be done under the contract is done within the time therein stipulated, there is a breach of the contract by which-ever party fails so to perform, unless the time in which the act is to be done be waived, or such performance be impossible by the act of God, such as an unexpected storm." The first idea which suggests itself upon this matter is that a rain in the last days of October is not such an extraordinary event as will constitute an act of God excusing performance. It was a seasonable event, one which was likely to happen, and which common prudence would have provided for. Respondent, however, contends that this view is justified by section 1511, Civil Code. That is, in effect, that want of performance "or any delay therein is excused by the following causes to the extent to which they operate. * * * (2) When it is prevented or delayed by an irresistible superhuman cause," etc. I cannot think this section was intended to have any application to a case of this kind. The doctrine in relation to the act of God is more often invoked by insurers than by others, but is in a proper case matter of defense, where one is sued for failure to perform a contract. When, however, one sues upon a contract, and must show performance on his part to entitle him to recover, he cannot rely upon such prevention to show performance. Excuse for not performing, in the nature of things, cannot be performance. A defendant cannot be made to pay for the act of God preventing the plaintiff from rendering an equivalent for the money he seeks to recover. The provision cited from section 1511 cannot be construed as going beyond this. Properly understood, it announces a well-known rule of law, but pressed further it works a radical change in the rule. Besides, the view here taken is the natural and obvious meaning of the language employed. The statute purports simply to provide an excuse for failure to

perform. Plaintiff might have relied entirely upon his claim that defendants had waived the matter of time, but did not. Under the circumstances, it is impossible to say that this evidence and the instruction did not have weight in convincing the jury that plaintiff was not in default when the notice was served. See section 1440, Civil Code.

Plaintiff set out on lots 49 and 50 grape cuttings or segments of grape vines, instead of rooted vines. Defendants contend that this was not a compliance with the contract, which calls for grape vines. They insist that a vine includes the root,—is an entire plant. Upon this subject expert testimony was admitted. It was also shown that vineyards were sometimes planted with cuttings and sometimes with rooted vines. Some witnesses thought the words "grape vines" necessarily meant a rooted vine, and some that it excluded the idea that the vine was rooted. The dictionaries give as the first meaning of the word "vine" a plant with a trailing or climbing stem, but they also apply the word to the trailing stem in contradistinction to the plant, and we all know that the word is so applied in common usage. As the words "grape vine" might mean either, and both are used in planting vineyards, I think plaintiff was at liberty under his contract to use either. It was proper to show how vineyards are planted, but, since the words were not used in any special or local sense, I think the meaning of the words was not a matter to be established by expert testimony.

Appellant complains of an order of the court striking out certain evidence given by Mitchell, a witness for defendants. The witness had stated that he procured some 15,000 cuttings from the lot from which plaintiff obtained his; that he set them out on land similar to lots 49 and 50, and in the vicinity; that his were well watered and cared for, and yet nearly all died; and was proceeding to specify the character and degree of care given them when he was interrupted by the court, who ordered the testimony stricken out, and instructed the jury not to regard it, saying that it was in regard to a matter entirely collateral, and had no bearing on the case. Counsel for the defense then stated that he had other testimony to the same point which he asked might be considered as offered, excluded, and exception noted. This was agreed to. That the evidence was upon a collateral issue is not conclusive against its relevancy. The question was whether the fact it tended to establish would tend to prove or disprove the fact at issue. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred. I think the evidence was relevant and material. Plaintiff claimed that his vines died for lack of water which

defendants agreed to furnish, but did not. The evidence excluded tended to show that the vines would not have lived had water been furnished. If this were established, plaintiff could not recover the cost of vines set in lots 49 and 50, nor for his labor in setting them, nor damages for the loss of his nursery, which he claims he would have made had he been permitted to complete his contract. The probative force of the evidence was for the jury. Plaintiff was to furnish the grape vines.

The question as to the necessity for a rabbit-tight fence was probably sufficiently discussed on the former appeal. Of course, the rule is well established that in construing a contract a court is not only to take it by all its corners, but is to be placed in the seats of the parties when it was made. In other words, it is to be construed in the light and with the knowledge of surrounding circumstances. If circumstances were shown at the trial which did not appear in the complaint, in the light of which the court construed the contract on the former appeal, and which would justify a different construction, that ruling would not then constitute the law of the case. The court should now interpret the contract in the light of all the facts, and, so far as other facts throw light upon it, the court is not bound by the ruling based upon the allegations of the complaint in overruling the demurrer.

I think the court erred in its ruling in regard to evidence that a fall plowing of the land was necessary. The ruling and remark of the court went beyond the necessities of the case, and amounted to an instruction to the jury that plaintiff was entitled to a judgment unless defendants furnished water on Hartley avenue. The court said: "I will instruct the jury, if the defendants did not furnish water on Hartley avenue according to the contract, the plaintiff is entitled to damage for a breach of the contract. You will direct your evidence to that point." This took from the jury at once all consideration of the question as to whether plaintiff had failed to perform the conditions of the contract on his part. Indeed, the ruling prevented defendants from putting in proof upon the subject of the claim that plaintiff did not plow, level, or prepare the land in 1888, or to rebut evidence on the part of plaintiff that they had waived such performance. It also ignored the evidence given by defendant Olds to the effect that plaintiff had consented to the furnishing of water on Clinton avenue.

It is fair to say that the formal instructions do submit to the jury the question as to whether plaintiff was in default when the notice was served. The remark was not intended to have any bearing upon that question. Still apparently it did, and we cannot say that it did no injury to defendants. Some further questions are raised, but, I think, none which need discussion here. I

think the order and judgment must be reversed, and a new trial had.

I concur: SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered.

99 Cal. 503

HIBERNIA SAVINGS & LOAN SOC. OF
SAN FRANCISCO v. WACKEN-
REUDER et al. (No. 14,185.)

(Supreme Court of California. Sept. 9, 1893.)

CLAIMS AGAINST DECEDENT'S ESTATES—PRESENTATION—LIENS.

1. Code Civil Proc. § 1502, provides that, if an action is pending against a decedent, plaintiff must present his claim as in other cases. Section 1500 permits the bringing of actions to foreclose liens against property of the estate without prior presentation of claim, if recourse against other property is expressly waived in the complaint. *Held*, that a suit to foreclose a mortgage, pending when the death took place, might be prosecuted to judgment against the representatives and heirs on the conditions prescribed in the latter section.

2. Under Code Civil Proc. § 1500, requiring that, if the claim have not been presented, the complaint to foreclose a lien against property of the estate shall expressly waive recourse against other property, and forbidding recovery of counsel fees, a complaint containing such waiver, in the words of the statute, is not vitiated by a prayer for judgment for the amount due on the note and mortgage, for costs and counsel fees, and for a receiver to take charge of the real estate till the same be sold, and to hold the net income, to be applied to any deficiency after sale.

3. Defendant in foreclosure having died pending suit, the filing of a supplemental complaint, substituting the heirs and representatives, is not the commencement of a new action, as regards the statute of limitations; Code Civil Proc. § 385, providing that an action shall not abate by death of a party, but may be continued against his successor in interest, and the substitution of defendants is not the beginning of a new action.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by the Hibernia Savings & Loan Society of San Francisco against Vitus Wackenreuder and Morris Windt to foreclose a mortgage. Wackenreuder having died, a supplemental complaint substituted his executors, heirs, and devisees as defendants, with one Reynolds, claimant of an interest in the land. Judgment for defendants. Plaintiff appeals. Reversed.

A. Tobin and Thomas F. Barry, for appellant. T. Z. Blakeman and Geo. D. Shadbourne, for respondents.

DE HAVEN, J. This action was commenced on June 19, 1885, against Vitus Wackenreuder and Morris Windt, for the purpose of foreclosing a mortgage made by said Wackenreuder to secure the payment of his note which matured on June 29, 1882, and he was properly served with the summons; but for some reason, not disclosed

by the record, the cause was not brought to a hearing in his lifetime. Wackenreuder died in August, 1887, and the time for presenting claims against his estate expired on April 11, 1889. The plaintiff did not present for allowance the claim which is the subject of this action. But on June 3, 1889, the court made an order substituting the executors of Wackenreuder as defendants in his place, and permitting the plaintiff to file "an amended and supplemental complaint," which it did on June 13, 1889. In the "amended and supplemental complaint," the executors of Wackenreuder and certain other persons, his heirs and devisees, and one Reynolds, who had made a bid for a portion of the property described in the mortgage, at a sale thereof under an order of the probate court, were named as defendants, and appeared and answered in the action. The supplemental complaint contained, in addition to the matters stated in the original, allegations of the death of Wackenreuder, and the appointment of his executors, who were named as defendants therein, and that the other persons who were named as defendants therein claimed an interest in the property mortgaged, and also contained the following waiver: "The plaintiff hereby expressly waives all recourse against any other property of the estate of said Vitus Wackenreuder, deceased, other than that which is included and embraced in, and covered by, said mortgage." The superior court found, upon the foregoing facts, that plaintiff's cause of action, as stated in the supplemental complaint, was barred by the provisions of sections 1493 and 1502 of the Code of Civil Procedure, and was also barred, as to the heirs, by sections 312 and 337 of the same Code, and thereupon gave judgment for the defendants. The plaintiff claims that these findings are against the evidence, and this is the only question presented by the appeal.

1. Sections 1493 and 1502 of the Code of Civil Procedure are as follows: "Sec. 1493. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever. * * *" "Sec. 1502. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required." The defendants insist that, as this action was pending at the date of the death of Wackenreuder, and as plaintiff has never presented to the executors of deceased, for allowance, its claim upon the note and mortgages sued on, the case is brought fully within the provisions of section 1502 of the Code of Civil Procedure, and the plaintiff is not entitled to recover.

This argument is based upon the assumption that the section referred to applies to all actions pending against a defendant at the date of his death, and this would be its proper construction if there were no other sections of the Code to be considered than sections 1493 and 1502. But, by section 1500 of the Code of Civil Procedure, it is provided that: "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint, but no counsel fees shall be recovered in such action unless such claim be so presented." Under this section, when the waiver therein provided for is made, claims secured by mortgage (other than a mortgage upon the homestead, which, by section 1475 of the Code of Civil Procedure, must be presented for allowance) are excepted from the operation of section 1493, requiring the presentation of claims to the executor or administrator for allowance; and, by necessary implication, actions upon such excepted claims are not affected by the general rule contained in section 1502 of the same Code. The latter section, when properly construed, refers only to actions upon such claims as are required to be presented to the administrator for allowance under section 1475 of the Code of Civil Procedure, or by the provisions of section 1493 of the same Code, as modified by section 1500. In other words, section 1502 of the Code of Civil Procedure simply means that, when an action is pending against a decedent at the time of his death, the plaintiff therein is not relieved from the duty of presenting for allowance the claim upon which it is based, when the claim is of that character that he would have been required to make such presentation in order to preserve its validity as a claim against the estate if such action had not been brought in the lifetime of the decedent. It is quite true that the language of section 1500 of the Code of Civil Procedure, permitting the holder of the mortgage or lien to maintain an action thereon without presentation of the claim to the executor or administrator of an estate, if construed literally, would only apply to an action to foreclose a mortgage or lien when commenced after the death of the mortgagor; but there is no distinction in reason between such an action commenced at such a time, and one which was brought for the same purpose in the lifetime of the mortgagor, and which is pending at the date of his death, and the section should not be construed as making any such distinction. Like all remedial statutes, it should not be confined to cases falling within its exact let-

ter, but it should be given effect according to its reason and spirit. The object of this section is not only to give to the holder of such a mortgage, or other lien, the right to maintain an action against the representative of the estate, to enforce the same, without presentation of the claim upon which the action is founded, when the waiver provided for is made, but also to relieve the estate from the payment of counsel fees stipulated for in the mortgage, and from the payment of any deficiency judgment, when the mortgagee elects to proceed under it; and this purpose or intention of the law is as fully satisfied when the complaint in an action pending in the lifetime of the decedent is, after his death, so amended as to secure this benefit to the estate of the deceased, as it would be by dismissing such pending action, and commencing a new one, and thus bringing the case within the literal terms of the statute. In holding, as we do, that section 1502 of the Code of Civil Procedure has no application to an action which, if brought against the administrator or executor in the first instance, could have been maintained without first presenting to such administrator or executor for allowance the claim upon which it is based, our conclusion is not in conflict with anything decided in *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. Rep. 375. That was an action to foreclose a mortgage upon a homestead selected by the deceased in his lifetime. By the express provision of section 1475 of the Code of Civil Procedure, such claim is required to be presented for allowance, and is not within the provisions of section 1500 of the same Code, which permits a mortgage to be foreclosed without such presentation when recourse against all other property of the estate is waived; and the court held that the fact that such action was pending in the lifetime of the deceased did not exempt the plaintiff from the duty of presenting such claim to the representative of the estate, but that section 1502 of the Code of Civil Procedure applied to such a case, and would permit no recovery in the pending action unless the claim was presented as required by law. The distinction between that case and this is broad, and the decision there is in entire harmony with all that is said in this opinion.

2. It is also claimed by respondents that the plaintiff did not, in its supplemental complaint, make the waiver required by section 1500 of the Code of Civil Procedure, and that for this reason the judgment should be affirmed. This argument is based upon the fact that in the prayer for relief the plaintiff asks for judgment for "the amount due upon the said note and mortgage," and for costs "and counsel fees," and "that a receiver be appointed to take charge of the real estate until the same be sold, and collect the rents, and hold the net income therefrom, to be applied to the payment

of any deficiency which may remain due to plaintiff after said sale." It must be conceded that the prayer of the complaint is carelessly drawn, but we do not think that this should be allowed to destroy the effect of the express waiver which is contained in the body of the complaint, and which is in the exact language of the statute, and therefore sufficient.

3. It is lastly claimed by respondents that the action is barred by section 337 of the Code of Civil Procedure, which requires an action upon a written contract to be brought within four years after the cause of action thereon accrues. This contention cannot be sustained, in view of the facts appearing in the record. The note which is sued on matured June 29, 1882, and the action was commenced June 19, 1885, which was less than three years after the maturity of the note. The contention of respondents that if the action was not pending at the date of the death of Wackenreuder, within the meaning of section 1502 of the Code of Civil Procedure, then the filing of the supplemental complaint on June 13, 1889, is to be treated as the commencement of a new action, is fallacious. The action was commenced within the time fixed by section 337 of the Code of Civil Procedure, and did not abate upon the death of Wackenreuder, but was continued against his representatives by the order of the court substituting them as defendants in his place; and the subsequent filing of an amended or supplemental complaint, in which the plaintiff waived its right to resort to any other property than that mortgaged in satisfaction of the judgment which it demanded, and which waiver was also, in effect, a waiver of its right to the counsel fees stipulated for in the mortgage, was not the introduction of a new and different cause of action against such representatives, or the other persons named as defendants in the supplemental complaint, who are heirs and successors of the deceased mortgagor. The filing of such supplemental or amended complaint was authorized by section 385 of the Code of Civil Procedure, which provides that an action shall not abate by the death of a party, and that the same may be continued against his representative or successor in interest, and the bringing in of such substituted defendants is not the commencement of a new action against them, but only a step in the progress of the original action to judgment. *Evans v. Nealis*, 69 Ind. 148; *Evans v. Cleveland*, 72 N. Y. 486. In the case last cited, the original plaintiff died, and his executrix was substituted as plaintiff therein by the filing of a supplemental complaint, by leave of the court. The supplemental complaint was not filed for more than one year after the original cause of action accrued, and, if the supplemental complaint was to be treated as the commencement of a new action, the cause of action therein stated was barred

by the statute of limitations of that state, and this was the contention of the defendant there; but the court held otherwise, saying: "It was provided in the old Code (section 121) that no action should abate by the death of a party, but that it might be continued in the name of the personal representative or successor in interest by motion made at any time within a year, or afterward, by supplemental complaint. The service of such complaint was not the commencement of a new action. It was a proceeding in an action which had been commenced, and which was then pending. The action had been commenced within the year after the cause of action accrued, and it is impossible to perceive how any lapse of time, subsequent to the commencement of the action, could bar the action under a statute, which prescribes a limit of time only before the commencement of the action." This reasoning is entirely applicable to the facts of this case, and fully supports our conclusion that the filing of the supplemental complaint in this action was not the commencement of a new action, and that, the original action having been commenced within the time limited by section 337 of the Code of Civil Procedure, the cause of action stated in the supplemental complaint is not barred by the provisions of that section. Judgment and order reversed.

We concur: McFARLAND, J.; FITZGERALD, J.

99 Cal. 536

HOPPE et al. v. HOPPE et al. (No. 18,225.)
(Supreme Court of California. Sept. 12, 1893.)

SUPERSEDEAS—SALE OF REALTY

Under Code Civil Proc. § 945, providing that, when the judgment appealed from directs the sale of land, execution cannot be stayed without a bond on the part of appellant against waste, supersedeas cannot be granted on the mere bond for costs on appeal, nor on an application filed after the land has been actually sold under the judgment.

Department 1.

Partition by Herman W. Hoppe and others against Julia Hoppe and W. A. Fountain, consolidated with suit by said Fountain against Julia Hoppe to foreclose a mortgage on the same land. Judgment for Fountain. Plaintiffs in partition, having appealed, apply for supersedeas. Motion denied.

Armstrong & Platnauer and Henry C. Ross, for petitioners. Clinton L. White, for respondent.

HARRISON, J. Application for a writ of supersedeas. The above-named plaintiffs, claiming to be the owners of an undivided interest in certain lands, brought an action in partition against the defendants, Julia Hoppe and W. A. Fountain, alleging that the latter held a mortgage upon the land, ex-

ecuted to him by his codefendant, Julia. Fountain also brought an action against Julia to foreclose his mortgage, and thereafter, by an order of court, the two actions were consolidated. The court sustained defendant's demurrer to the claim of the petitioners for the partition of the land, and rendered judgment in his favor against Julia for a foreclosure of his mortgage and a sale of the land. This judgment does not refer to the claim for partition, but is limited to the claim on the mortgage, and it does not appear that the determination of the court upon the partition claim has passed into a judgment. From this judgment separate appeals have been taken, one by the petitioners herein, and one by the defendant Julia.

By the terms of the judgment appealed from, a receiver is appointed, who is directed to make sale of the mortgaged premises, and out of the proceeds of said sale to pay the amount of the plaintiffs' mortgage claim, and report the deficiency, if any, to the court. The defendant is also directed to deliver immediate possession of the premises to the said receiver, who is also directed to retain possession thereof until a redemption from said sale shall be made, or until the time for such redemption has expired, and thereupon to execute a deed to the purchaser. Upon this judgment an order of sale was issued to the receiver, and, after he had advertised the land for sale, the plaintiffs in the partition suit gave notice that they would apply to this court for a stay of proceedings pending the appeal. Before the day noticed for the hearing, the receiver had, however, sold the land in accordance with the directions of the judgment, for the amount of the mortgage claim, by which the judgment was satisfied. Section 945, Code Civil Proc., provides: "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon." The undertaking given by the appellants in the present case is only the ordinary \$300 bond for costs of appeal, and makes no provision against the commission of waste. The object of a supersedeas is to stay proceedings "in the court below upon the judgment appealed from," and to suspend the enforcement of that judgment until the appeal has been determined. *Dulin v. Coal Co.*, (Cal.) 33 Pac. Rep. 123. If, however, the judgment has been executed, there is no further action to be taken thereon by the court below, and consequently nothing upon which the supersedeas can act. It follows, therefore, that the undertaking on appeal was insufficient to operate as a stay of proceedings, and that, even if it had been sufficient therefor,

the petitioners did not make their application in time to have any order of this court effective, and their motion is therefore denied.

We concur: GAROUTTE, J.; PATERSON, J.

4 Cal. Unrep. 224

HAWKINS et al. v. MOREHEAD et al.
(No. 18,129.)

(Supreme Court of California. Sept. 13, 1893.)

APPEAL—RECORD—EVIDENCE.

The sufficiency of testimony contained in a transcript on appeal, unaccompanied by a certificate that it was given or is correctly stated, will not be considered.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by William Hawkins and others against A. A. Morehead and others. From a judgment for defendant Morehead, plaintiffs appeal. Affirmed.

Wm. H. Schooler, for appellants. Park Henshaw, for respondents.

BELCHER, C. This is an action to recover the value of certain materials furnished by the plaintiffs to the defendant Stauffer, and by him used in the construction of a house for the defendant Morehead, upon a lot of land owned by her, and to enforce a lien therefor on the said house and lot. The court below found, among other things: "That the amount agreed to be paid said contractor, Stauffer, for the erection of said house, was less than one thousand dollars; that defendant Morehead had paid Stauffer in full when the said claim of lien was filed, and that there was nothing due or owing to said Stauffer at said date; that no written notice of any kind was given said Morehead by plaintiffs that they had furnished material or labor, either or both, to said Stauffer for said building; that said building was completed and occupied by a tenant on the 3d day of October, 1891, and that more than thirty days had elapsed after the completion of said contract and building before plaintiffs filed for record with the county recorder their claim of lien." And as conclusions of law the court found that plaintiffs were entitled to a judgment against Stauffer for the amount demanded, but were not entitled to have the same enforced as a lien on the said premises. Judgment was accordingly entered that the plaintiffs take nothing against defendant Morehead, and that she recover from them her costs. From this judgment in favor of defendant Morehead plaintiffs have appealed, and the case is brought here without any statement or bill of exceptions. The transcript contains nearly 50 pages of printed matter, purporting to be testimony given at the trial, but

not accompanied by any certificate that it was in fact given, or is correctly stated.

It is argued for appellants that the findings were not justified by the evidence, and in support of this position numerous references are made to the testimony found in the transcript. The trouble with this argument is that the supposed testimony cannot be looked at or regarded here for any purpose. The rule has been too long settled to admit of discussion that the question of the sufficiency of the evidence to justify the verdict or decision can only be considered on appeal when the evidence is brought up in a statement or bill of exceptions, properly certified. The only question then left to be determined is, does the judgment roll show error? We do not think it does. The findings follow the pleadings, and fully support the judgment. See *Lumber Co. v. Cummings*, 86 Cal. 22, 24 Pac. Rep. 814. We advise that the judgment be affirmed.

We concur: TEMPLE, C; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

4 Cal. Unrep. 226

DE ARNAZ v. JAYNES et al. (No. 19,138.)

(Supreme Court of California. Sept. 13, 1893.)

NOTICE OF APPEAL—ON WHOM SERVED—DEFENDANT CONSENTING TO JUDGMENT.

In an action to foreclose a mortgage, the owners of two-thirds of the property alleged that plaintiff, as mortgagee, had been in possession and received certain rents and profits, and prayed for an accounting. A demurrer to this answer having been sustained, judgment was rendered against such owners, and they appealed. The owner of the other third interest consented to judgment for plaintiff, the latter having waived a deficiency judgment. The mortgage debt bore interest at 8 per cent., and the judgment at 7. *Held*, that notice of appeal must be served on the owner of the one-third interest, since he would be injuriously affected by a reversal of the judgment.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Jose de Arnaz against James Jaynes, Joseph Moffatt, I. B. Conkling, and others. From a judgment for plaintiff, the three named defendants appeal. Dismissed.

M. W. Conkling, for appellants. Lee & Scott, for respondent.

HAYNES, C. This is an appeal from a judgment foreclosing a mortgage. Appellants Jaynes, Moffatt, and Conkling, and J. M. Taylor, Andrew Stephens, and others, were made defendants. The mortgage was executed February 3, 1887, by appellant Moffatt and one H. Clay Graham, since deceased, to secure their two joint and several promissory notes for the aggregate sum of \$20,540, with interest at 8 per cent.

per annum, payable semiannually, and if not paid, to bear interest at the same rate. Andrew Stephens was a lessee of the mortgaged property, and answered, setting up his interest. J. M. Taylor answered, alleging that he is the owner of an undivided two-thirds of the mortgaged premises, subject to the lien of the mortgage, and consenting that plaintiff be granted the relief prayed for in his complaint, including the appointment of a receiver. Defendants Jaynes, Moffatt, and Conkling (the appellants here) answered, admitting that no payments had been made upon the mortgage, and alleging that from December 1, 1887, to November 17, 1891, defendant Taylor owned an undivided two-thirds of the mortgaged property, and they the remaining one-third; that during the time above mentioned the plaintiff, as mortgagee, was in possession of the mortgaged premises, and received the rents and profits of the same, of the value of \$5,000, which should have been applied upon the mortgage; and prayed for an accounting. Plaintiff demurred to this answer. The demurrer was sustained, and, defendants declining to amend, judgment went against them. Of all the defendants, Moffatt was the only one personally liable for the mortgage debt; and plaintiff, in his complaint and in the judgment, waived a deficiency judgment, except as to the funds in the hands of the receiver. The notice of appeal was served only upon the plaintiff, and he, as respondent here, now insists that the appeal should be dismissed because of appellants' failure to serve the notice of appeal upon defendants Taylor and Stephens, both of whom, he contends, would be affected by a reversal of the judgment.

There was no personal judgment against any of the defendants, for a deficiency or otherwise, but there was a judgment against the whole of the property, and to which Taylor is a necessary party. If the judgment should be reversed, Taylor would necessarily be a party to further proceedings, else his interest in the mortgaged premises would not be foreclosed. Respondent suggests that as the mortgage debt bears interest at 8 per cent., compounded semiannually, while the judgment bears but 7 per cent., Taylor would necessarily be injuriously affected, since the amount for which his property would be liable would be increased. On the other hand, appellants contend that plaintiff should be required to account for the rents and profits, as alleged in their answer, and that such accounting would diminish the amount for which Taylor's interest would be liable, and that, therefore, he would be benefited. But this must depend upon their success in compelling an accounting, and the amount for which the plaintiff may be required to account. Taylor, having consented to the judgment, could not appeal, and is therefore conclusively presumed to be satisfied therewith. What his reasons were for so consenting, we can only

conjecture. It may be that he hoped, by having a prompt disposition of the case, and an early sale,—thus preventing a continued accumulation of interest,—that there might be a surplus to be distributed among the owners. It is just as essential that Taylor should be a party to proceedings in the appellate court, which necessarily affect him or his interests, as that he should be a party to the proceedings in the court below. In *Senter v. De Bernal*, 38 Cal. 640, it was said: "Every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an adverse party, within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of a plaintiff or defendant or intervener." There the action was for partition. The court further said: "From the interlocutory judgment upon such issues, appeals may be taken by the party aggrieved, without making any persons parties to the appeal, except such as were parties to the issues; but no appeal from the whole of the final judgment can be made effectual unless all the parties to it are made parties to the appeal, either as appellants or respondents, for such a judgment cannot be reversed without affecting the interest of all who are parties to it." See, also, in *re Castle Dome Min. & Smelting Co.*, 79 Cal. 248, 21 Pac. Rep. 746; *Millikin v. Houghton*, 75 Cal. 540, 17 Pac. Rep. 641; *Williams v. Association*, 66 Cal. 194, 5 Pac. Rep. 85; *O'Kane v. Daly*, 63 Cal. 318. Of course, all the cases concede that, if the omitted party would not be affected by a reversal or modification of the judgment appealed from, the appeal will be sustained; but this, I think, is as far as the court has gone, or could go, in any case. The appellate court having no jurisdiction to enter a judgment which would necessarily affect one not a party to the appeal, the other questions presented cannot be examined. I advise that the appeal herein be dismissed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal is dismissed.

99 Cal. 538.

CITY OF SANTA ANA v. HARLIN. (No. 19,030.)

(Supreme Court of California. Sept. 13, 1893.)

EMINENT DOMAIN—NECESSITY—PUBLIC USE—COMPENSATION—EVIDENCE—WITNESS—EXPERTS—PLEADING AND PROOF—APPEAL.

1. As Acts 1889, p. 70, giving the city council power to open streets, imposes on it the duty of determining the necessity, and makes the official order opening the street conclusive evidence of the necessity, the question

of necessity is purely for the council, and will not be passed upon by the courts.

2. The mere fact that individuals subscribed money or gave bond to a city to contribute to the expense of laying out a street will not vitiate the proceedings, or prove that the land was taken for the accommodation of private persons, and not for a public use.

3. In proceedings to condemn land, the present market value is the measure of damages, and not its value in use to the owner or to those seeking to condemn.

4. The term "present market value" of land means the price he could obtain after such a reasonable and ample time to sell as would ordinarily be taken by an owner.

5. In condemnation proceedings, a question: "For what purpose could that property be used properly?"—is properly disallowed.

6. In condemnation proceedings the owner is entitled to show the adaptability of the land to the different practical purposes to which it is naturally adapted, but the proof should be limited to showing the present condition of the property, and the uses to which it is adapted, and not extended to speculative inquiries as to possible future uses under altered circumstances.

7. In condemnation proceedings the owner cannot show offers received for the property. *Muller v. Railway Co.*, 23 Pac. Rep. 265, 83 Cal. 240, distinguished.

8. Even if the owner could testify as to offers received for property sought to be condemned, a question whether he received offers was properly excluded, where no time was specified, and he had just testified that he had owned the property for 16 years.

9. The extent of cross-examination to test the knowledge, judgment, or bias of a witness is within the discretion of the trial court.

10. Witnesses testifying as to the market value of land need not be experts in the severe sense of the term, provided they show sufficient knowledge and experience as to values of land in the neighborhood.

11. An objection to the exclusion of evidence will not be considered on appeal, where the statement does not show in what it consisted.

12. Evidence only tending to establish part of an answer which has been stricken out is properly excluded.

13. In an action to condemn land for a street, evidence of irregularities in the proceedings to open the street is properly excluded where irregularities are not alleged in the answer.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by the city of Santa Ana against T. J. Harlin to condemn land for a street. From the judgment therein defendant appeals. Reversed.

E. E. Keech, for appellant. Z. B. West and James G. Scarborough, for respondent.

SEARLS, C. The action was brought by the city of Santa Ana, a municipal corporation, to condemn a right of way over certain land of the defendant for the opening of Second street in said city. The cause was tried by a jury, and the damages assessed at \$267, for which sum judgment was entered in favor of defendant, as well as a decree that the use of the land for the purposes of a street was a public use, and the taking thereof necessary to such use. The appeal is from this judgment, and from an order de-

nying a motion for a new trial. The final order of condemnation had not been made when the appeal was perfected.

The first error assigned is founded upon an order of the court striking out from defendant's answer certain allegations to the effect that the action is instituted upon the motion and at the request and for the benefit of the Santa Ana & Westminster Railroad Company, a corporation, for the purpose and benefit of said railroad company. *Mahoney v. Waterworks Co.*, 52 Cal. 159, and *Dill. Mun. Corp.* (3d Ed.) § 596, (461,) are relied upon in support of the alleged error. Under the act of March 6, 1889, (St. 1889, p. 70,) the power to order the opening of streets in municipalities, and the method of its exercise, is conferred upon the city council or legislative department of the municipality. Provision is made whereby those interested and objecting to the improvement and to various of the measures for carrying it out may be heard and their objections passed upon by the council; and when the several steps provided by the statute have been taken, and the resolution and ordinance ordering said work have been regularly adopted, the action of the council is final and conclusive of the necessity of the improvement, and the courts may not adjudicate the question of such necessity in an action or proceeding for condemnation of lands necessary to the improvement. See St. 1889, p. 75, § 18; *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673; *Butte Co. v. Boydston*, 11 Pac. Rep. 781, (not officially reported); *City and County of San Francisco v. Kiernan*, (Cal.) 33 Pac. Rep. 720. The question sought to be raised by the portion of defendant's answer stricken out was one going to the public character of the use and the necessity for its establishment, and as such was properly solvable by the city council. It follows that the court did not err in striking out that portion of the answer. *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. Rep. 604.

After the resolution of intention passed by the city council, declaring its intention to open and extend Second street, and the ordinance or resolution providing for the proposed work, were introduced in evidence, and plaintiff had rested its case, defendant offered in evidence all the proceedings and records in the matter of opening Second street, for the alleged purpose of proving: (1) That the jurisdictional facts required by section 6 of the act of March 6, 1889, had not been proven, and did not exist. (2) That there was no street superintendent; that none was ever appointed; that the person attempted to be appointed was not eligible, and did not qualify, and that he was at the time of the attempted appointment and pretended service a member of the board of trustees of the city of Santa Ana. (3) That no publication of notice was ever made, as required by section 3 of said act. Objection was made to the introduc-

tion of the record evidence, and sustained by the court, and the ruling is assigned as error. The statement fails to show in what the proffered evidence consisted, and, in the absence of all information as to the contents or character of the evidence offered, we cannot say whether it was material or pertinent to any issue in the case. Error must be shown, and, in the absence of all showing, will not be presumed. The bonds of Humphreys and Head, offered in evidence for the purpose of proving that the obligors were bound to pay the expense of opening the street, were properly excluded, as not within the issues. If they established anything in the case, it was that portion of the answer which had been stricken out. The mere fact that individuals have subscribed money or given a bond to a city to contribute towards the expense of laying out a street will not vitiate the proceedings, or prove that the land was taken for the accommodation of private persons, and not for public uses. *Parks v. Boston*, 8 Pick. 218; *Copeland v. Packard*, 16 Pick. 217; *Stilson v. Board of Com'rs*, 52 Ind. 213. There is no doubt that in many instances of attempted taking of private property for public uses, it devolves upon the courts to determine whether or not the use is a public use. *Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269; *Varick v. Smith*, 5 Paige, 159; *Loan Ass'n v. Topeka*, 20 Wall. 655. These, however, are exceptions to a general rule which recognizes in the legislative department the source of the power to determine what shall be held to be a public use, and the action of the legislature on the question is not, except in extreme cases, open to review by the courts. *Napa Valley R. Co. v. Napa Co.*, 30 Cal. 437. That the use of land for public streets in an incorporated town is a public use is true beyond controversy. And when, as under the statute of March 6, 1889, the duty of determining the necessity for opening such streets, and where, as under that statute, the official declaration or order opening a street is made conclusive evidence of the necessity therefor, the field of inquiry, in proceedings for the condemnation of land for such purposes, is confined to comparatively narrow limits. The answer contains no allegations of any defect or irregularity in the proceedings, and hence there was no issue under which such evidence was admissible. The case of *Los Angeles Co. v. San Jose Land & Water Co.*, 96 Cal. 93, 30 Pac. Rep. 969, involved a like principle with that urged by appellant here, although under a different statute.

The next error assigned relates to the exclusion of evidence offered by defendant to show the uses and purposes to which the land proposed to be taken could properly be applied. In proceedings for the condemnation of land the present market value of the land is the measure of damages, and not its value in use

to the owner or to the parties seeking to condemn it. By the term "present market value" is meant not what the owner could realize at a forced sale, but "the price that he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property." *Railway Co. v. Woodruff*, 49 Ark. 390, 5 S. W. Rep. 792. In *Boom Co. v. Patterson*, 98 U. S. 403, it was said: "The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted?—that is to say, what it is worth from its availability for valuable uses." Again, the court says: "As a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." The peculiar fitness of land for particular purposes is an element in estimating its value which may be shown, and, when it appears, forms a factor in solving the problem of market value. *Town Co. v. Neale*, 78 Cal. 63, 20 Pac. Rep. 372; *Id.*, 88 Cal. 50, 25 Pac. Rep. 977; *Water-Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. Rep. 681. One of the questions ruled as inadmissible was the following: "For what purpose could that property be used properly?" No doubt the land in question could be properly used for a great variety of purposes, but it is not perceived that such fact would enlighten a jury upon the question of its value. Whether or not it was adapted to and peculiarly suited for some specific purpose is quite a different proposition, and testimony was introduced in reference to its qualities, location, surroundings, etc., all of which was proper. The following question was asked by defendant: "What are the characteristics or qualities of the land, Mr. Palmer, that render it suitable for a courthouse?" Similar questions, tending to draw out testimony showing the adaptation of the land for a college, and for the purpose of a school, etc., were put, and ruled out on the objection of plaintiff, and the rulings are assigned as error. I am of opinion the court erred in some of these rulings. The rule as enunciated by Lewis on *Eminent Domain*, at section 479, is as follows: "The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown; and, if such peculiar adaptation adds to its value, the owner is entitled to the benefit of it. But when all

the facts and circumstances have been shown, the question at last is, what is it worth in the market?" It will be seen from the foregoing quotation, which is regarded as a correct exposition of the law on the subject, that as to some of the questions seeking to elicit the value of the property for a specific purpose the rulings of the court below were correct. It should, however, it is thought, have permitted a full and free investigation as to the adaptability of the land to the varied practical purposes to which it is naturally adapted. *Railroad Co. v. Pearson*, 35 Cal. 247. Such proof should be limited to showing the present condition of the property, and the uses to which it is adapted, and may not be extended to speculative inquiries as to possible future uses under altered circumstances, which may or may not arise.

There was no error in the ruling of the court excluding an answer to the following question, propounded to defendant when testifying as a witness in his own behalf: "Question. Have you ever received offers for this real estate property?" The witness had just testified that he owned the land described in the pleadings, and had resided there 16 years. The question as to whether he had received offers for the property was, in effect, to ask him if he had received such offers at any time in 16 years. The general rule in estimating the market value of property is that "it is not competent for the owner to prove what he has been offered for his property, (*Railroad Co. v. Pearson*, 35 Cal. 247,) or what persons who have been looking for similar property were willing to give for it," (*Railroad Co. v. Keith*, 53 Ga. 178; *Lewis, Em. Dom.* § 446. See, also, *Water-Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. Rep. 681. A case apparently at variance with the general line of decisions is to be found in *Muller v. Railway Co.*, 83 Cal. 240, 23 Pac. Rep. 265, in which the court held a similar question admissible, saying: "Bona fide offers for property afford some test as to its value, and are, we think, admissible," quoting *Harrison v. Glover*, 72 N. Y. 451. The case quoted was not in relation to the market price of land, but related to a subject so different as to lend no support to the case there under discussion. If the doctrine of *Muller v. Railway Co.* can be upheld, it must be only as an exception to a general rule applicable only in peculiar cases, of which the present is not one. Again, if the binding force of *Muller v. Railway Co.* be admitted, the question put to defendant was improper, in not confining the witness to a period near the time at which the value was to be ascertained.

Upon cross-examination, where great latitude is allowed for the purpose of testing witnesses, questions of this character are conceded on all hands to be allowable. The questions put upon cross-examination of defendant's witnesses and objected to were proper. Great liberality is properly extend-

ed in such cross-examinations; and for the purpose of testing the knowledge, judgment, or bias of the witness the liberality is wisely exercised. In such cases, and for such purposes, much must be left to the discretion of the trial court, and it is only for an abuse of discretion that its action should be impugned. The witnesses Pinther, Ames, and Blee should have been allowed to testify as to the market value of the property. They were not experts in the severe sense of the term, but showed such knowledge and experience as to values of land in that neighborhood as entitled the defendant to their opinions. *Railroad Co. v. Bunnell*, 81 Pa. St. 426; *Robertson v. Knapp*, 35 N. Y. 92; *Railroad Co. v. Hawk*, 39 Kan. 638, 18 Pac. Rep. 943; *Shattuck v. Railroad Co.*, 6 Allen, 117; *People v. Sanford*, 43 Cal. 32; *Town Co. v. Neale*, 78 Cal. 77, 20 Pac. Rep. 372. For the errors indicated the judgment and order appealed from should be reversed, and a new trial had.

We concur: TEMPLE, C.; BELCHER, C.

HARRISON and DE HAVEN, JJ. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

PATERSON, J. I concur, and recommend to the court below for its guide the decision in *Town Co. v. Neale*, 88 Cal. 50, 25 Pac. Rep. 977, where the whole subject was carefully considered by this court in bank.

99 Cal. 526

In re SHORTRIDGE. (No. 15,288.)

(Supreme Court of California. Sept. 11, 1893.)

NEWSPAPERS—PUBLISHING TESTIMONY—CONTEMPT.

1. Code Civil Proc. § 125, providing that in certain actions the court may direct the trial of any issue of fact to be private, and exclude all persons except the officers of the court, the parties, their witnesses, and counsel, does not authorize the court in such a case to forbid publication of the testimony.

2. The finding that a publication was an unlawful interference with the proceedings of the court, within Code Civil Proc. § 1209, defining contempts, is not conclusive on certiorari, where it appears that the publication could not possibly have had that effect.

In bank. Certiorari to superior court, Santa Clara county; W. G. Lorigan, Judge.

Contempt proceedings against Charles M. Shortridge, publisher of the *San Jose Mercury*, for publishing certain testimony in disobedience to an order of court. Judgment of guilty. Shortridge brings certiorari. Reversed.

John E. Richards, Samuel M. Shortridge, and D. M. Delmas, for petitioner. Frs. E. Spencer, D. W. Burchard, and N. Bowden, for respondent.

PATERSON, J. When the case of *Price v. Price*—an action for divorce—was called for

trial in the superior court of Santa Clara county, the court was advised that the evidence would probably be of a filthy nature, and thereupon made an order directing "that during the trial all persons be excluded from the court room except the officers of the court, the parties, and their counsel." It was further ordered "that no public report or publication of any character of the testimony in the case be made." On the following day the petitioner herein caused to be published in the San Jose Mercury, a newspaper of which he was the editor and publisher, an article referring to the order of the court and containing what purported to be the testimony of the witnesses. Upon an affidavit setting forth the facts stated, the court made an order commanding Shortridge to appear and show cause why he should not be adjudged guilty of contempt. Mr. Shortridge, in his answer and at the hearing, disclaimed any intention to reflect upon the court or show any disrespect therefor, and claimed that in publishing a fair and true report of the testimony and proceedings he was simply exercising a constitutional right with which the court could not interfere by order or otherwise. Thereafter an opinion was filed showing that the learned judges of the court, sensible of the delicate position they occupied in determining the scope of their own judicial powers, had given the subject most careful consideration, and holding it to be their duty, in support of the honor of the state and the dignity of the court, to punish the respondent for violating the order. A judgment was entered adjudging Shortridge guilty of contempt of court, and ordering him to pay a fine of \$100. Thereupon the petitioner herein applied for a writ of certiorari, which was granted, and, the matter having been heard and submitted, we are now called upon to determine whether the court exceeded its jurisdiction in adjudging the petitioner guilty of contempt on the facts stated. In support of the order under consideration, counsel for respondent rely upon two propositions, namely: First, that the order was authorized by sections 125, 1209, subsecs. 5, 9, Code Civil Proc.; and, second, that the publication was an interference with judicial proceedings which the court had the inherent power to punish as a contempt.

1. The sections referred to read as follows: "Sec. 125. In an action for divorce, criminal conversation, seduction or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses and counsel; provided that in any cause the court may, in the exercise of a sound discretion during the examination of a witness, exclude any or all other witnesses in the cause." "Sec. 1209. The following acts or omissions, in respect to a court of justice or proceedings therein, are contempts

of the authority of the court: * * * (5) Disobedience of any lawful judgment, order or process of the court. * * * (9) Any other unlawful interference with the process or proceedings of a court." It may be well to note that petitioner was not a party, a witness, or an officer of the court, and that no order was made excluding the witnesses from the court room. The question, therefore, whether a witness, party, officer, or other person over whom the court has acquired jurisdiction may be punished for disclosing testimony when the trial is had with closed doors, and the question whether it is a contempt for a newspaper to publish the evidence after an order has been made excluding the witnesses from the court room during the trial, must be eliminated from the consideration of the case. The court planted its conclusion squarely upon the ground that "the evident purpose of the act was that in cases of divorce * * * the entire evidence should not be produced before the public," saying: "Of course, the main purpose of this enactment was to promote public morals. * * * How the public morals can be promoted by detailing to the world the testimony in low and filthy divorce cases, or blazoning forth the injuries that some poor, unfortunate girl may have suffered, or by heralding the connection of good and respectable and moral people where they are unfortunately and unwillingly as witnesses, is something that the court cannot understand, and which the legislature unquestionably intended to prohibit. * * * It is the disposition of every man to protect his fireside. It is his disposition to raise his children up in the moral way. It is his desire to keep all contaminating influences from them, and I think the legislature has wisely and properly placed, in these particular actions, the power in the court to do so, and that the court would be recreant to its duty if it did not undertake to discharge the duty cast upon it." Every one who has the welfare of society at heart will doubtless agree with the learned judges of the court below in their opinion as to the policy of a law which would prevent the publication of such matters as they complained of; but the construction placed upon the provisions of the act quoted above is not, we think, authorized by the language of the section. In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong, and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions, in which the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency, are regarded as essential

to the public welfare. Therefore, when it is claimed that this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the lawmaking power, or the right to exercise the authority claimed must be necessarily implied as essential to the execution of the powers expressly conferred. We find no expression in the section referred to upon which such a claim can be based. If the legislature had intended to prohibit the publication of proceedings in cases tried with closed doors, it would have been easy to declare its will in that regard in express terms. It has not done so, and the right claimed is not essential to the execution of the authority conferred by the section. The assumption that the object of the statute was to protect the public from the contaminating influence of prurient revelations often made in actions of divorce, seduction, and criminal conversation is unwarranted. The object of the act is palpable. It was to secure decorum in the conduct of trials involving the relation of the sexes, and to protect witnesses of refined sensibilities from the ordeal which they might otherwise have to pass through in giving testimony of a delicate or filthy nature in the presence of a crowd of vulgar or curious spectators. To give effect to the section no other intention on the part of the legislature is necessarily implied, and, proceedings for contempt being criminal in their nature, no presumption should be indulged. Section 1032, Pol. Code, adds no strength to the position taken by counsel for respondent. What has been said of section 125, Code Civil Proc., is applicable to section 1032, and may be summed up in the proposition that the public have the right to know and discuss all judicial proceedings, unless such right is expressly interdicted by constitutional or statutory provisions, or unless the publication prohibited by the order of the court is of such a nature as to obstruct or embarrass the court in its administration of the law and the execution of the powers expressly conferred upon it.

2. Counsel for petitioner contend with much emphasis that any act of the legislature or of the court attempting to deprive the people of the right to be informed of judicial proceedings, or to publish or discuss the same, is void. It is said that secrecy and silence in such matters are utterly repugnant to the spirit of our institutions, and opposed to the constitutional declaration of right with respect to free speech and the liberty of the press. Provisions of the Codes are cited showing that the legislature has sought to abridge, rather than to extend, the common-law right of the courts to punish for contempt. Most of them relate purely to questions of libel, but one of them—a recent act of the legislature—provides that “no speech or publication reflecting upon or concerning any court or any officer

thereof shall be treated or punished as a contempt of said court, unless made in the immediate presence of such court while in session, and in such manner as to actually interfere with its proceedings.” St. 1891, p. 7. But we know of no decision which supports the proposition contended for. No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act, whether committed in or out of its presence, which tends to impede, embarrass, or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by American courts everywhere, and does not need the support of foreign authorities, based upon the fiction that the majesty of the king, represented in the persons of the judges, is always present in the court. It is founded upon the principle—which is coeval with the existence of the courts, and as necessary as the right of self-protection—that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independently of statute. The legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court, and destroying the autonomy of that system of checks and balances which is one of the chief features of our triple-department form of government, fetter the power itself. In Arkansas the legislature sanctioned the power of the court to punish as contempts certain enumerated acts, and no others. The court held that the sanction was merely declaratory of the common law, and that the prohibitory clause was entitled to respect as an opinion of a co-ordinate branch of the government, but was not binding upon the courts. *State v. Morrill*, 16 Ark. 384. This decision is in line with all the authorities. Although the power is necessarily an arbitrary one to a great extent, it has been exercised by the courts, in this country at least, only as an auxiliary means to attain the ends of justice. If abused by the judges at all, it has been only in the rarest instances. No one has realized more than the judges themselves the fact that a court cannot coerce the respect of the people for itself or its decisions, and the very delicacy of the power has proved to be a safeguard against its abuse. To this alone must be attributed the fact that, although the inherent power referred to has been claimed and exercised by the courts of this country since the organization of the government, the framers of the constitutions in all the states of the Union except Georgia and Louisiana have deemed it unnecessary to place any limitation upon the power of their courts to punish for contempts. *Stim. Amer. St. Law*, § 582.

Did the article in question tend to embar-

ness, impede, or obstruct the administration of justice? If it did, the petitioner is guilty of contempt, regardless of the order. In determining the question whether the conduct of the petitioner was an unlawful interference with the proceedings of the court, the order itself is a false quantity. As said by his counsel at the argument: "If the law, under the circumstances, prohibited the publication, the order of the court was superfluous; and the petitioner is censurable, regardless of that order, for the all-sufficient reason that he has violated the law. If, on the other hand, the law did not prohibit the publication, the petitioner had the right, under the law, to make it, and that right could not be abridged or taken away by an order." The constitution of every state in the Union guaranties to every citizen the right to freely speak, write, and publish his sentiments on all subjects, and prohibits the passage of any law "to restrain or abridge the liberty of speech or of the press." What one may lawfully speak he may lawfully write and publish. The rights thus preserved by the constitution are dear to the heart of every American, and their exercise can be complained of by the courts in a summary proceeding only when the publication or the speech interferes with the proper performance of judicial duty. If there has been no such interference, there has been no contempt. In the article complained of we find nothing which could have interfered with a full and fair investigation of the merits of the case then on trial. The case was before the court without a jury. It is not claimed that the petitioner, in his report, mutilated the testimony, misrepresented or reflected upon the judge, attempted to intimidate or swerve any witness, or to dictate to any one connected with the trial what his action should be in regard to any matter. How, then, could such an article interrupt the orderly conduct of a trial, or tend to induce a failure of justice? With the moral aspect of the case we have nothing to do. The courts are not conservators of public morals. Rules affecting the conduct and morals of the community must proceed from the legislative department. It is argued with some plausibility that the publication of the testimony might deter timid and highly sensitive witnesses from making disclosures which they would make if assured that their utterances would not be given publicity. But this is an argument which would apply to all cases, and rests upon the erroneous assumption that a witness will violate his oath to tell the truth, and the whole truth, to save himself from the mortification incident to the relation and publicity of certain disagreeable facts within his knowledge. There is no real danger of such a result. The testimony which a witness gives in a court of justice is not the discussion of a topic voluntarily selected by him, and for which he may choose his

language, and use chaste or unchaste words, regardless of the truth of the facts he is required to detail; and every witness is supposed to appreciate this fact, and to speak the truth without regard to the question who or how many will be informed of the proceedings. We are aware of the fact that there are English precedents for holding that the courts possess and exercise the power to prohibit in all cases the publication of their proceedings; but we know of no decision in this country upholding the right of a court to make such prohibition, except where the publication tended to interfere with the proceedings before the court. Blackstone lays it down as the law of England in his day that it was unlawful and a contempt of court "to print false accounts (or even true ones without proper permission) of causes then dependent in judgment." 4 Bl. Comm. 285. Several English cases are cited which seem to hold this doctrine to the extent stated. But precedents promulgated at a time when the ministers of the crown claimed and exercised the right to seize a newspaper, and stifle the voice of its editor, when books were destroyed and speeches suppressed to subserve political purposes, are of little value in this age, and especially in this country. It was to forever stamp out such a claim and prevent such occurrences that the framers of our constitutions incorporated therein the guaranty of liberty of speech and of the press. This constitutional liberty, as Judge Cooley says, "implies the right to freely utter and publish whatever the citizen may please, and be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals; * * * implies not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character when tested by such standards as the law affords." Cooley, Const. Lim. p. 421. Liberty of the press must not be confounded with mere license. Liberty of the press stops where a further exercise would invade the rights of others. This provision of the constitution does not authorize a usurpation of the functions of the courts. Under the plea of the liberty of the press, a newspaper has no right to assail litigants during the progress of a trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases which are on trial. As stated before, what may be spoken may be written; and the converse of the proposition is true, that what may not be spoken under such circumstances may not be written. As the article in question does not go beyond these limitations, and as the section under

which the court below proceeded to judgment clearly does not authorize the order which was made, the proceedings must be annulled.

Counsel for respondent claim that the finding of the court that the publication was an unlawful interference with the proceedings of the court, and therefore a contempt, must be taken as conclusive. But where it appears from all the facts found that the publication could not, under any circumstances, constitute a contempt, a judgment thereon imposing a fine or imprisonment is a nullity. It is ordered that the proceedings of the court under review be, and they are hereby, annulled, and the clerk of this court is directed to transmit a copy of the judgment to the clerk of the court below.

We concur: DE HAVEN, J.; FITZGERALD, J.; HARRISON, J.; McFARLAND, J.

99 Cal. 564

PEOPLE v. GREEN. (No. 20,992.)

(Supreme Court of California. Sept. 26, 1893.)

CRIMINAL LAW—ARGUMENTS OF COUNSEL—OATH OF WITNESS.

1. A trial for robbery lasted five days, three of which were occupied in hearing 24 witnesses. The evidence was circumstantial and conflicting. *Held*, that an order of the court limiting the time of argument of counsel to one hour exceeded the discretionary power of the court.

2. A refusal of the court to administer to Chinese witnesses an oath other than the usual form, as authorized by Code Civil Proc. §§ 2095, 2096, is not reversible error; such sections not being mandatory, and it not appearing that the witnesses regarded some other form of oath more binding than the usual form.

Department 2. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

George Green was convicted of robbery, and appeals. Reversed.

Frank H. Short, G. C. Freeman, and W. H. La Rue, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. By information, the defendant and Albert Larsen were jointly accused of the crime of robbery. They demanded separate trials, and the defendant was first separately tried, convicted, and sentenced to imprisonment in the state prison for the term of his natural life. He appeals from the judgment, and from an order denying his motion for a new trial. The information charges that defendant robbed one You Kam, a Chinaman, of \$174 and a gold watch, the property of one San Kee, in the county of Fresno, on the 27th day of April, 1892. Counsel for appellant contend that the court committed several errors prejudicial to the rights of the defendant, the most important of which will be first considered.

It is claimed that the court erred in limiting counsel for defendant to one hour in

which to sum up the evidence, and argue the case to the jury. The trial of the case occupied five days, three of which, at least, were devoted to hearing the testimony of 24 witnesses. When the evidence had been closed, and counsel were ready to proceed with their addresses to the jury, the court said to them: "I think two counsel will be enough to argue the case, and an hour on a side." Mr. Freeman, of counsel for defendant said: "We object to being limited. The Court: Give him the benefit of his exception. Limit you to an hour on a side, gentlemen. Mr. Freeman: Well, we except." Defendant was represented by two counselors, Messrs. Freeman and La Rue, by whose affidavits it appears that the testimony of the 24 witnesses examined at the trial consisted of over 90,000 words, besides the testimony of witnesses taken at the preliminary examination of defendant and others before the magistrate, which was admitted at the trial by stipulation, consisting of over 12,000 words; that only Mr. Freeman addressed the jury on the part of the defendant, and consumed the hour to which defendant's counsel were limited, and closed his address at the expiration thereof; that, by reason of the limitation, counsel for defendant were prevented from presenting several important points to the jury, which they deemed material for the defense, and which they would have considered it their duty to present, and would have presented, but for the limitation of time to which they were subjected by the order of the court; that it was impossible, fully and properly, to argue the case to the jury for the defendant within one hour; and that they believe the rights of the defendant were prejudiced by the limitation. The evidence contained in the bill of exceptions, condensed, as most of it appears to be, into the form of a narrative, occupies 158 pages of the transcript. Much of it is circumstantial, and all contradictory, as to nearly all the material facts. The principal questions as to which the evidence was contradictory and conflicting were: (1) Was the defendant identified as one of the robbers by the three Chinamen who were the only witnesses that testified in chief to such identity? (2) Was the defendant, at the time of the robbery, at a place five miles distant from the place of the robbery? (3) Was it probable that the robbery had been committed by Cliff Ragan, John Fry, and George W. Cain? In the attempted solution of these main questions, numerous subsidiary questions arose, as to which the evidence was conflicting. As to the identity of the defendant, it was claimed that the testimony of the Chinamen was inconsistent with what they had said the day after the robbery, and inconsistent with their testimony at the preliminary examinations of defendant and others whom they had accused of the crime. As to the alleged alibi of the defendant, four wit-

nesses, besides the defendant, testified positively that defendant was at a place five miles distant from the place of the robbery at the time it was committed. This testimony of five white witnesses on the part of the defendant was irreconcilably inconsistent with that of the three Chinamen who had testified in chief on the part of the people. To rebut the evidence of the alibi, the people called from the jail Cliff Ragan, who was imprisoned on a charge of having participated in the same robbery, and also on a charge of another crime distinct from the robbery, who testified that he and the defendant committed the robbery for which defendant was being tried, and that he confessed the crime at the instance of the district attorney, who had told him that it would be easier on him if he told all he knew about it, and that he might get off with two or three years, though he (the district attorney) said he had no control over the amount of punishment, which depended entirely upon the court. He further testified that he was about 20 years of age, and had served one term in the state prison for a felony of which he was convicted in 1888. As to the contention of defendant that the robbery was committed by Cliff Ragan, John Doe Fry, and George Cain, it appeared that, some days after the complaint before the magistrate was made against defendant and Larsen by the Chinamen, the same Chinamen, or some one of them, made like complaints against Ragan, Fry, and Cain, and that warrants for the arrest of these were issued, though Fry and Cain were not arrested. It also appeared that the watch which had been taken from the Chinaman at the time of the robbery was found in the possession of Cain soon after the robbery. This was explained by Cain, in his testimony, by stating that he had received the watch from Ragan, and delivered it to the constable for the purpose of detecting the guilt of Ragan, whose confidence he had solicited and obtained by false pretenses, and then betrayed.

The purpose of the foregoing outlined skeleton is not to indicate an opinion as to the merits of the case, except so far as necessary to establish a basis upon which to estimate the time to which counsel were entitled, in which to sum up and argue the case to the jury on behalf of the defendant, and thereby to test the truth of the affidavits of counsel to the effect that the time to which they were limited was insufficient. That a defendant being tried on a charge of felony has a constitutional right to be fully heard in his defense by counsel, which it is not within the discretionary power of the court to deny or abridge, is not to be questioned. Yet it has been found to be impossible to formulate any abstract rule or definition by which the extent of this right may be ascertained in all cases. It is also well settled that the court has a discre-

tionary power to restrain what has been termed, perhaps not quite appropriately, an "abuse" of this right, by which is meant very little more than that counsel may be restricted to a discussion of matters relevant to the case, and restrained from wasting the time of the court by useless repetition. But it must always be a difficult as well as a delicate matter, in a case like this, for the court to determine in advance what limitation should be imposed upon counsel, against their consent. *Williams v. State*, 60 Ga. 369. And as was said in the case of *People v. Keenan*, 13 Cal. 581: "If it [the court] imposes a limitation of time upon counsel, against their consent, this must be done at the risk of a new trial, if it be shown by uncontradicted affidavits that the prisoner was deprived, by the limitation, of the opportunity of a full defense, for this is his constitutional right, without which he cannot be convicted." And in the same case it was said: "It is impossible to deny that, if the constitutional privilege of being heard by counsel be allowed at all, it must be so admitted as that the prisoner may have the benefit of a complete discussion of all the matters of law and evidence embraced by the case." In that case it appeared that the evidence was circumstantial and voluminous, consisting of the testimony of 14 witnesses, (10 less than in this case,) and that the two counsel for defendant were limited to 3 hours, 1 hour and 30 minutes being allowed to each. Yet, for the error of thus limiting counsel, the judgment was reversed. The affidavits of counsel in that case, as to the necessity of more time than was allowed, are substantially the same as in this case. In that case, however, one of defendant's counsel, upon the expiration of the time allowed him, asked for further time, and it is claimed that this difference distinguishes that case from the case at bar. It is not perceived, however, that a repetition or counsel's objection and exception would strengthen their point. The court, without consulting them, limited them to one hour. They duly objected to being limited. The court peremptorily repeated the order. They excepted, and submitted to the order, and obeyed it without begging for a modification of it. In the case of *Dille v. State*, 34 Ohio St. 617, wherein a like exception had been taken to an order of the trial court limiting counsel to 30 minutes, the appellate court said: "Counsel sufficiently indicated that in their judgment the thirty minutes allowed for argument was insufficient, by promptly protesting against it, and the defendant saved his right by excepting to the limitation at the time it was imposed." In this Ohio case the defendant had been convicted of burglary and larceny on the testimony of seven witnesses for the state, four witnesses testifying on the part of the defendant, and only half a day was occupied in taking all the testimony. There were no

affidavits of counsel. The bill of exceptions contained merely a statement of the evidence, the order of the court limiting counsel to 30 minutes, and the objection and exception by defendant. From the nature of the evidence alone, it was determined that the order limiting counsel was in excess of the discretionary power of the trial court. Among other things, the court said: "The court has no discretionary power over the right itself, for it cannot be denied; and hence it has no right to prevent the accused from being heard by counsel, even if the evidence against him be clear, unimpeached, and conclusive, in the opinion of the court. But the exercise of the right is subject to judicial control, to the extent that is necessary to prevent the abuse of it. * * * There were seven witnesses for the state, and four for the defendant. Half a day was occupied in the taking of the testimony. It was entirely circumstantial, and there was serious conflict in it. Under these circumstances, when the defendant's liberty was at stake, and an ignominious punishment threatening him, he was entitled to be heard, in a reasonable manner, by both counsel whom he had employed for his defense." Several cases in which orders limiting counsel have been affirmed are cited by counsel for the people, but they are all in harmony with the foregoing, as to the right of the accused, and the limitations upon the discretionary power of the court. None of them is a precedent for this case, except, perhaps, *State v. Collins*, 70 N. C. 241, which, it is said, has been reversed by an act of the legislature of that state, providing that "any attorney appearing in any civil or criminal action shall be entitled to address the court or jury for such a space of time as, in his opinion, may be necessary for the proper development and presentation of his case." Under the circumstances of this case, we think the order limiting counsel for defendant to one hour exceeded the discretionary power of the court. Aside from the affidavits of counsel, it appears from the bill of exceptions that the evidence was voluminous, partly circumstantial, and extremely conflicting; so that its effect upon the three leading issues, to say nothing of incidental questions, was fairly debatable. As was justly said by Mr. Justice Baldwin in *People v. Keenan*, supra: "It is very difficult for a judge to determine what effect a given line of argument may have upon a jury, or some one of them, or what period may be necessary to enable counsel to present, in the aspect deemed by them important, the case of their client. The minds of men are so differently constituted that an advocate may require much more for the statement and elaboration of his view than another."

As only one of the other points made by appellant will probably arise on a new trial, that one only need be considered. It is that the court erred in refusing to admin-

ister to the Chinese witnesses a form of oath other than the usual form, as authorized by sections 2095 and 2096 of the Code of Civil Procedure. In answer to this, it is enough to say that it does not appear that the court was informed that those witnesses had "a peculiar mode of swearing * * * more solemn or obligatory" than the usual form, nor that they believed "in any other than the Christian religion." And it may be added that those sections of the Code are not mandatory, but merely permissive, at the discretion of the court, under the circumstances therein stated. To show an abuse of the discretionary power conferred, it should be made to appear, at least, that the witness regarded some other form of oath more obligatory than the form usually adopted in this state, and perhaps that he did not consider the latter at all obligatory. The judgment and order are reversed, and the cause remanded for a new trial.

McFARLAND, J., (concurring.) I feel compelled, under the authorities, to concur with my associates in reversing the judgment; but I do so with great reluctance, and some doubt. The manner of nisi prius courts in conducting trials, nowadays, is not generally subject to the criticism of too great curtailment of the privileges of attorneys. On the other hand, it seems to me that attorneys are frequently given too much latitude to conduct trials according to their own pleasure. The presiding judge should always hold the reins, and should apply the curb when occasion requires it. Neither should the time given for argument always be gauged by the length of the trial, for tedious and useless prolongations of examinations and cross-examinations of witnesses, and needlessly long discussions of objections to evidence, frequently cause a trial to drag through a couple of weeks, when it should have been concluded in two or three days. In the case at bar, however, it seems that there was a good deal of material and proper evidence, which was conflicting as to several matters important to the case, and necessary for the jury to be sure about; and, under these circumstances, one hour was hardly sufficient time for appellant's counsel to properly present his views. I hope, however, that this decision will not give trial courts the notion that they can prescribe no reasonable limits, in point of time, to the arguments of counsel.

4 Cal. Unrep. 248

PEOPLE v. DANIELS. (No. 20,980.)

(Supreme Court of California. Sept. 28, 1893.)

ARSON—INSTRUCTIONS—MALICE—CIRCUMSTANTIAL EVIDENCE.

1. On a trial for arson an instruction that "malice, within the meaning of the law, includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive," is correct; Pen. Code, § 7, subd. 4, providing that "the words 'malice' and 'mali-

ciously' import a wish to vex, annoy or injure another person, or an intent to do a wrongful act."

2. An instruction that, "where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been," is correct. *People v. Cronin*, 34 Cal. 202, followed.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

R. Daniels was convicted of arson in the second degree, and appeals. Affirmed.

C. C. Stephens, for appellant. Atty. Gen. Hart, for the People.

BELCHER, C. The defendant was convicted of the crime of arson in the second degree, and has appealed from the judgment and from an order denying his motion for a new trial. The only grounds urged for a reversal are that the court erred in giving to the jury portions of two instructions asked by the people, and in its rulings upon the admissibility of certain evidence. It was proved that the defendant was present at the time and place of the fire, but otherwise the evidence against him was entirely circumstantial. The court instructed the jury, in the language of the Penal Code, that arson is the willful and malicious burning of a building with intent to destroy it, and that the offense is divided into two degrees, etc. It next gave an instruction to the effect that, to constitute the offense charged, the intent alleged in the information must be proved, but direct and positive testimony is not necessary to prove it. It may be inferred from the evidence if there are any facts proved which satisfy the jury beyond a reasonable doubt of its existence. Then follows the clause first objected to, in these words: "The court instructs the jury that malice, within the meaning of the law, includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive." The only criticism of the instruction is that "the definition of malice is fatally incorrect," but in what respect it is incorrect is not stated, nor are any authorities cited. The Penal Code defines "malice" and "maliciously" as follows: "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." Section 7, subd. 4. In the connection in which they are used, the phrases "an intent to do a wrongful act" and "every other unlawful and unjustifiable motive" must be held, in our opinion, to mean substantially the same thing. There was therefore no prejudicial error in the words complained of.

The court also instructed the jury in regard to direct and circumstantial evidence in the

language used and approved in *People v. Morrow*, 60 Cal. 142. Then followed the part of the instruction secondly objected to, in these words: "Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been." It is claimed that the court erred in giving this instruction, but here, again, no particular error is pointed out and no authorities are cited. The language quoted is copied from the opinion delivered by Mr. Justice Sanderson in *People v. Cronin*, 34 Cal. 202, and, so far as we are advised, it has never been overruled or questioned. It must be held, therefore, that the instruction stated the law correctly.

The points in regard to the admissibility of evidence are made by simply calling attention to certain folios in the transcript, where the rulings and exceptions are to be found. This way of presenting a case in this court is not very satisfactory, but we have examined the folios referred to, and fail to see any material error in any of the rulings. The judgment and order should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

4 Cal. Unrep. 250

BRADLEY et al. v. PARKER. (No. 18,141.) (Supreme Court of California. Sept. 28, 1893.)

HARMLESS ERROR—AMENDMENT OF PLEADINGS.

1. Where a finding on one of the issues involved is determinative of the case against plaintiffs, the failure of the court to find on defendant's plea of the statute of limitations as to one of the plaintiffs is not prejudicial to such plaintiff.

2. Where the complaint in an action for conversion describes plaintiffs as heirs of one B., which is merely matter of inducement, an amendment will not be allowed, after trial, so as to count on plaintiffs' rights, as heirs of B., whose estate had not been administered on or distributed, to sue for conversion of property of which they had never been in possession, and which defendant had received under a contract to which plaintiffs were not parties, as such amendment would raise new issues, which would probably require a new trial.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by James S. Bradley, Helen Trav-ers, and Edwin Bradley against B. G. Parker to enforce a trust. There was a judgment in favor of defendant, and plaintiff James S. Bradley appeals. Affirmed.

E. O. Larkins and Chas. G. Lamberson, for appellant. Bradley & Farnsworth, for respondent.

SEARLS, C. This action was brought to enforce a trust against the defendant on account of certain sheep received by him to be kept for the plaintiffs. Defendant had judgment, from which, and from an order denying a motion for a new trial, James S. Bradley, one of the plaintiffs, appeals.

According to the amended complaint, one James H. Bradley died intestate, in the county of Tulare, August 4, 1870, leaving an estate consisting of real and personal property, among the latter of which was 1,500 head of sheep. His heirs were Margaret Bradley, his widow, and the plaintiffs herein, who are their children, all of whom were minors at the date of their father's death. At the time of the commencement of this suit, appellant was of the age of 21 years, and the other plaintiffs were aged 23 years and 26 years, respectively. No administration was ever had on the estate of James H. Bradley. About 1877, Margaret Bradley, the widow and mother of plaintiffs, entered into an agreement with defendant, whereby the latter was to take charge of said sheep for said plaintiffs, in trust for them, to render an account of the issues and profits, and to account for all the increase. Defendant took the sheep to Utah about 1878, and, contrary to his trust, traded some of the sheep for cattle, sold some to pay his own debts, sold the remainder, as well as the cattle, and retained the money, and mingled it with his own, and since 1878 has enjoyed the profit thereon, without right, etc. The complaint further avers that, before the trust agreement was entered into, Margaret Bradley had taken possession of certain of the property of the estate, and had given her interest in the sheep to plaintiffs, whereby it is alleged they became the legal owners thereof. Defendant is averred to have received for the sheep \$2,000, which, with the accumulations since 1878, now amounts to \$4,000, which sum plaintiffs pray be declared a trust fund, and defendant be decreed to pay with interest, and that he account, etc. It is also alleged that the defendant has never disavowed the trust. The complaint is not verified. The answer denies all the material allegations of the complaint, and pleads the statute of limitations. The cause was tried by the court without a jury, and written findings filed, upon which the judgment was entered. The findings of the court negative all the allegations of the amended complaint charging the existence of a trust relation between defendant and the plaintiffs. The court then proceeds to find that October 1, 1876, Margaret Bradley, the mother of plaintiffs, had in her possession about 650 sheep, in poor condition, which she let to defendant for one year; the latter to care for them for one year, and each to have one-half the wool and increase. The winter of 1876-77 was very dry, and in the spring of 1877 feed failed, and defendant, having 7,000 sheep of

his own, was compelled to move them, in quest of food. Defendant requested Margaret Bradley to take charge of her sheep, which she did not desire to do; and thereupon a new agreement was made, by which defendant was to take the Bradley sheep with his own, pay himself for the expenses and trouble of their care, and, if anything was left, to pay it to Mrs. Bradley. Defendant started with the sheep for Utah, having in all 7,800, of which all died on the road, except 3,100. The Bradley sheep being very poor, a greater proportion of them died than those of defendant. Defendant sold \$200 worth of sheep to pay expenses, among which were some 10 to 20 of the Bradley sheep worth \$2 per head. Defendant traded off all the remainder of the sheep—among them, about 125 head left of the Bradley sheep, worth \$2 per head—for 180 head of cattle, which he afterward sold for \$20 per head, but did not receive the money therefor, the same having been garnished under a writ of attachment against defendant, in favor of the Bank of Visalia, for moneys advanced to defendant, and by him expended in taking the sheep to Utah. The 650 head of sheep belonged to the estate of James H. Bradley, deceased, although defendant was not aware of that fact; he supposing the estate had been closed, and that the sheep belonged exclusively to Margaret Bradley, the widow. The court found against the averment that the sheep had been given to the plaintiffs. The court also found, upon the plea of the statute of limitations, in favor of defendant, and against all the plaintiffs except James S. Bradley. The agreements were both oral. The findings are lengthy and explicit. The foregoing is but a synopsis of them.

It is objected that the court failed to find upon the plea of the statute of limitations as to the plaintiff James S. Bradley. This was of no consequence. The issues upon which the court passed were determinative of plaintiffs' right to recover; and, as a judgment against James S. Bradley necessarily followed those findings, it could not in the least have benefited him, had a finding been entered in his favor on that issue. *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. Rep. 557; *Johnson v. Vance*, 86 Cal. 130, 24 Pac. Rep. 863; *Dyer v. Brogan*, 70 Cal. 133, 11 Pac. Rep. 589; *McCourtney v. Fortune* 57 Cal. 617; *Porter v. Woodward*, Id., 535; *Murphy v. Bennett*, 68 Cal. 530, 9 Pac. Rep. 738.

Appellant also contends that, although the plaintiffs failed to establish the trust upon which they counted in their complaint, still, as they were entitled to any relief embraced within the issues, plaintiff James S. Bradley was entitled to recover such pro rata of the proceeds from the sale of the sheep belonging to the estate of James H. Bradley, deceased, as the evidence showed him entitled to. Appellant does not attempt to show us what particular sum of money

or pro rata share thereof James S. Bradley was entitled to recover. In the light of the new agreement entered into between Mrs. Bradley and defendant before the latter left with the sheep for Utah, and of the fact that all the proceeds arising from the sale of the entire lot of sheep went to pay the expenses incurred, it is not perceived that anything was left to go to the plaintiff designated.

After the trial and before judgment was entered, the plaintiffs asked leave to file a second amended complaint, making Margaret E. Bradley, the mother of plaintiffs, a co-plaintiff, and setting out an entirely new cause of action. The court refused leave to so amend, and the action is assigned as error. The question of amendments to pleadings is one in which much must be left to the discretion of the *nisi prius* court, and it is only where there is an abuse of such discretion that this court will reverse its action. In furtherance of justice the courts of this state have gone further, probably, in permitting amendments, than in those of any other jurisdiction within the Union. In New York, it is said, the real limitation seems to be that the amendment shall not bring a new cause of action. *Reeder v. Sayre*, 70 N. Y. 190. In *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. Rep. 673, the court below, during the trial, permitted plaintiff to amend the prayer of a complaint which originally demanded a money judgment so as to include a demand for an accounting and for general relief, thus virtually changing the cause of action from one at law to recover money to an equitable action, and this court sustained its action. It is highly probable that in that and other cases of like import, had the court below refused leave to amend, this court would not have deemed it proper to say the courts have abused the discretion confided to them. Be that as it may, the present case does not fall within any rule calling for a reversal for the reasons indicated. Here the proffered second amended complaint came after the trial had closed, and, while it purported to be an amendment "to correspond to the facts as proven by the testimony in the case," it in fact raised new issues, calling for an answer from the defendant, and which would, in all probability, have required a new trial of the cause. The complaint upon which the action was tried rested upon the trust relation created by contract with defendant for the benefit of plaintiffs,—a relation in which defendant was a trustee, and plaintiffs the beneficiaries. It is true, they were described as the heirs of James H. Bradley, deceased. This was merely matter of inducement, and not material. The proffered amended complaint counted upon their rights, as heirs of said James H. Bradley, to the

property, and their rights, as such heirs, to maintain an action for the conversion of personal property received under a contract to which they were not parties, which had never been in their possession, and which belonged to an estate upon which no administration had been had, and in which no distribution is averred. These questions have not, so far as we are aware, been decided in this state; questions upon which, in the absence of statutory provisions, much discussion has occurred elsewhere, resulting in a diversity of opinion; questions which should not be determined lightly, and without a full opportunity for a hearing pro and con. Under such circumstances, there was no abuse of discretion on the part of the learned court in refusing leave to amend.

The attack upon the third finding of the court is without merit. That finding is to the effect that "all the allegations of paragraph 3 of said plaintiffs' amended complaint are untrue." It then goes on to find that defendant did not agree to take the sheep in trust for plaintiffs, that he never held them in trust, that he never detained or disposed of them in violation of any trust, etc., and then adds, "on the contrary, the facts are as follows," whereupon the whole history of the contract with Margaret Bradley, in relation to the sheep, and what was done with them and the proceeds, are fully set out. The contention of the appellant is that many of the allegations of the third paragraph of the complaint are concededly true; hence, that portion of the finding which we have quoted is erroneous. From a legal standpoint, and in the view which the court took of the testimony, the allegations are not true. The gravamen of the charges is that, pursuant to an agreement, defendant received certain sheep as a trustee of plaintiffs; that, contrary to said trust, he disposed of the sheep and received the money therefor, etc. In this view, the allegations were untrue, and the finding illustrates the transaction clearly by first stating the untruth, and then setting out succinctly the whole transaction. Instead of being subject to criticism, the finding, taken as a whole, affords an example which it would be well for courts to follow more frequently.

The other objections to the findings are not more cogent than those mentioned, and need not be further considered. The evidence was contradictory upon all the material issues. Upon a review of the whole case, we are of opinion the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

PEOPLE v. CASTEEL et al. (No. 20,997.)
(Supreme Court of California. Sept. 23, 1893.)

CRIMINAL LAW—APPEAL—AFFIRMANCE.

On appeal from a conviction in a criminal case, where there has been no oral argument in the supreme court, and appellant has filed no points or authorities, and no error appears in the record, the judgment will be affirmed.

Department 2. Appeal from superior court, San Bernardino county; James A. Gibson, Judge.

Casteel and others were convicted of robbery, and appeal. Affirmed.

Paris & Satterwhife and Elmer E. Rowell, for appellants. Atty. Gen. Hart, for the People.

PER CURIAM. This is an appeal by the defendants from a judgment of conviction for the crime of robbery, and from an order denying their motion for a new trial. There was no oral argument in this court, and the appellants have filed no points and authorities. We discover no error in the record. Judgment and order affirmed.

4 Cal. Unrep. 236

HELSEL v. SEEGER. (No. 19,016.)
(Supreme Court of California. Sept. 25, 1893.)

APPEAL—RECORD—BILL OF EXCEPTIONS.

A paper in the transcript, denominated a "bill of exceptions," not certified by the clerk to be a correct copy of any bill of exceptions on file, and not containing any specific exceptions to any particular finding of the court, will not be considered by the supreme court.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

J. R. Haralson, for appellant. Brundage & Flournoy, for respondent.

DE HAVEN, J. The findings are sufficient to sustain the judgment. The paper found in the transcript, and denominated a "bill of exceptions," is not certified by the clerk to be a correct copy of any bill of exceptions on file, nor does it contain any specific exception to any particular finding of the court. Judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

99 Cal. 577

PEOPLE v. ETTING et al. (No. 20,971.)
(Supreme Court of California. Sept. 28, 1893.)

INDICTMENT AND INFORMATION—SIGNATURE—EVIDENCE—POSSESSION OF STOLEN PROPERTY—PROOF OF VENUE.

1. It is sufficient that the name of the district attorney is signed to an indictment or information by his deputy.

2. On a prosecution for robbery, an instruction that defendants' possession of the stolen property shortly after the crime, and their failure to account for such possession, are circumstances to show their guilt, and that

they were bound to explain the possession to remove its effect, is not error where the court has also charged that such possession is not of itself sufficient to warrant a conviction, but merely a circumstance to show guilt.

3. Where an indictment charges the offense to have been committed in the county of Los Angeles, evidence showing the crime to have been committed in the city of Los Angeles is sufficient proof of venue, since the court will take judicial notice that the city of Los Angeles is the county seat of Los Angeles county.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Louis Etting and Burt Hadley were convicted of robbery, and appeal. Affirmed.

R. Dunnigan and C. W. C. Rowell, for appellants. Atty. Gen. Hart, for the People.

SEARLS, C. Defendants were charged by information with robbery, committed in the county of Los Angeles September 6, 1892, and upon a trial were convicted. The appeal is from the judgment of conviction, and from an order denying a motion for a new trial.

The information was signed as follows: "James McLachlan, District Attorney in and for the County of Los Angeles, State of California. By B. W. Diel, Deputy." It is sufficient that the name of the district attorney is signed to an indictment or information by his deputy. People v. Darr, 61 Cal. 554; People v. Turner, 85 Cal. 432, 24 Pac. Rep. 857.

The following instruction was given to the jury at the request of the prosecution, and the action is assigned as error: "If the jury believe the property was stolen, and was seen in the possession of defendants shortly after being stolen, the failure of the defendants to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show their guilt; and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such." In the instruction immediately preceding the foregoing the court had instructed the jury that "the mere possession of stolen property, unexplained by defendant, however soon after the taking, is not sufficient to justify a conviction; it is merely a guilty circumstance, which, taken in connection with other testimony, is to determine the question of guilt," etc. Again, at the request of defendant, the court instructed as follows: "The mere possession of property recently stolen is not of itself sufficient evidence upon which to convict the prisoner of the theft. It is a circumstance tending to show guilt, but not of itself sufficient to warrant conviction." This court, in People v. Fagan, 66 Cal. 534, 6 Pac. Rep. 394, upheld an instruction of similar import with the one here objected to. The instruc-

tions are to be taken together, and read as a whole, and when so read, if they correctly interpret the law applicable to the case, no error is committed. With the explanations contained in the other instructions, and in view of the former rulings of this court, the contention of appellants cannot be maintained. *People v. Chambers*, 18 Cal. 383; *People v. Kelly*, 28 Cal. 424; *People v. Rundoo*, 44 Cal. 538; *People v. Clough*, 59 Cal. 438; *People v. Velarde*, *Id.* 457.

The venue was sufficiently proved. The information charged the offense to have been committed at the county of Los Angeles, state of California. The trial was had at Los Angeles county. The prosecuting witness described the robbery and loss of his watch as having occurred in Los Angeles. The defendants, as witnesses, described certain circumstances connected with their supposed guilt, and their residence and presence in Los Angeles on the night of the robbery. There was no suggestion that the supposed offense was committed elsewhere than at Los Angeles, in the county of Los Angeles. *People v. Tonielli*, 81 Cal. 275, 22 Pac. Rep. 678; *People v. Manning*, 48 Cal. 338. The courts will take judicial notice of "whatever is established by law," (Code Civil Proc. § 1875, subd. 2,) and hence that Los Angeles is the county seat of Los Angeles county, and in said county. The evidence was conflicting, and sufficient to uphold the verdict. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

99 Cal. 574

PEOPLE v. KOENING. (No. 20,967.)

(Supreme Court of California. Sept. 27, 1893.)

ACCOMPLICE TESTIMONY—CORROBORATION.

Testimony of a woman that she gave to defendant, who was charged with being her accomplice, money which she admitted having stolen from one G., and that defendant had advised her to "work" some money out of G., is not corroborated by evidence that, when the woman was arrested for the larceny, defendant asked to see her, told the sheriff that he had arrested the wrong woman, and told the undersheriff that he did not know her, though there is also evidence, which defendant contradicted, that the woman had been his mistress.

Commissioners' decision. Department 2. Appeal from superior court, Butte county; John C. Gray, Judge.

Fred Koenig was convicted of grand larceny, and appeals. Reversed.

R. Clark and J. M. McGee, for appellant. Lewis Freer, for the People.

SEARLS, C. The defendant was convicted of the crime of grand larceny, committed at

Oroville, county of Butte, July 8, 1892. He moved for a new trial, which was denied, and thereupon he appeals. He was convicted as an accomplice of one Sarah Brady, who admits that she committed the offense, and the only question calling for discussion relates to the sufficiency of the evidence in corroboration of said Brady. The testimony tended to show that on the 3d of July, 1892, defendant engaged to one Klein to tend bar for the latter in place of his regular bartender, who was ill. Defendant and Sarah Brady were acquainted, and had lived together, more or less, for a year or two. Chris Gilmer was accustomed to visit the saloon of Klein, and at times slept there. On the afternoon of July 7th, Sarah Brady visited the saloon, met Gilmer there, and they drank together repeatedly. The Brady woman returned to the saloon the same evening, again met Gilmer, who had retired to an adjoining room, usually occupied by the regular barkeeper. Gilmer was aroused, and they again had numerous potations, after which they retired, occupying together a bed in the bartender's room. In the early morning, Sarah Brady extracted from beneath the pillow \$80.50, the property of Gilmer, and, according to her testimony, found defendant lying on a lounge in the saloon, to whom she gave the money. She testifies further that defendant had on the previous evening advised her to work some money out of Gilmer, and had said, "If you don't get that money, you are no good," etc. The only evidence against defendant, in corroboration of the above testimony of Sarah Brady, is to the effect that when she was arrested he went to the sheriff, and desired to see her, and, upon his request being refused, said, in the language of the sheriff: "He told me that I had the wrong woman. Then he went off,"—and in the language of the undersheriff: "Defendant said he did not know, or have anything to do with, her." On the part of defendant there was testimony tending to show that he did not sleep in the saloon on the evening in question, but that he left before the proprietor, who locked up the place, and that defendant had no key thereto, so far as he (the proprietor) knew. There was also evidence as to defendant's previous good character for honesty, by many apparently reliable witnesses. Defendant was a witness in his own behalf, and declared he left the saloon before the proprietor; that he had no key; and that, when he returned in the morning, the saloon had been opened by Ed., the old barkeeper. He denied that the Brady woman was his mistress, admitted he had been at her house sometimes, and accounted for his inquiry at the jail by saying he was acquainted with her, had heard she was arrested, and desired to know what she was arrested for.

This testimony was not sufficient to warrant a conviction. Sarah Brady was, confessedly, the perpetrator of the felony. The

testimony as to defendant's complicity all came from her. "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which, in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." Pen. Code, § 1111. No inference of the guilt of the defendant can be drawn from the fact that he was at the saloon on the evening of the commission of the crime, beyond the fact that it gave him an opportunity to advise its commission. His business called him there, and his presence was not a suspicious circumstance. His inquiry at the sheriff's office is not regarded of sufficient importance to warrant a conviction. At most, it could only raise a bare suspicion, and falls short of such corroboration as can be safely relied upon to support a conviction. *People v. Ames*, 39 Cal. 403; *People v. Thompson*, 50 Cal. 430. It is the peculiar province of the jury to weigh the evidence and determine the credibility of witnesses, and this court will not, in case of a substantial conflict in the evidence, disturb the verdict of the jury. So, in case of the corroboration of an accomplice, if there is any substantial evidence in support of a satisfactory case made by the accomplice, the court will not trench upon the province of the jury by reversing its action. In the present instance, however, the figment of evidence in support of the testimony of the accomplice does not rise to the dignity of corroboration, and the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

99 Cal. 554

WOODWARD v. FRUITVALE SANITARY DIST. et al. No. 15,439.)

(Supreme Court of California. Sept. 26, 1893.)

SANITARY DISTRICTS—FORMATION—OFFICERS—CONSTITUTIONAL LAW

1. The presentation of a petition to the board of county supervisors praying for the formation of a sanitary district is a sufficient manifestation of the desire of the petitioners for the formation of such a district, as required by St. 1891, p. 223, and the petition need not contain an express statement of such a desire.

2. A petition for the formation of such a district signed by 25 residents and freeholders of the proposed district, as required by St. 1891, p. 223, is not vitiated by the addition of signatures of other persons not possessing the requisite qualifications.

3. The posting on October 4th of notices for holding an election on November 8th to determine the question as to the formation of a sanitary district, which notices remain posted for four successive weeks, is a sufficient compliance with St. 1891, p. 223, § 3, which requires notices "to be posted for four successive weeks prior to the election," and not that the posting shall be during the four weeks next preceding the election.

4. The fact that the persons duly elected as the officers of a sanitary district met, qualified, and organized before the votes were canvassed by the board of supervisors, and before they were officially declared elected, is no ground for questioning in a collateral proceeding their official acts done after such canvass.

5. Act March 31, 1891, (St. 1891, p. 223,) authorizing the organization and creation of sanitary districts throughout the state, and empowering such districts to issue bonds for the construction of sewers and drains, is within the police power of the legislature; and the courts will not assume that the act must include cities and towns, and is therefore in violation of Const. art. 11, §§ 6, 11-13, which prohibit the legislature from interfering with the municipal functions of the different cities and towns within the state.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Submission of an agreed statement of facts to determine a controversy between F. J. Woodward and the Fruitvale sanitary district and others. From a judgment in favor of the sanitary district Woodward appeals. Affirmed.

Freeman & Bates, for appellant. Reed & Nusbaumer and Chas. E. Snook, for respondents.

SEARLS, C. This is a controversy submitted to the court below upon an agreed statement of facts, as provided for by section 1138 of the Code of Civil Procedure. Judgment was rendered in favor of the sanitary district, and Woodward appeals. The proceeding was initiated by F. J. Woodward, a taxpayer within the Fruitvale sanitary district, to test the validity of the organization of such district, and the legality of certain bonds issued by the sanitary board, as well as the validity of a tax levied by said sanitary board upon property in said district. The Fruitvale sanitary district was organized under and pursuant to an act of the legislature of the state of California, approved March 31, 1891, entitled "An act to provide for the formation, government, operation and dissolution of sanitary districts in any part of the state for the construction of sewers and other sanitary purposes," etc. St. 1891, p. 223.

The first point made by appellant is that the petition for the formation of the district is defective in this: (1) That the petition "does not state distinctly the desire of the petitioners to form a district, nor what the name of the district is to be;" (2) that, while the petition was signed by 36 persons, only 25 of them were freeholders within the district. The petition is addressed to the "Hon. Board of Supervisors of the County of Ala-

meda, State of California," and provides as follows: "We, the undersigned, residents and freeholders of the hereinafter described district, to be known as 'Fruitvale Sanitary District,' bounded and described as follows, to wit, [then follows a description of the bounds of the proposed district,] do respectfully petition your Hon. Board that, in conformity with an act to provide for the formation, government, operation, and dissolution of sanitary districts in any part of the state, * * * you do call an election within said district for the purpose stated in said act." The first section of the act referred to in the petition reads as follows: "Whenever twenty-five persons in any county of the state shall desire the formation of a sanitary district within the county, they may present to the board of supervisors of such county a petition signed by them, stating the name of the proposed district, and setting forth the boundaries thereof, and praying that an election be held as provided in said act. Each of the petitioners must be a resident and freeholder within the proposed district." St. 1891, p. 223.

The desire to form a sanitary district is made manifest by filing a petition as provided by the statute. Beyond this expression of the desire of the petitioners it was unnecessary to go. The statute having prescribed the manner by which the desire for a sanitary district is to be shown, no other or further evidence of such desire is required, and, had the petitioners expressed affirmatively their desire in the premises, it would have added nothing as evidence to the force of their petition. They stated "the name of the proposed district" in their petition. It was according to that instrument to be known as the "Fruitvale Sanitary District." This was clearly a sufficient designation of a name for the proposed district.

The petition is signed by 36 names, and, according to the agreed statement of facts, "each and all of the thirty-six persons who signed said petition were then residents of, but only twenty-five of them were freeholders within the boundaries of, the proposed sanitary district." The law is complied with in that respect when 25 petitioners, as in this case, sign the petition, each of whom is a resident and freeholder within the proposed district. The object of the statute is to have that number of petitioners thus qualified, and the addition of others wanting in these essential qualifications does not vitiate the petition.

Within 30 days after filing the petition, and on, to wit, October 3, 1892, the board of supervisors of Alameda county, in regular session, acted upon the petition, and by resolution provided for an election in said sanitary district to be held on the 8th day of November, 1892, for the purpose of determining the question of the formation of a sanitary district within said county of Alameda, to be known and designated as the

"Fruitvale Sanitary District," and for the election of officers of said district, etc., setting out the boundaries of the district, defining the officers to be elected, etc., as provided by section 2 of the act hereinbefore referred to, and provided for posting and publishing a copy of the order for four weeks, as in said act provided. It is objected that this order was not posted for four successive weeks prior to the election, as by section 3 of the act provided. The evidence on this subject is "that on the 4th day of October, 1892, a copy of the order last above mentioned was posted for four successive weeks prior to the 8th day of November, 1892, (the date fixed for the election,) in three public places within the limits of the proposed sanitary district, and a copy of said order was published," etc. The language of the statute is: "A copy of such order shall be posted for four successive weeks prior to the election," etc. This language is frequently used in statutes directing the publication of notices, while in the matter of posting the usual direction is that it be posted at least, etc., specifying some given time before a fixed date or event. The evidence of posting is perhaps somewhat obscure, but the inference is fairly deducible that the notice was posted on the 4th of October, 1892, and remained posted for four successive weeks prior to November 8, 1892. The statute does not in terms provide that the four successive weeks of posting shall be the four successive weeks next preceding the election, and the evidence of posting, being a literal compliance with the letter of the statute, is regarded as sufficient.

The election was held on the 8th day of November, 1892, at which a majority of the voters voted in favor of the formation of a sanitary district, and by a like vote a sanitary assessor and five members of the sanitary board were elected, pursuant to the call of the board of supervisors, and as provided in the statute. On the 18th day of November following, the board of supervisors canvassed the votes of said election, and as a result, after reciting a compliance with the statute, ordered that the sanitary district be established, defining its boundaries, and declared P. H. Blake duly elected as sanitary assessor, and P. L. Barrett, C. D. Bennett, A. C. Fay, J. H. W. Riley, and A. Schroyer duly elected as the sanitary board of said Fruitvale sanitary district, they severally having received a majority of the votes cast for said several offices. On the 14th day of November, 1892, the said officers so afterwards declared elected met and organized by the election of said J. H. W. Riley as president and said C. D. Bennett as secretary. It is objected by appellant that this organization was premature and unauthorized, and, as there is no evidence that a president and secretary have since been elected, there are no duly authorized officers of the board. The statute provides

that, "if a majority of the votes cast at such election shall be in favor of a sanitary district, the board of supervisors shall make and cause to be entered in the minutes an order that a sanitary district of the name and with the boundaries stated in the petition (setting forth such boundaries) has been duly established, and said order shall be conclusive evidence of the fact and regularity of all prior proceedings of every kind and nature provided for by this act or by law, and of the existence and validity of the district." Section 4. The act in question does not provide in terms that the vote for officers of the district shall be canvassed by the board of supervisors. It does, however, provide that "such election shall be conducted in accordance with the general election laws of the state, so far as the same shall be applicable, except as herein otherwise provided." "Where a person is elected to an office, his right is established by the result of the election, and does not depend upon his getting a commission, for in such a case the choice comes from the people, and, when they have voted, the last act required of them has been performed. In such a case the issuing of a commission is merely a ministerial act, to be performed by the proper officer, and not, as in the case of taking by appointment, a part of the act to be done." *Conger v. Gilmer*, 32 Cal. 80. The members of the sanitary board are not required to file a bond, and they are required by the statute to elect a president and secretary at their first meeting. If it be conceded that they prematurely met and organized, it did not affect their eligibility or right to act as a board when thereafter commissioned. The contention is not that they have not been duly elected and qualified, but that they organized before the votes were canvassed by the supervisors, and the result declared. Under such circumstances, the acts of the officers as such since they received their commissions, being under color of office, would be valid. Having been regularly elected and qualified as members of the sanitary board, their acts as officers of such board in signing bonds cannot be inquired into in this collateral proceeding, but only by some direct proceeding to test their right to the offices which they are in fact filling.

Is the act of March 31, 1891, permitting the organization and creation of sanitary districts, constitutional? The contention of appellant seems based upon the theory that the act attempts to authorize the invasion by the legislature and by the special boards provided for in the act of the functions of municipal corporations; that the powers conferred relate to sewers and drains; and that the only bonds provided to be issued under the act must be "for the construction of sewers;" and while it is admitted that districts may be formed within a territory not embracing a municipal corporation, such as a city or town, still, as it applies to any

part of the state, it must in many instances embrace such cities and towns, and the powers conferred come in conflict with those delegated to the municipal authorities thereof. Section 6 of article 11 of the constitution inhibits the legislature from creating municipal corporations by special laws, but provides that it shall provide by general laws for the incorporation, organization, and classification in proportion to population of cities and towns. Section 12 of the same article provides that "the legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Section 13 of the article provides that "the legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever." Section 11 of article 11 provides that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." These provisions may be epitomized as follows: (1) The legislature may not create corporations for municipal purposes by special laws, but may provide therefor by general laws. (2) The legislature shall not impose taxes upon such corporations or the inhabitants or property thereof for municipal purposes, but may by general law authorize such corporations to do so. (3) The legislature cannot delegate to other than the municipal corporations power to assess, collect taxes, or to control, appropriate, or supervise, or interfere with municipal improvement, money, or effects. (4) Any county, city, town, or township may make and enforce within its limits such local, police, and sanitary laws, etc., and other regulations, as do not conflict with general laws.

The argument is that the statute in question applies to the whole state, and hence will in many instances involve the formation of sanitary districts embracing cities and towns; that among the recognized municipal functions of cities and towns, the power to construct sewers and drains, and to manage and control them for the purpose of improving sanitary conditions, occupies a prominent place; that the subject-matter of the act is sewers and drains, and is, in effect, an attempt on the part of the legislature to interfere with municipal functions, and hence in violation of section 6 of article 11 of the constitution; that the power conferred by the

act necessarily involves the right to assess property for municipal purposes, and hence falls within the prohibition of section 12 of article 11; and, further, that the act under consideration attempts to delegate to a special commission power to levy taxes, and to make, control, and supervise municipal improvements, and exercise municipal functions within cities and towns, in violation of section 13 of said article 11. *People v. Lynch*, 51 Cal. 33, and *Yarnell v. City of Los Angeles*, 87 Cal. 603, 25 Pac. Rep. 767, are cited in support of this contention. Those cases relate to the power of the legislature to interfere by direct legislation in the municipal affairs of Sacramento and Los Angeles, respectively. The vice of the argument on the part of appellant lies in the fact that it presupposes that the act under consideration must include cities and towns, and must interfere with their municipal functions. There is no suggestion that the Fruitvale sanitary district embraces within its boundaries any city or town, or that the powers to construct sewers, etc., to assess and levy taxes, in any way interferes with or affects any such municipality. To the legislature is confided the entire power of the people to make laws not granted by the federal constitution to congress or inhibited by that of the state constitution. In passing upon the constitutionality of the statute, we are not required to imagine some possible contingency in which its provisions may conflict with the constitution or with other statutes, but to determine whether, in its general scope and in the manner provided for its enforcement, it is within the province of the lawmaking power. The act of March 7, 1887, to provide for the organization and government of irrigation districts, has been repeatedly held constitutional, (*Irrigation Dist. v. Williams*, 76 Cal. 360, 18 Pac. Rep. 379; *Irrigation Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825; *In re Madera Irr. Dist.*, 92 Cal. 296, 28 Pac. Rep. 272, 675); yet we can imagine the formation of an irrigation district under that statute with its boundaries confined to the limits of an incorporated city or to those of a swamp-land district, where irrigation would be productive of injury, and of no benefit. Should such a case arise, it may well be that it would be held that the facts showed that the case was not within the reason of the law, and hence not subject to its provisions. It would not, however, follow that the law was unconstitutional. So here it may well be that if, in the formation of a sanitary district, an incorporated city or town shall be included in which the authority conferred upon the sanitary board is delegated to the municipality, it will be held that the law under consideration was not intended to apply to such city or town. The illustration is only used by way of comparison to show that the act is not unconstitutional for the reason indicated by appellant, and not to indicate an opinion upon

a case which may never arise. The statute in question is one coming clearly within the purview of the legislative power. All laws affecting the peace, good order, morals, and health of the community come within the "police power" of the legislative department of the state. *Ex parte Shrader*, 33 Cal. 279. It has been said: "There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which (in the absence of constitutional restriction) no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." *Redfield, C. J.*, in *Thorpe v. Railroad Co.*, 27 Vt. 140. With the advance of civilization and the increase of knowledge upon the subject of hygiene, the importance of sanitary laws is coming to be better understood, and their necessity more fully appreciated. Referable, as they are, to a conceded branch of the power vested in the lawmaking department of the government, few constitutional questions can arise over their exercise except such as relate to the mode of its exercise and the extent of its application. The well-considered and elaborate case of *In re Madera Irr. Dist.*, 92 Cal. 296, 28 Pac. Rep. 272, 675, disposes of and affirms the constitutionality of nearly every question involved in this case, and a further discussion of the subject is not deemed necessary. No point is made as to the regularity of the bonds, or as to the validity of the assessment, or levy of the tax in the sanitary district, except for the reasons hereinbefore specified. I am of the opinion the judgment of the court below should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment of the court below is affirmed.

4 Cal. Unrep. 237

SMITH v. LOS ANGELES & P. R. CO.

(No. 19,252.)

(Supreme Court of California. Sept. 27, 1893.)

ESTOPPEL—VOID ORDER—COLLATERAL ATTACK—
RES JUDICATA.

1. Where an order appointing a receiver of a corporation is void, a judgment creditor of the corporation does not, by intervening in the action for the purpose of enforcing his judgment, waive all objections to the order, and thereby lose the right to levy on the corporate property.

2. A void order may be attacked in any proceeding.

3. An order denying a motion to vacate a void order does not validate such void order.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Smith against the Los Angeles & Pacific Railroad Company. An applica-

tion for an order directing the sheriff to levy on sufficient property of defendant to satisfy a judgment theretofore obtained by plaintiff against defendant was denied, and plaintiff appeals. Reversed.

T. L. Winder and Chapman & Hendrick, for appellant. Anderson & Anderson, for respondent.

PATERSON, J. A receiver was appointed in the case of California Bank v. Los Angeles & Pacific R. R. Co. on September 13, 1889. On October 26, 1891, plaintiff herein filed a petition of intervention in that action, setting forth, among other things, that he had obtained a judgment against defendant herein for the sum of \$4,403.30 on October 2, 1891, and that no part thereof had been paid. He prayed that his claim might be allowed against the corporation defendant, and that certain land belonging to the latter be sold, and the proceeds of the sale be applied to the payment of the debts of the corporation in such proportion as the court should determine. On July 11, 1892, he applied to the court for an order discharging the receiver, on the ground that said order was void, the court having no jurisdiction to make the same. The application was denied, and thereafter he applied to this court for a writ of certiorari to review the proceedings. A hearing was had, and judgment was entered denying the petition on the ground that the petitioner had lost his right to the relief prayed for by reason of his delay in making the application. *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. Rep. 322. Subsequently, plaintiff applied in this action to the court below for an order directing the sheriff to levy upon sufficient property of the defendant in the hands of the receiver to satisfy his judgment. The motion was denied, and from the order this appeal was taken. Respondent contends that the order should be affirmed for the following reasons: By intervening in the Bank Case, for the purpose of enforcing his judgment, the plaintiff became a party to that action, and has ratified and consented to the appointment of the receiver, thereby waiving all right to question the order by which said receiver was appointed; that this is a collateral attack upon the order appointing the receiver; and that, as between the appellant and the respondent, said order is *res adjudicata*.

1. It is doubtless true that one may so conduct himself as to be estopped from repudiating the action of a receiver, although the order by which the receiver was appointed is void. But in this case mutuality, which is one of the essential elements of estoppel, is wanting. The plaintiff herein

could not, by simply intervening in the other case, receive any benefit, and no one, certainly, was prejudiced by his action therein. The receiver was not appointed upon his suggestion. If there be any act tending to validate the order appointing the receiver, such act is the act of the court, and not of this plaintiff; but, as we shall see, the order was void. The action in which the receiver was appointed was brought against the corporation, the principal bondholders, and the trustee of the property mortgaged to secure payment of the bonds; but the clerk certifies that no summons appears among the files of the case, and that no entry of the same appears upon his register of actions, and the record shows that on June 7, 1891, the action was dismissed as to some of the parties. Inasmuch, therefore, as it appears that the plaintiff therein cannot avail itself of the services of the receiver, to hold that the plaintiff is not entitled to an execution herein is to decide that he has no remedy whatever for the enforcement of his judgment. We do not think that his conduct in the action referred to would warrant any such conclusion. Certainly, the California Bank ought not to be permitted, after practically abandoning the action for all purposes, to put the creditors in such a position that they can obtain no relief, either through the receiver, or by the ordinary processes of law.

2. This is not a direct attack upon the order appointing the receiver, but, the order being void, it may be disregarded. If the order is absolutely void, it is a nullity, and can be attacked in any proceeding. That it is absolutely void was clearly demonstrated when the matter was before the court, in department, in *Smith v. Superior Court*, *supra*.

3. As to the proposition that the order appointing the receiver is *res adjudicata*, it is sufficient to say, we think, that a court cannot, by an order denying a motion to set aside a void order, give the latter any vitality. If the order is void, it is void,—a mere nullity,—and may be treated as nothing. The decision of this court in the certiorari proceeding did not affirm the order of the court below. It declared that order void. It is true the proceedings were dismissed, but laches is the ground upon which the decision went; and the question whether the conduct of the plaintiff, as intervener, estops him from denying the validity of the order appointing the receiver, was not determined.

The order appealed from is reversed.

We concur: De HAVEN, J.; HARRISON, J.; McFARLAND, J.

99 Cal. 571

**BOARD OF LAW LIBRARY TRUSTEES
OF ORANGE COUNTY v. BOARD OF
SUPRS OF ORANGE COUNTY.** (No.
19,260.)

(Supreme Court of California. Sept. 26, 1893.)

**DELEGATION OF LEGISLATIVE POWER—COUNTIES—
ESTABLISHMENT OF LAW LIBRARIES.**

1. The legislature has power to provide, in an act establishing law libraries, (Act March 31, 1891,) that counties shall come or remain without the provision of the act, as the boards of supervisors of the respective counties may determine.

2. After the board of supervisors of a county has voted that Act March 31, 1891, establishing law libraries, shall be applicable to such county, it cannot evade the force and effect of the statute by repealing the adopting ordinance, since the county, after once coming within the provisions of the act, is there for all purposes, as fully and completely as if it had passed directly under the provision of the act at the date of its enactment.

3. The setting apart by the county board of supervisors of a few feet, for shelf room for a law library, in a large room occupied by the principal county officers, and by the board of supervisors when in session, where access to the books is obstructed, and rendered greatly inconvenient, by furniture and other articles occupying the room, and where the books cannot be consulted or used with reasonable convenience, is not providing such a library room for the use of the law library as is contemplated by Act March 31, 1891, providing for the establishment of law libraries in the different counties of the state.

In bank.

Application by the board of law library trustees of Orange county against the board of supervisors of Orange county for a writ of mandate to compel the board of supervisors to provide a suitable library room for its law library. Writ granted.

J. W. Towner, for petitioner. James G. Scarborough, for respondent.

GAROUTTE, J. This is an application for a writ of mandate. The matter is before us upon a demurrer to the petition, and the merits of the proceeding may be fully determined by a consideration of the facts relied upon by petitioner for the issuance of the writ. The writ is asked to issue against the board of supervisors of Orange county, requiring them to provide a library room for the use of the law library created under the statutes of this state. See St. 1891, p. 430. The petition alleges the establishment of the library as provided by the statute; that there is no suitable room for the use of said library; that the board of supervisors furnished some shelving, inclosed by doors, upon which the books were placed, in a large room, 100 feet by 25 feet, which was used by the principal county officers of the county for the performance of their official duties, and also for the meetings of the board of supervisors; that said room has no partitions, other than desks and railings; that said shelves are located on one side of said room, and about midway from front to rear thereof, and between the space occu-

pled by the county clerk and county auditor; that access to the books is obstructed and rendered greatly inconvenient by furniture and other articles occupying said room; that the books cannot be consulted or used with reasonable convenience, or in any proper or satisfactory manner. The petition further states "that on the 5th day of May, 1891, said board of supervisors duly passed an ordinance, No. 14, and which is in the words and figures following: 'The board of supervisors of the county of Orange do ordain as follows: Section 1. The provisions of the act entitled "An act to establish law libraries," of the Laws of 1891 of the State of California, and approved March 31, 1891, are hereby made applicable to the county of Orange.'" It is further alleged that on the 16th day of May, 1893, the said board of supervisors undertook to repeal and annul said ordinance No. 14 by an ordinance, No. 23, which is in the words and figures following: "The board of supervisors of the county of Orange do ordain as follows: Section 1. Ordinance No. 14 of the county of Orange, entitled 'An ordinance making applicable to the county of Orange the act of the legislature of the state entitled "An act to establish law libraries,"' approved March 31, 1891, is hereby repealed." It is further stated that demand upon the board of supervisors has been made to provide a suitable room for such law library, but the demand has been refused. Section 9 of the act of 1891 provides: "The board of supervisors of any such county shall provide a library room for the use of such library, whenever such room may be demanded by such board of trustees" And section 14 contains the following provision: "And provided further that it shall be discretionary with the board of supervisors of any county to provide by ordinance for the application of the provisions of this act to such county." It will be observed that the board of supervisors, acting under the clause of the section last quoted, brought Orange county within the provisions of the act by passing the ordinance to which reference has been made. To defeat this application for the writ, it is insisted (1) that the act of 1891 is unconstitutional; (2) that the board of supervisors, by ordinance, repealed the prior ordinance bringing the county within the provisions of the act, and by reason of such repeal the county occupied the same position as if no ordinance had ever been passed; (3) the room furnished is sufficient for the purpose contemplated.

We think the legislature had the power to provide in the act that counties should come within or remain without the provisions of the act, as the boards of supervisors of the respective counties might determine. It is not necessary to enter into a discussion of the constitutionality of this law in that regard, for in the recent case of *People v. McFadden*, 81 Cal. 489, 22 Pac. Rep. 851,

involving the constitutionality of the act creating the county of Orange, there is found an exhaustive discussion of the same principle, with the citation of many cases bearing upon the question. Among other things, it is there said: "Not only had the legislature the power to provide upon what condition or contingency the provisions of the act might be carried into effect, but also to provide within what time it must be done, if done at all."

It is also plain that the attempted repeal of the ordinance declaring Orange county within the provisions of the act was of no avail. When Orange county once came within the provisions of the act, it was there for all purposes; as fully and completely there as if it had passed directly under its provisions at the date of the enactment. We do not perceive how it can evade the force and effect of this statute of the state (which, after the passage of ordinance No. 14, applied to it) in any different manner or to any greater extent than it can escape the force and effect of any other statute of the state. If it can do so in this instance, it has the power to disorganize, for it was created under an act involving the same principle.

As to the third contention, from the facts recited we have no hesitancy in saying that the room used as a library room is not sufficient, and not such as is contemplated by the statute. The board should provide a suitable library room. The writ should issue, and it is so ordered.

We concur: McFARLAND, J.; HARRISON, J.; PATERSON, J.; DE HAVEN, J.; FITZGERALD, J.

(99 Cal. 636)

SECURITY LOAN & TRUST CO. v. WILLAMETTE STEAM MILLS LUMBERING & MANUF'G CO. et al. (No. 14,903.)

(Supreme Court of California. Oct. 7, 1893.)

TRADE FIXTURES—WHAT CONSTITUTE—ACTION FOR REMOVAL—EVIDENCE.

1. An owner of land leased it for, and it was used by the lessee as, a lumber yard. By the terms of the lease, part of the land was reserved for use in common by the lessor and lessee. By consent of the former, the latter erected on the reserved part a frame building, used as the lumber office, and as a place for some of the workmen to sleep. The lessee, to give access to the office, also built some bridges of stringers, with plank nailed thereto. *Held*, that such building and bridges were "trade fixtures," within the meaning of Civil Code, § 1019, which provides that a tenant may remove from the demised premises, during his term, anything affixed thereto for purposes of trade, etc.

2. In an action by the grantee of the lessor against the lessee for damages for removing such building and bridges during the term of the lease, it appeared that, during such term, defendant for a time held the legal title to the premises, but reconveyed them to the lessor and another. *Held*, that defendant might show that its deed was in fact a mortgage to secure it for money advanced to the lessor's grantor in payment for the premises at the lessor's request, that it never owned the fee, and that it paid rent during the entire term, since defendant's possession under the lease was sufficient to put the lessor's grantee on inquiry as to the real nature of the transaction.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by the Security Loan & Trust Company against the Willamette Steam Mills Lumbering & Manufacturing Company and others to recover damages for entry on plaintiff's land, and forcibly removing therefrom and converting to their own use a certain building and bridges. From a judgment for plaintiff against defendant company only, and from an order denying a motion for a new trial, such defendant appeals. Reversed.

Sheldon Borden, for appellant. Geo. E. Harpham and R. H. Knight, for respondent.

FITZGERALD, J. This is an action brought by plaintiff to recover damages alleged to have been sustained by the entry of defendants upon its lot, and forcibly removing therefrom, against its will, and wrongfully converting to their own use, a certain house, foundations, and bridges, which it is alleged were erected thereon, and attached to the freehold. Defendants in their answer admit the removal of the property from the plaintiff's lot, but aver their right to do so on the ground that they were trade fixtures erected by the defendant corporation during its occupancy of the premises as tenants under a lease from plaintiff's grantor, and that such removal was made before the termination of its tenancy thereunder. The case was tried by the court without a jury, and, upon the issues thus joined, judgment was rendered in favor of plaintiff and against the defendant corporation alone, from which judgment, and the order denying its motion for a new trial, it prosecutes this appeal.

The facts are as follows: On April 1, 1884, Jothan Bixby, then owner of the premises in question, entered into a contract in writing to sell and convey the same to Frank L. Stearns for \$6,000, payable on or before April 1, 1887. Stearns entered into possession of the premises under this contract, which was never recorded, and on May 6, 1885, he executed to J. A. Russ a lease of the portion in dispute, for a lumber yard, for the term of five years from June 1, 1885. The lease contained a provision "that the balance of the land from Chavez street shall be used in common," and it was upon this latter portion of the premises that the house referred to was situated. The lease was duly acknowledged and recorded January 11, 1887, and on February 25, 1889, it was assigned by Russ to his principal, the defendant corporation, for whom it appears he acted as agent in the execution thereof. That in October, 1885, the building was erected, upon the suggestion of the lessor, by the defendant corporation, on that part of the premises reserved in the lease for the common use of the parties for office purposes, and was used by it as such in its business as a lumber dealer, for the sale of lumber and the transaction of its business in connection with its yard, and not otherwise, and that the said bridges were built to give access thereto. On the contract of sale from Bixby to Stearns of the premises in question are the following indorsements: "Deed made to J. A. Russ at request of Stearns for within-described property. Deed dated March 6, '87, and delivered April 1, 1887." This deed was recorded April 2, 1887. On March 3, 1888, Russ conveyed the premises to the defendant corporation. On April 20, 1888, the defendant corporation conveyed the premises to George L. and Frank L. Stearns. On January 6, 1890,

George L. Stearns & Co. conveyed the premises to Frank L. Stearns and Mrs. Snyder, and on March 1, 1890, George L. and Frank L. Stearns, Mrs. E. M. Snyder, and the Stearns Manufacturing Company conveyed the same to plaintiff. That the defendant corporation was in the actual possession of the premises as tenant from the commencement of the lease up to the time of the removal of said property, and that it paid the rent therefor, according to the terms of the lease, up to June 1, 1890. That in 1887 it paid upon the lessor's demand an additional rent of \$50 per month for the use of all that part of the land reserved by the terms of the lease to be used in common, and upon which the said building was erected, which rent was paid up to the date of the expiration of the lease, and that the property in controversy was removed by it therefrom prior to that time, and that during the whole of the term of the lease the defendant corporation was in the open, notorious, and exclusive possession of the leased premises.

Upon the facts stated, the important question arises whether the building and bridges were erected by the defendant for the purposes of trade, and were so used, or intended to be used, by it in connection with, and as accessory to, carrying on its business as a lumber dealer on the demised premises. If so, then they were "trade fixtures," within the meaning of section 1019 of the Civil Code,¹ and as such were removable by the tenant from the leased premises at any time during the continuance of its term, unless they were so physically annexed to the freehold that their removal could not be effected without injury to the premises, or that they, by the manner in which they were affixed, had become an integral part thereof. It is expressly stated in the lease that the premises were leased as a lumber yard, and the evidence shows that they were used as such during the term for which they were leased, and that the building was erected on that part of the land reserved by the terms of the lease to be used in common, with the knowledge and consent of the lessor, as an office for the purpose of carrying on its business as a lumber dealer; that the bridges were built to give access to the premises, and that they were so used from their erection up to the time of their removal. As to the character of the building and bridges, and the manner and purpose of their erection, Stearns, the original lessor and plaintiff's grantor, testified on behalf of plaintiff as follows: "The character of the building was one and

¹ Section 1019 provides as follows: "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

a half story, good cornice and shingle roof, grate and fireplace and chimney in it, well put up and sealed inside. I don't think the chimney extended to the ground. I think there was blocking under the chimney and studding. The building was built upon the land in the ordinary way,—sills laid upon the ground, and short posts or underpinning on top of them, upon which the building rested. The bridges and foundations that were torn out were stringers across the zanja and plank nailed on them. I don't think the removal of the building injured the lot any, except by depriving it of the building. I know the purpose for which the building was erected. It was erected for a lumber office and a place to sleep, and the like of that. Two or three of Mr. Russ' men who worked in the lumber yard slept there. It was so used from the time it was built up to the time it was removed."

We think from this and other evidence upon the subject that it is conclusively shown that the building and bridges were "trade fixtures," within the meaning of the statute, and as such were removable by the defendant during its term, unless the character with which they were originally impressed was changed by their merger in the realty, by virtue of the deed from Bixby to Russ conveying the leased premises; and such a result would inevitably follow if during such time the ownership of the fee and of the personalty were united in Russ or his principal, the corporate defendant; in other words, the merger of personal property of this character in the realty, where nothing appears to show a contrary intention, necessarily results from the unity of title to the personal and real property. Defendant, for the purpose of showing there was no merger of the chattel in the realty, or of the leasehold interest in the legal title, introduced testimony tending to show that the corporate defendant did not acquire the ownership of the fee from Bixby; that the deed was in effect a mortgage executed by him to Russ (who acted as agent in the matter for the corporate defendant) at the request of Stearns, the lessor, to secure to the defendant corporation the payment of the balance of the purchase money due on the land, and advanced and paid by it to Bixby at the instance and request of and for the benefit of Stearns, upon an agreement that, when the money so advanced was repaid to it by Stearns, it would execute to him a conveyance of the premises; that afterwards Stearns repaid the money, and it conveyed the land to him and George L. Stearns, in pursuance of the agreement, and thereby discharged the mortgage; that during the entire term it was in the actual possession of the premises as tenant under the lease from Stearns, and paid the rent therefor, according to the terms thereof. This testimony was, on motion of plaintiff, stricken out by the court on the ground of

want of notice on the part of plaintiff as to the real character of the various deeds and transfers as shown by this testimony, and that the defendant was bound by the record evidence of title. This ruling, which was excepted to, was clearly erroneous for the reason that the corporate defendant was in the actual possession and quiet enjoyment of the premises under the lease, and paying rent therefor according to its terms, at and prior to the time they were conveyed by Stearns to plaintiff, and that it continued in the occupancy thereof until the expiration of the lease. This possession was sufficient to put plaintiff on inquiry, and, if the inquiry had been made by plaintiff, it could easily have ascertained that the relation of landlord and tenant existing between Stearns and the defendant corporation continued without interruption up to the date of his conveyance of the premises to plaintiff; that it was in the actual possession thereof as tenant during the whole of the leased term, and that it paid the rent therefor during that time according to the terms thereof; that the corporate defendant held the legal title merely as security for money loaned by it to its landlord, and that its subsequent conveyance of the premises to the landlord was by way of discharging the mortgage; that the title to the trade fixtures was preserved separate and distinct from the title to the land, and that their character as such was never merged in the realty; that, when the conveyance was made by the corporate defendant to Stearns, no reservation was made as to the trade fixtures in the deed, because it was known and understood by all parties that they were personalty, and for that reason no mention of them in the deed was necessary; that Russ acted, during all the times mentioned, for and on behalf of the corporate defendant as its agent; that the nature of all of the transactions referred to, and which were consummated before the sale of the premises to the plaintiff, was perfectly understood by Stearns, as they were made upon suggestions emanating from him and in his own interest. It therefore follows that plaintiff had no right to rely on the record title alone in making the purchase, but that it was its duty, from the knowledge which it had of the defendant's possession, to act upon the inquiry suggested thereby, and to look beyond the record title for the purpose of ascertaining what rights and equities, if any, the corporate defendant had in the premises; and, as it failed to do this, the corporate defendant's possession thereof charged it with full knowledge of the true character of the transactions referred to, and of the rights and equities arising therefrom, and existing between the landlord and tenant, at the time of plaintiff's purchase of the land, and it took it subject to them. This testimony was perfectly competent for the purpose for which it was introduced, and, as the court erred

in striking it out, it follows that the judgment and order appealed from should be reversed, and it is so ordered.

We concur: DE HAVEN, J.; McFARLAND, J.

99 Cal. 583

WELLS v. MANTES et al. (No. 18,137.)
(Supreme Court of California. Oct. 2, 1893.)
WATER RIGHTS—ACTUAL AND STATUTORY APPROPRIATIONS—PRIORITY.

1. A person by the actual diversion and appropriation of the water of a stream, acquires the right to its use as against a claimant who subsequently posts notices on such stream, as provided by Civil Code, § 1415, and proceeds, as required by statute, to perfect his rights.

2. Civil Code, §§ 1415, 1416, 1418, provide that a person desiring to appropriate water must post a written notice at the point of intended diversion, stating that he "claims" the water to the extent desired; that within 60 days thereafter the "claimant" must commence work; and that by a compliance with the above rules "claimant's" right to the use of the water relates back to the time notice was posted. *Held*, that Civil Code, § 1419, which provides that a failure to comply with such rules deprives the "claimants" of the right to the water as against a subsequent "claimant" who complies therewith, refers to a person posting the notice required by section 1415, and does not apply to an appropriator by actual diversion.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. M. Wells against John Mantes and others to restrain defendants from diverting the waters of a stream, and thereby depriving plaintiff of the use thereof. From a judgment for plaintiff, defendants appeal. Affirmed.

J. P. Meux and A. W. Thompson, for appellants. Sayle & Caldwell, for respondent.

GAROUTTE, J. This is an action to restrain appellants from diverting the waters of a certain stream, and thereby depriving plaintiff of the use thereof. The plaintiff, by actual diversion, appropriated 2,500 inches of the water of the stream for the purpose of irrigation. Subsequently defendants, at a point a mile or more above plaintiff's place of diversion, posted notices in accordance with the provisions of the Civil Code, and proceeded to claim and appropriate the waters of the said stream, regardless of any rights of plaintiff to such waters obtained by virtue of his actual appropriation. The only question presented by this record is: Can a person, by the actual diversion and appropriation of water, obtain the right to the use thereof as against a claimant who subsequently posts his notices upon a stream, in accordance with section 1415 of the Civil Code, and proceeds thereafter, as required by the statute, to perfect his rights? We have no doubt but that an actual and complete appropriation of the waters of a running stream may be made without fol-

lowing the course laid down in the Civil Code. In *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. Rep. 563, and 22 Pac. Rep. 198, which was subsequently followed in *Burrows v. Burrows*, 82 Cal. 564, 23 Pac. Rep. 146, it was decided that such an actual appropriation was good as against a subsequent pre-emptioner of the land upon which the spring was situated from which the appropriated water flowed. Such was declared to be the law by virtue of the amendatory act of congress of July 9, 1870, which, among other things, provided that "all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested or accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." It was held that, by virtue of the act of congress quoted, defendant took his title from the government with a servitude resting upon the land. The spring from which the stream flowed was situated upon the land pre-empted, and therefore was the property of the defendant, Curtis. In contesting *De Necochea's* right to the use of the water running from the spring, the pre-emptioner in no sense could be classed as a mere trespasser seeking to interfere with the rights of the party enjoying the actual possession of the water. The defendant, Curtis, occupied a position much stronger than as a mere subsequent appropriator, for as to such a one it is apparent at a glance he would have had no rights whatever. In order to defeat the defendant's claims in that litigation it was necessary to hold that the prior appropriator had a right to the use of the waters of the stream by virtue of his actual appropriation and possession, beyond that which was sufficient to defeat a mere intruder, for that term in no sense could be applied to the pre-emptioner, Curtis. If a right to the use of the water of the stream, merely sufficient to defend against a trespasser, would not have been sufficient to defeat the pre-emptioner, it follows necessarily that, the pre-emptioner being defeated in that case, the prior appropriator was recognized as possessing vested rights to the use of the water by actual diversion, and without complying with the provisions of the Code. It is substantially held in that case that, when the pre-emptioner took his title, he took it with a servitude upon the land; and this servitude was not created by complying with the statute as to the appropriation of water, but by an actual diversion alone. For these reasons we deem that case directly in point upon the question at bar.

As supporting the determination that a vested right to the use of water may be secured without invoking the provisions of the Code, it must be remembered that the congressional legislation quoted was enacted, as

is said in *Broder v. Water Co.*, 101 U. S. 276, for the purpose of recognizing pre-existing rights to the use of water, rather than establishing new rights. Again, we cannot bring ourselves to think that a mere subsequent appropriator under the Code occupies a better position than the pre-emptioner whose situation we have just been discussing, and whose rights to the waters of the stream we have held to be secondary to those of the prior appropriator. To say that the pre-emptioner has no rights against the prior appropriator, but that the subsequent appropriator, by posting notices, etc., has a superior right to the prior appropriator, we think inconsistent in the extreme. Such a practice would result in an unjust discrimination, and has no sound support in the law. If the prior appropriator has sufficient rights in the water to defeat the pre-emptioner, and we have decided such to be the case, he has sufficient right to defeat the subsequent appropriator under the Code. Section 1418 of the Civil Code reads: "By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted;" and we think the scope and purpose of all the provisions of the chapter upon water rights was to establish a procedure for the claimants of the right to the use of water, whereby a certain definite time might be established as the date at which their title should accrue. In this connection we quote from *De Necochea v. Curtis*, wherein the court, speaking of this question, said: "In this provision we begin to see the purpose and object of the legislature, which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation upon which it had always been held before the statute that one who gave sufficient notice of his intention to appropriate, and followed up his notice by diligent prosecution of the work, was upon its completion to be deemed an appropriator from the date of his notice, and was, therefore, prior in time and stronger in right than an intervening appropriator, notwithstanding his diversion of the water might be first completed." No possible injury can result from this construction of the statute. A party contemplating an appropriation of water from a stream is furnished with more definite information for his guidance as to the character and extent of the appropriation by an actual diversion than could be obtained from the notices provided by the statute.

To defeat the respondent's rights, appellants invoke section 1419 of the Civil Code, which reads: "A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith." We think this provision does not refer to an appropriator by actual diversion, but only to claimants seeking the right to the use of

water under the provisions of this chapter of the Code. This is made apparent by an examination of the preceding sections. Section 1415 provides: "A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: that he claims the water there flowing to the extent," etc. Section 1416 reads: "Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works," etc. Section 1418 reads: "By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted." It thus becomes apparent from these provisions that the word "claimants," as used in section 1419, refers to a party posting and recording the notices required by the provisions of section 1415, and does not apply to an appropriator by actual diversion. For the foregoing reasons it is ordered that the judgment and order be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

99 Cal. 602

ANTHONY v. GRAND. (No. 19,256.)

(Supreme Court of California. Oct. 4, 1893.)

APPEAL—DISMISSAL—SECOND APPEAL.

Following a stipulation filed in the supreme court that an appeal might be dismissed without prejudice to a new appeal, were written the words, "So ordered," with the names of four of the justices subscribed thereto, and the clerk entered in the minutes, "Appeal dismissed without prejudice," followed by the names of such justices. *Held*, that such appeal was thereby dismissed, and a second appeal taken on the next day should not be dismissed on the ground that a prior appeal was then pending, though the supreme court, after the second appeal was taken, inadvertently entered an order dismissing the first appeal absolutely.

In bank. Appeal from superior court, San Diego county; E. S. Torrence, Judge.

Action by Adolph Anthony against Fred Grand, in which defendant appealed from a judgment for plaintiff, and from an order denying a motion for a new trial. Plaintiff moves to dismiss the appeal. Motion denied.

Trippet, Boone & Neale, for appellant. Utley, Thorp & Holcomb, for respondent.

PER CURIAM. This is an appeal by the defendant from a judgment entered against him in the superior court of San Diego county, and from an order denying his motion for a new trial. It was taken by filing in the court below a proper notice and undertaking on February 10, 1893. The transcript was filed in this court on March 18, 1893. The respondent now moves to dismiss the appeal upon the ground that, when it was taken, another and prior appeal from the same judgment and order was pending and undisposed of in this court.

It appears that an appeal from the judgment and order entered and made in the action was properly taken by the defendant on December 22, 1892, but no transcript on that appeal was ever filed in this court. On February 3, 1893, the respondent filed notice of motion to dismiss the appeal upon the ground that the transcript had not been filed within the time prescribed by rule 2 of the court. On February 9, 1893, the defendant and appellant filed in this court a paper signed by his attorneys, and dated February 7, 1893, by which he "stipulates and agrees that the appeal heretofore taken in the above-entitled cause * * * be dismissed, without prejudice to the taking of a new appeal, within the time allowed by law, by said defendant." Following this stipulation is written, "so ordered," with the names of the chief justice and three associate justices of the court subscribed thereto; and on filing the paper the clerk entered in the minutes of the court an order: "Appeal dismissed without prejudice. Beatty, C. J. De Haven, J. McFarland, J. Fitzgerald, J." On this order a remittitur was sent to the clerk of the court below on March 13th. On April 3d, respondent's motion was submitted to the court, then sitting at Los Angeles, and on April 7th an order was inadvertently made, dismissing the appeal absolutely. This inadvertence may have arisen from the fact that the case was erroneously numbered, and the plaintiff was named as appellant and the defendant as respondent, thus apparently showing a different case from that in which the appeal had already been dismissed. But, however this may be, it is clear that, when the order of February 9th was made, the appeal was in fact dismissed, and there was thereafter no appeal pending on which the order of April 7th could take effect. This being so, the second appeal was taken after the first had been dismissed without prejudice, and the respondent's motion must therefore be denied. So ordered.

99 Cal. 579

VERMONT MARBLE CO. v. SUPERIOR
COURT OF CITY AND COUNTY OF
SAN FRANCISCO. (No. 15,418.)

(Supreme Court of California. Sept. 28, 1893.)

INSOLVENCY—EFFECT OF ADJUDICATION ON LIEN
ACQUIRED BY EXECUTION—DEATH OF INSOLVENT
—EFFECT ON INSOLVENCY PROCEEDINGS.

1. A levy of execution on a debtor's property, prior to the filing of a petition in insolvency against him, gives the judgment creditor a lien on such property which is not divested by the debtor's subsequent adjudication of insolvency; Insolvent Act 1880, § 17, which provides that such adjudication dissolves any attachment made within one month next preceding the commencement of the insolvency proceedings, being equivalent to an express declaration that it does not affect liens of any other nature.

2. The death of a judgment debtor after

execution levied will not affect the lien, or relieve the sheriff of his obligation to sell the property; Code Civil Proc. § 1505, providing that, if execution is actually levied on any property of the decedent before his death, the same may be sold for the satisfaction thereof, and the officer making the sale must account to the executor for any surplus in his hands.

3. Where an alleged insolvent dies before the return day of an application for his insolvency, the proceedings in insolvency abate, and orders that have been made therein cease to have any force.

In bank.

Petition by the Vermont Marble Company for a writ of review of certain orders of the superior court of the city and county of San Francisco, restraining the sheriff from selling the property levied on to satisfy a judgment rendered by respondent in petitioner's favor. Denied.

F. Wm. Reade, for petitioner. William A. Jordan, for respondent.

HARRISON, J. The petitioner obtained a judgment in the superior court in and for the city and county of San Francisco, on the 31st of May, 1893, against William Black, for the sum of \$3,710, and on the same day caused an execution thereon to be issued and placed in the hands of the sheriff, and by virtue thereof the sheriff levied upon and took into his possession certain personal property belonging to the defendant, and advertised the same to be sold on the 6th day of June, 1893. On the 3d day of June, 1893, certain creditors of Black filed their petition in the superior court that he be adjudged an insolvent debtor, and thereupon the court made an order appointing June 17th as the day for hearing the said petition, restraining him, in the mean time, from transferring any property, and from collecting or receiving any debts, and also forbidding his creditors from paying any debt to him, or delivering to him any property belonging to him, or to any person for his use. On the same day the court made the following order: "To J. J. McDade, sheriff of the city and county of San Francisco: Upon reading the petition of creditors praying that William Black be declared an insolvent debtor, and upon reading and filing the affidavit of J. F. Kennedy, presented in connection with said petition, it is hereby ordered that you refrain from selling any of the property of the said William Black by virtue of any writ of execution issued out of the suit entitled Vermont Marble Company vs. William Black, or any other suit, until the further order of this court. Dated June 3, 1893. J. V. Coffey, Judge." The said William Black died on the 5th day of June, 1893, and on the 17th of June, the return day of said application for his insolvency, the petitioner, upon notice of his motion to the petitioning creditors, moved the court to vacate the last-named order, restraining the sheriff from selling the property. The court denied the motion, whereupon the present application was made for a review of the aforesaid orders.

By the levy of the execution upon the property of Black, prior to the filing of the petition in insolvency against him, the petitioner herein acquired a lien upon that property which would not be divested by his subsequent adjudication of insolvency. *Howe v. Insurance Co.*, 42 Cal. 533. In the absence of any statute, an adjudication in insolvency does not affect any lien upon the property of the insolvent existing at the institution of the proceedings for such adjudication, but the assignee takes the property of the insolvent subject to all such liens. Section 17 of the insolvent act of 1880 provides that the effect of the adjudication is to dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings, and this designation is equivalent to an express declaration that it does not affect liens of any other nature. The subsequent death of the judgment debtor did not affect this lien of the petitioner, or relieve the sheriff from his obligation to sell the property. Section 1505, Code Civil Proc., provides that, "if execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands." When the sheriff took the property into his custody under the execution, that property ceased to be subject to any control of the court in the proceedings in insolvency, and the court had no jurisdiction to make an order restraining the sheriff from selling the same. Proceedings in insolvency are purely statutory, and the court, in exercising its authority therein, is limited by the statute. Section 9 of the insolvent act gives to the court authority, upon the filing of the creditor's petition, to make an order "forbidding the payment of any debts, and the delivery of any property belonging to such debtor to him, or for his use, or the transfer of any property to him." This is the measure and limit of its power to restrain the creditors of the alleged insolvent, either by a general order, or by an order directed to any individual creditor.

The court had no jurisdiction to make the foregoing order restraining the sheriff from selling the property in question, and the order itself conferred no protection upon the sheriff. It was not made in the action in which the execution had issued, and it derived no more authority, by virtue of its having been made in the insolvency proceedings, than it would have had if made in any other proceeding. The superior court has no authority, merely by virtue of its general jurisdiction, to restrain the sheriff from selling property which he has advertised under an execution, issued upon a valid judgment. When a plaintiff has obtained his judgment, he is entitled to enforce it, unless it be set aside or modified in

due course of law. *Livermore v. Hodgkins*, 54 Cal. 637. In an action against the sheriff for damages for refusing to execute the writ, the order would not constitute a defense, or afford him any protection. By the death of the alleged insolvent before the return day, the proceedings in insolvency abated, and with them the orders that had been made therein ceased to have any force. Acts of bankruptcy are analogous to torts, and, like proceedings against a defendant for a tort in which the cause of action does not survive, proceedings in involuntary bankruptcy abate upon his death. *Frazier v. McDonald*, 8 N. B. R. 237. As the orders sought to be reviewed herein have ceased to have any vitality by reason of the death of the alleged insolvent, an order of this court annulling them would be vain, and the application is for that reason denied.

We concur: DE HAVEN, J.; McFARLAND, J.; FITZGERALD, J.

BATES v. McDOWELL et al. (No. 15,366.)
(Supreme Court of California. Oct. 5, 1893.)

DISMISSAL OF APPEAL—FAILURE TO FILE TRANSCRIPT.

Where no transcript on appeal is filed within the time prescribed by the rules of the supreme court, and no satisfactory reason appears why it was not so filed, the appeal will be dismissed.

In bank. Appeal from superior court, San Diego county.

Action by Bates against S. A. McDowell and others. From a judgment for defendants, plaintiff appeals. Appeal dismissed.

Clarence L. Barber, for appellant. Works & Works, for respondents.

PER CURIAM. The motion of respondents in the above-entitled action to dismiss the appeal from the judgment therein is granted, for the reason that no transcript on appeal was filed within the time prescribed by the rules of this court, and no satisfactory reason appears why it was not so filed. The said appeal from said judgment is dismissed.

4 Cal. Unrep. 256

FREEMAN v. GRISWOLD. (No. 19,157.)
(Supreme Court of California. Oct. 4, 1893.)

VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT—DEFAULT BY PURCHASER—RECOVERY OF PURCHASE PRICE.

1. A covenant in an agreement to convey land, which provides that on noncompliance by the purchasers with the terms as to payment the seller shall be free from any obligation to convey, and the purchasers shall forfeit all right thereto, time being made of the essence of the contract, authorizes the seller to avoid the contract or not, at his option, and he is not bound to tender a deed except on payment of the price.

2. Where a land contract provides that, on noncompliance by the purchaser with the terms as to deferred payments, the seller shall be free from any obligation to convey, and the purchaser shall forfeit all rights thereunder, except a right to occupy the premises as a tenant of the seller so long as the sums paid are equivalent to an annual rent equal to 12 per cent. per annum of the price agreed on, with the right to purchase during such time, the seller, by bringing an action to recover the unpaid price, waives his right to treat the agreement to convey as void, and hence this clause, giving a right of occupancy for a certain time to the purchaser, which was to apply only in case of forfeiture, has no application.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Daniel Freeman against Daniel Griswold. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Dupuy, E. H. Bentley, and R. Dunnigan, for appellant. Henry Bleeker and Geo. I. Cochran, for respondent.

SEARLS, C. This is an action on a written contract entered into between the assignor of plaintiff and defendant for the sale and purchase of real estate, and is brought to recover a balance of \$5,863.24 on account of the purchase price, and interest from August 2, 1887, at 10 per cent. per annum. Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant prosecutes this appeal.

By the agreement which was entered into on the 2d day of August, 1887, R. F. Lotspeich, trustee, agreed to sell, and defendant, Daniel Griswold, agreed to buy, certain lots of land situate in the county of Los Angeles, at specified prices per acre, the purchase price of which amounted in the aggregate to \$8,194.90. Of the purchase price defendant paid \$2,331.66 at the execution of the agreement, and agreed to pay a like sum at the expiration of six months, and the residue at the end of one year from the date of the agreement, with interest at 10 per centum per annum. That portion of the agreement which gives rise to the principal contention here follows, and is in the following language: "In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligation in law or equity to convey said property, and said party of the second part shall forfeit all right thereto, except a right to occupy such premises as a tenant of party of the first part so long as the sums paid are equivalent to an annual rent equal to 12 per cent. per annum of the purchase price agreed on, and party of the second part shall have the right to purchase at any time during the continuance of said rental at original price and twelve per cent. interest. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to said

party of the second part, or to his assigns, a good and sufficient deed in form of grant, bargain, and sale. Time is the essence of this contract, and it is understood that the stipulations aforesaid apply to and bind the heirs, executors, administrators, and assigns of the respective parties." No payments have been made upon the contract except the \$2,331.66 paid at the date of its execution.

According to the complaint and findings of the court, defendant asked for and received from Lotspeich an extension of time for payment of the residue of the purchase price until on or about December 10, 1889, when defendant refused to pay then or at any time, repudiated the contract, and declared himself no longer bound thereby. January 4, 1890, Lotspeich transferred, assigned, and conveyed the land and his interest in the agreement to the plaintiff herein. At the trial it was stipulated "that the contract set out in the complaint was admitted, and the assignment as set out in the complaint was admitted, * * * and the sole issue was stipulated to be as to the extension of time and waiver, as set out in the complaint." The cause was tried January 27, 1891. It is highly probable, judging from the foregoing stipulation, that the defendant at the trial sought to bring himself within the purview of the rule enunciated in *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280, to the effect that where time is made the essence of a contract for the sale of land, which contract provides for the execution of a deed at a given day upon the payment of a certain sum of money, and also provides for a forfeiture, and that in the event of a failure by the purchaser to comply with the terms of the contract the seller shall be released from all obligations to convey, and the purchaser shall forfeit all right thereto, then, and in such a case, the covenants to convey and to make payment are mutual and dependent, and, if neither party tenders performance on his part, or demands performance from the other on the day fixed, the contract is at an end, and cannot thereafter be enforced by either party. The covenants and agreements in the case at bar are, in effect, precisely similar to those set out in the agreement in *Cleary v. Folger*, supra, except as to the proviso here that the purchaser might become a tenant of the seller, and might subsequently purchase at the same price, but with an added rate of interest. *Cleary v. Folger*, so far as it held that in the absence of payment by the purchaser the seller was bound to tender a deed on the precise day named in the contract, and that, failing to do so, he could not thereafter, upon tender of a deed, recover the purchase money remaining unpaid, was not in conformity with the law as previously declared in like cases, and was to the extent indicated directly

overruled in the later case of *Newton v. Hull*, 90 Cal. 487, 27 Pac. Rep. 429, decided after the case at bar was tried upon an opinion concurred in by a majority of the commissioners who participated in the opinion in *Cleary v. Folger*. We must hold here, as was held in *Newton v. Hull*, supra, and in *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629, as well as many others that might be cited, that a covenant in an agreement to convey land which provides that, in the event of a failure to comply by the purchasers with the terms as to payment, the seller shall be released from all obligations in law or equity to convey the land, and the purchaser shall forfeit all right thereto, time being made of the essence of the contract, is a covenant for the benefit of the vendor, and must be construed as authorizing him to avoid the contract or not, at his option, and does not authorize the vendee to take advantage of his own neglect in making payment and avoid such contract. It may be said here as was said in *Newton v. Hull*, supra: There is no provision in the agreement that the plaintiff should forfeit his right to the purchase money in case the defendant should fail to pay it on or before the day on which it became due, nor in case he failed to tender a deed on that day, or at any time before the defendant tendered payment of the purchase money. Plaintiff was not bound to tender a deed, except upon a tender of the purchase money. *Smith v. Mohn*, 87 Cal. 489, 25 Pac. Rep. 696; *Wilcoxson v. Stitt*, supra. Plaintiff could only be put in default by a tender of the purchase money and failure to deliver a deed, and as there is no claim that any such tender of purchase money was ever made we are bound to conclude that the plaintiff is entitled to recover under the contract, unless inhibited therefrom by the exception contained therein, which provides that upon a failure, etc., the party of the second part shall forfeit all right thereto, (to the property,) except a right to occupy the premises as a tenant of the party of the first part so long as the sums paid are equivalent to an annual rent of 12 per cent. per annum of the purchase price agreed to be paid, with the right on his part to purchase the land at any time during such tenancy at the price originally agreed upon, with interest thereon at 12 per cent. per annum. This clause is certainly peculiar. So far as we know, it is *sui generis*, and is probably an outgrowth of the boom period in which it originated. Twelve per cent. per annum on \$8,194.90, the purchase price, would amount to \$983.38 per annum, according to which calculation defendant would have been entitled to hold as a tenant, with the privilege of purchasing, for say 28 months. A careful examination of this clause in connection with the provision of forfeiture of which it is a part, and to

which it is an exception, leads to the following conclusions:

1. If defendant failed to make payment of the purchase money as called for by the agreement, his vendor was at liberty to declare a forfeiture, refuse a conveyance, and retain the money already paid.

2. If the vendor declared such forfeiture, and refused a conveyance, defendant had a right, although he had not paid in full, to enter as a tenant, and to purchase, as hereinbefore specified.

3. If the vendor waived a forfeiture, as under a covenant for his own benefit he might well do, the exception, which only applied in case of forfeiture, had no application.

4. The vendor, by bringing an action to recover the purchase money remaining due and unpaid, waived his right under the contract to treat his agreement to convey as null and void, and hence the exception, which only applied in case of forfeiture, had no application.

If we are in error in these views of the force and effect of the contract, it still remains to be said that, the exception in the clause providing for a forfeiture, being for the benefit of defendant, and in the nature of an option, he was at liberty to avail himself of or to reject it, at his pleasure. According to the complaint and findings, which are supported by the testimony, he did repudiate the contract, and there is not in his answer or in the testimony any suggestion that he ever entered into possession as a tenant of his vendor, or claimed any right or evinced any desire so to do. It follows from these views that the demurrer to the amended complaint was properly overruled, and that the contentions of appellant upon the same questions as presented at the trial by numerous exceptions cannot be maintained. The assignment to plaintiff is averred in the complaint, and not denied by the answer. There was evidence in support of the findings, and it can serve no useful purpose to refer to them in detail. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

99 Cal. 593

LOS ANGELES COUNTY v. BALLERINO
et al. (No. 19,036.)

(Supreme Court of California. Oct. 4, 1893.)
DELINQUENT TAXES—COLLECTION—PENALTY—LIMITATION OF ACTIONS.

1. Under St. 1880, p. 136, providing that "any county, or city and county," where taxes are delinquent, may sue in its own name for

the recovery thereof, "whether the same be for county or city, or city and county, and state purposes or taxes, or either of them," a county may sue for delinquent taxes levied for county purposes only; and defendant cannot claim that it ought also to have sued for delinquent state taxes, levied in the same year, and not to have split its demand, thus subjecting defendant to two actions, when it is not alleged in the answer that another action to recover the state taxes is pending, or has been prosecuted to judgment. *Los Angeles County v. Ballerino*, (Cal.) 32 Pac. Rep. 581, affirmed.

2. An action to recover delinquent taxes is not within Code Civil Proc. § 339, providing that an action "upon a contract obligation or liability not founded on an instrument in writing" must be brought within two years after the cause of action accrues, but it is within section 338, providing that an action on a liability created by statute, other than a penalty or forfeiture, must be brought within three years. *Los Angeles County v. Ballerino*, (Cal.) 32 Pac. Rep. 581, affirmed.

3. Pol. Code, § 3770, directs that 5 per cent. on the amount of the delinquent tax be collected in addition to such delinquent tax. *Held*, that the added per cent. is not such a penalty or forfeiture as is excepted from the operation of Code Civil Proc. § 338, or as falls within section 340, requiring an action "upon a statute for penalty or forfeiture, when the action is given to an individual and the state," to be brought within one year after the cause of action accrues; but the statute contemplates that it shall be collected at the same time and in the same manner as the delinquent tax, and the right to recover it is not lost until the cause of action on the delinquent tax is barred. *Los Angeles County v. Ballerino*, (Cal.) 32 Pac. Rep. 581, affirmed.

4. Where a party defends an action for delinquent taxes on the ground that his property was fraudulently assessed in excess of its real value, he must show by his answer that he has paid or tendered the amount which would have been due if his property had been assessed at a fair valuation, and he must offer to pay what the court shall find equitable and just; otherwise evidence cannot be admitted as to matters alleged in the answer in regard to the unjust discriminations made against him in the assessment. *Los Angeles County v. Ballerino*, (Cal.) 32 Pac. Rep. 581, affirmed.

On rehearing.

PER CURIAM. The points urged by appellant upon the reargument of this case have been fully considered by us, and we think the judgment and order appealed from should be affirmed for the reasons given by us in the former opinion, filed herein on March 9, 1893, and that opinion will stand as the opinion of the court. Judgment and order affirmed.

99 Cal. 598

PEOPLE v. BALLERINO et al. (No. 19,035.)

(Supreme Court of California: Oct. 4, 1893.)

DELINQUENT TAXES—RECOVERY—ACTION BY STATE.

1. St. 1880, p. 136, providing that any county "may sue in its own name for the recovery of delinquent taxes," whether such taxes be for county and state purposes, or either of them, is not repugnant to Pol. Code, § 3899, authorizing actions for delinquent taxes to be brought in the name of the people in certain cases, so as to repeal it by implication, and therefore the authority of the county to sue is not exclusive.

2. Pol. Code, § 3899, provides that the comptroller may direct a tax collector to whom a delinquent list has been delivered not to proceed further with the collection of any tax on the list amounting to more than \$300; and that, if there is no purchaser in good faith at such sale, the collector must deliver to the comptroller a certified copy of the entries on the delinquent list relative to such tax, whereupon an action to collect the same may be brought in the name of the state. *Held*, that the complaint must aver that the property had been once offered for sale, and a failure to do so is not cured by an averment that defendant had procured an injunction against the sale.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the people of the state against Ballerino and others to recover delinquent taxes. There was a judgment in favor of the people, and defendant Ballerino appeals. Reversed.

Horace Allen, for appellant. James McLachlan, for the People.

DE HAVEN, J. This action is brought by the people of the state to recover the amount of taxes levied in the year 1888 for state purposes upon certain property of the defendant Ballerino, situate in the county of Los Angeles. The amount of the delinquent tax exceeds \$300. The prayer of the complaint is for a judgment against defendant Ballerino for the amount of such tax, with 5 per cent. for delinquency, and also interest thereon, "and for a decree * * * that said real estate be sold as provided by law, and that out of the proceeds of such sale said tax so due * * * to said county * * * be paid." Judgment was rendered in favor of the plaintiff in accordance with this prayer of the complaint, and the defendant Ballerino appeals.

By section 1 of "An act prescribing the form of complaints in actions to recover delinquent taxes, and to authorize the bringing of suits therefor," (St. 1880, p. 136, Bancroft Ed. p. 402,) it is provided that "any county, or city and county, where such taxes are delinquent, may sue in its own name for the recovery of delinquent taxes, whether the same be for county, or city and county and state purposes, or taxes, or either or them." The defendant contends that the authority thus given to the county, or city and county, is exclusive, and that the people of the state are not authorized to maintain such actions. We do not think this act should be so construed. Section 3899 of the Political Code authorizes an action to be brought in the name of the people of the state to recover delinquent taxes under certain circumstances. This section of the Political Code is not expressly repealed by the later act of 1880, just cited, and there is no such repugnancy between that section and the act referred to as will justify us in holding that the latter repeals the former by implication. The remedy given by the act of 1880 is more simple, but there is nothing in

its language which expressly or by implication deprives the people of the state of the right to maintain an action for the collection of delinquent taxes under the provisions of section 3899 of the Political Code. The remedy given by the act of 1880 is cumulative, and not exclusive. But, while this is so, we are of the opinion that the complaint in this action does not state facts sufficient to entitle the people of the state to maintain this action under section 3899 of the Political Code. That section provides: "3899. The controller may, at any time after a delinquent list has been delivered to a collector, direct such collector not to proceed in the collection of any tax on said list, amounting to three hundred dollars, further than to offer for sale but once any property upon which such tax is a lien. Upon such direction the collector, after offering the property for sale once, and there being no purchaser in good faith, must make out and deliver to the controller a certified copy of the entries upon the delinquent list relative to such tax; and the tax collector or the controller, in case the tax collector refuses or neglects for fifteen days after being directed to bring suit for collection by the controller, may proceed by civil action in the proper court, and in the name of the people of the state of California, to collect such tax and costs." It is very clear that under this section the people of the state are not authorized to commence an action for the recovery of the delinquent tax until after the property upon which the tax is delinquent has been once offered for sale. This is made by the section a condition precedent to the right to maintain such an action, and it is not alleged in the complaint here that this condition was complied with, or that the controller ever directed the tax collector to only once offer such property for sale. The averment that the defendant procured a temporary injunction restraining the tax collector from selling the property for delinquent taxes, and that this injunction was not dissolved until May 19, 1890, does not cure the defect in the complaint just noticed. The statute having prescribed the conditions upon which alone the state may proceed by action, the performance of such conditions is essential to the right to maintain the action. The manner of collecting taxes rests with the legislature, and when the legislature has prescribed the particular mode, that procedure must be followed, unless it is apparent that it was not intended that such course of procedure should be exclusive. Cooley, Tax'n, pp. 13, 200; City of Camden v. Allen, 26 N. J. Law, 398. This principle was applied in the case of People v. Pico, 20 Cal. 595. Section 2 of the act of 1861 (St. 1861, p. 471) contained a provision that, "if the tax collector of the county shall fail to collect the delinquent taxes * * * by reason of his inability to find, seize or sell property belonging to the delin-

quent, it shall be the duty of the district attorney of the county to commence a civil action * * * to recover the unpaid taxes;" and the court in that case, construing this language, said: "No right of action or authority to bring an action under that act is given, except in cases in which the tax collector shall fail to collect the delinquent tax for the reason above mentioned. The complaint in this case, although averring the action to be brought in pursuance of the act, omits altogether to state the fact of the failure of the tax collector to collect the delinquent tax for the reason above specified, or for any reason. Without such an averment, the complaint shows no cause of action under that act." And this same rule was affirmed in the later case of People v. Holladay, 25 Cal. 301. We think it equally clear that section 3899 of the Political Code confers no right upon the people of the state to maintain such an action as this without at least once offering for sale the property upon which the tax is delinquent, in compliance with the terms of that section. The case of Oakland v. Whipple, 39 Cal. 112, does not conflict with this view. Section 33 of the act of April 24, 1862, (St. 1862, p. 337,) under which that action arose, conferred upon the district attorney the general authority to commence that action.

The question whether the citizen may be harassed and vexed by two suits to recover the amount of taxes levied for state and county purposes in one year upon property situate in one county,—that is, whether the state can maintain an action for its portion, and the county a separate action for the amount levied for county purposes,—is not raised by the answer in this case, and we express no opinion upon it.

Other points urged by counsel for defendant are disposed of adversely to his contention in the case of County of Los Angeles v. Ballerino, 34 Pac. Rep. 329, (19,036,) the decision in which has just been filed, and it is unnecessary to discuss them here. Judgment and order reversed.

We concur: McFARLAND, J.; FITZGERALD, J.

99 Cal. 587

FULTON v. JANSEN et al. (No. 19,130.)

(Supreme Court of California. Oct. 3, 1893.)

SPECIFIC PERFORMANCE—FAILURE TO SHOW PART PERFORMANCE—STATUTE OF FRAUDS.

Plaintiff, who purchased land, paying part cash, the balance payable within a year, under oral agreement that he should have a deed thereof on final payment, cut wood on the land for fuel, but never entered into possession. Before the year expired, his grantor conveyed the land to defendants, who verbally agreed to carry out his contract with plaintiff. Held an insufficient part performance by plaintiff to warrant a decree compelling defendants to convey the land to plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Joseph Fulton against Christian Jansen and others. Judgment for plaintiff. Defendants appeal. Reversed.

E. C. Bower and Reymert & Orfila, for appellants. A. R. Metcalfe, for respondent.

SEARLS, C. This action was brought by the respondent to enforce the specific performance of a contract to convey certain real property situate in the county of Los Angeles. Plaintiff had judgment, from which, and from an order refusing a new trial, defendants appeal.

The findings of the court show, in substance, that on the 13th day of October, 1889, one Jason Brown was the owner of the land in dispute, and certain other land of which it was an undivided part. That said Brown, in the presence of defendants, and upon the land, pointed out to plaintiff certain boundaries defining the northerly portion of the tract, which he offered to sell to plaintiff, and plaintiff agreed to buy, for \$450,—\$200 in cash, and the remaining sum of \$250 in one year, without interest; a deed to be executed and delivered when the final payment was made. Fulton, the plaintiff, paid the \$200 to Brown on the following day, and received a receipt therefor from Brown. One hundred dollars of the amount so paid was borrowed from Christian Jansen, for which plaintiff gave a promissory note payable within 18 months, with interest. Plaintiff lived in a house near said land, upon which he entered, and thereafter cut wood upon it, and removed it to his house, where he used it for fuel. Defendants and plaintiff were at the time intimate friends, and they were present consulting and advising in relation to the purchase. On the 5th of November following, Brown conveyed the whole tract of land, including that sold to plaintiff herein, to the defendants, they agreeing on their part that they would carry out, with plaintiff, Brown's contract to convey to him. Plaintiff tendered the residue of the purchase money to defendants, and demanded from them a conveyance, which was refused. The agreement of Brown to convey to plaintiff, and that of defendants to carry out the same contract, were verbal, and no memorandum or agreement in writing was made or had.

The important questions in the case are these: (1) The contract between Brown and Fulton being for the sale of land, and not being in writing, was there such a part performance as to take the case out of the statute of frauds? (2) If not, does the case, as made, develop such a state of facts as to raise a resulting or a constructive trust in favor of plaintiff which will support the decree? The only evidence under this head tends to prove that the plaintiff paid part

of the purchase price, and used the land in question so far as to cut and remove from it stovewood (but how much, or at how frequent intervals, or for how long a period, does not appear) for family use. This falls far short of making a case for specific performance. *Forrester v. Flores*, 64 Cal. 25, 28 Pac. Rep. 107. No improvements were made upon the property by plaintiff. The evidence did not show, and the court did not find, that plaintiff entered into possession of the property. In *Forrester v. Flores*, supra, it was said: "It is only where the payment is accompanied by a change of possession in the land, or the expenditure of money upon it on the faith of the oral agreement, and where the failure to perform by the vendor would work a gross fraud upon the vendee, that a court of equity will decree specific performance by compelling the execution of a deed. Story, Eq. Jur. § 761. For money paid under an invalid contract, the party who pays has an adequate remedy at law." It is concluded that there can be no specific performance of the oral contract to convey decreed upon the ground of such part performance as is shown in this case.

Resulting trusts and constructive trusts are such as arise by operation of law, and are by our Civil Code, § 2217, denominated "Involuntary trusts." Resulting trusts are such as arise where the legal estate in property is transferred or conveyed, but the interest appears, or it is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to pass to, or be enjoyed with, the legal title. Familiar examples of this character of trusts are cases where property is conveyed by will or deed upon trusts, but no trusts are in fact declared, or where the trust, although in fact declared, has failed, or, where attempted to be declared, the declaration of trust is so imperfect that it cannot be carried into effect. Another example of a resulting trust occurs where a conveyance of property is made to A., the price or consideration being paid by B., whereupon, according to well-settled principles in equity, A. takes the title in trust for B. Pom. Eq. Jur. § 1037; *Hidden v. Jordan*, 21 Cal. 93; *Bayles v. Baxter*, 22 Cal. 575. Cases of this character are not within the statute of frauds, and may be proved and disproved by parol. In order to raise such resulting trust by payment of the purchase money, it is essential that the payment be actually made by the beneficiary, or that an absolute obligation to pay should be incurred by him, "as a part of the original transaction of purchase, at or before the time of the conveyance. No subsequent and entirely independent contract, intervention, or payment on his part would raise any resulting trust." Pom. Eq. Jur. § 1037. Where a part, only, of the purchase money is advanced by B., under like circumstances, a resulting trust pro tanto arises, and an allegation of such

trust in a whole tract or parcel of land does not preclude proof of a trust in a part thereof. *Osborne v. Endicott*, 6 Cal. 149. This whole theory assumes that the conveyance to A. is made with the knowledge and consent, express or implied, of B., who pays the price, that the whole transaction is in pursuance of a common understanding or arrangement. "If the conveyance is taken by A. secretly, contrary to B.'s wishes, in violation of a duty owed to him, or in fraud of his rights, the trust which arises in B.'s favor is not resulting, but is a constructive trust." Note to section 1037, Pom. Eq. Jur., and cases there cited. And it matters not whether the conveyance be taken to one or several, whether jointly or severally, the trust results to the man who advances the purchase money. Constructive trusts arise in that class of cases where there is no intention of the parties to create a trust, and usually contrary to the intention of the party holding the legal title, and where there is no express or implied, written or verbal, declaration of a trust. "They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership." Pom. Eq. Jur. § 1044. In most cases of constructive trust, pure and simple, an element of fraud, actual or constructive, is the basis upon which the trust is founded. Equity sometimes proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser intended to act in pursuance of his fiduciary duty, as in case of a trustee who uses trust funds to pay for property purchased in his own name, though no doubt in many such cases the intention is to violate duty.

From the foregoing brief definitions of resulting and constructive trusts, it becomes apparent that the facts of the present case, as found by the court, and the evidence combined, causes it to fall within the principle of a resulting trust. The plaintiff in effect paid \$200 of the purchase price. Although at the date of payment it was intended as a payment pro tanto for the land for which he had contracted, yet when the defendants subsequently purchased the whole tract, and agreed to convey to plaintiff that portion which he had agreed to purchase, this sum was deducted from the price paid, thus virtually placing plaintiff in the position of one who advanced a portion of the purchase money. We have said the facts as found by the court and the evidence combined show this condition of things. Unfortunately, however, for this theory, there is nothing either in the complaint or in the findings to support it. According to the complaint, plaintiff made a purchase of a tract of land, paid part of the purchase money, and was to pay the residue within one year.

His vendor then sold the land to defendants, who had full notice, and refused to consummate the transaction and convey the property, wherefore he seeks the specific performance of the contract. The findings show that the contract was verbal, and fail to show such part performance as to authorize a decree for specific performance. There is nothing averred in the complaint, or found by the court, which places the defendants in a different position from that which the original vendor would have occupied had he not conveyed. The evidence tends to show, not that defendants are liable as purchasers with notice, but that, by virtue of having advanced a portion of the purchase price, plaintiff acquired, as against them, a right not inherent in him as a purchaser, but which equity gives to him by virtue of his relation to the defendants, and devolves upon the latter a duty not arising in their character of purchasers, but growing out of the fact that in making such purchase they availed themselves of the money paid by plaintiff, out of which a new relation sprang, viz. that of trustee and beneficiary, or a resulting trust in favor of plaintiff. This new relation being foreign to anything contained in the pleading or findings, we are not authorized to invoke it, even in aid of the judgment. The order and judgment appealed from should be reversed, with leave to the plaintiff to amend his complaint, if he shall be so advised.

We concur: TEMPLE, C.; BELCHER, C.

GAROUTTE and McFARLAND, JJ. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with leave to the plaintiff to amend his complaint, if he shall be so advised.

HARRISON, J. I concur in the judgment.

99 Cal. 617

REED et al. v. NORTON. (No. 19,127.)
(Supreme Court of California. Oct. 6, 1893.)
MECHANICS' LIENS—ENFORCEMENT—PLEADING
AND PROOF.

Where the complaint in an action to foreclose a mechanic's lien alleges that there was no contract between the owner and the person who erected the building, there can be no judgment on proof that there was, and it is error for the court, on finding the latter, and without an amendment, to render judgment for plaintiff to the extent of 25 per cent. of the contract price, which the owner failed to keep back, as required by the statute.

Department 2. Appeal from superior court, San Luis Obispo county; W. B. Cope, Judge.

Consolidated actions by C. H. Reed and others against Thomas Norton and another. From a judgment for plaintiffs, and an order denying a new trial, defendant Norton appeals. Affirmed in part, and reversed in part.

Wm. Shipsey and Graves & Graves, for appellant. J. M. Wilcoxon, for respondents.

McFARLAND, J. This is a consolidation of eight actions to foreclose liens under the mechanic's lien law against defendant Thomas Norton, the owner of the building in question, and Thomas Helm, original contractor. Judgment went for all the plaintiffs except Knight, and Norton appeals from the judgment, and from an order denying his motion for a new trial.

The case was here on a former appeal. 90 Cal. 590, 26 Pac. Rep. 767, and 27 Pac. Rep. 426. At that time the trial court had held that the written contract between Norton and Helm was void for want of proper rec ordation, etc., and had given judgment for plaintiffs for the full amount of their claims, which amount exceeded 25 per cent. of the contract price. On that appeal this court held that errors had been committed with respect to two of the liens, (those of Smith & Waite and Knight,) but it also held that the court below erred in finding that the written contract between Norton and Helm was void, and for these reasons the judgment was reversed. In the opinion it was said that Norton did not retain, for 35 days, 25 per cent. of the contract price, and that "he is responsible to that extent, but no further, to those who make good their claim to it." But there was no point raised or decided as to the sufficiency of the complaints, as they then stood, to sustain judgments, upon the theory that there was a valid written contract between Norton and Helm. As a fact the complaints—all except that of Schwartz, Beebe & Co.—expressly aver that there was no contract between Norton and Helm. The averments are that the last-named persons did sign a written contract by which Helm was to construct the building for \$5,500, but that neither the contract nor a memorandum thereof was recorded before the work was commenced, or at any time; and that Helm was merely the "agent" of Norton, and as such agent bought the materials for which the liens were filed. When the remittitur went down after the first appeal the complaints were not amended so as to aver a valid contract between defendants Norton and Helm; but for the purpose of further fortifying the original position, that there was no such valid contract, each of the complaints was amended by adding thereto a clause averring that "said defendants mutually agreed to, and did, abrogate, cancel, and annul said contract;" that, after work had been commenced, Norton filed in the recorder's office "what purported to be a memorandum thereof, but which was not a memorandum of the same;" and that they merely conspired together to pretend that the contract price was only \$5,500, whereas the reasonable value of the materials and labor was \$9,000. At the trial respondents first introduced, over the objection and ex-

ception of appellant, the written contract between Norton and Helm, and then immediately introduced the said Helm as a witness, who testified substantially that the contract was a mere sham; that Norton was to "run the job," and he (Helm) was "to work on it by the day;" that he "signed the contract in evidence merely as a guaranty that Norton would have a proper job done;" and that he (Helm) "never employed anybody to do anything on this building," "never hired a man nor discharged a man," and "did not buy any of the lumber that went into the building." But the court found that there was such a contract, and that a memorandum thereof was recorded; that Norton and Helm did not conspire to abrogate and annul, and did not abrogate and annul, said contract; that "all of said plaintiffs, and their several assignors, at all times while they, and each of them, were furnishing materials for, and performing labor upon, said building, treated said contract between said Norton and Helm as valid and subsisting;" that they made their contracts for materials and labor with said Helm individually, not as "agent;" that "at no time during the erection and construction of said building was defendant Helm otherwise connected therewith than as contractor, as aforesaid;" and that the plaintiffs, under said contract, are entitled to liens "for the payment to each of a pro rata portion of the sum of \$1,375," which last sum is 25 per cent. of the said contract price of \$5,500.

We do not see how the judgment can be affirmed without violating well-settled principles. "A plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other, which may be developed by the proofs." *Mondran v. Goux*, 51 Cal. 151. "The consequence of a variance between the averments in a pleading and the proof are the same under our system of practice as at common law, except that they may be, to a great extent, obviated by amendments to pleadings, which are allowed with great liberality." *Stout v. Shuster*, 28 Cal. 65. See, also, *Johnson v. Moss*, 45 Cal. 515; *Goss v. Strelitz*, 54 Cal. 641. In the complaints in the case at bar the respondents' causes of action are based upon averments of facts which the findings show not to be true; and the judgment is based upon facts which are denied in the complaints. The *allegata* and *probata*, as shown by the findings, do not agree. In an action to enforce the lien of a mechanic or material man, the complaint must show, either that the building was constructed under a valid statutory contract, or that it was not; and a complaint upon the one theory will not warrant a judgment rendered upon the other. In their complaints respondents allege the facts, and go upon the theory that there was no contract, that they dealt directly with the owner of the building, and that he is liable for the whole of their

claims. The court finds and proceeds upon the theory that these averments of respondents are not true, that there was a valid contract, and that respondents dealt directly with Helm as contractor, and not with Norton. The judgment must therefore be reversed. Upon the theory on which it was rendered, the complaint does not state facts sufficient to constitute a cause of action. The respondents Schwartz, Beebe & Co. aver in their complaint that they sold the materials for which they claim their lien directly to the appellant, Norton, and contracted with him personally. The court finds this averment to be true. It also finds all the other issues as to the liens of these respondents in their favor; and, as there is a fair conflict of evidence as to these issues, the judgment, so far as it relates to these respondents, should stand. The judgment and order denying a new trial are reversed, and the cause remanded, except as to that part of the judgment which is in favor of respondents L. Schwartz, W. L. Beebe, and A. Jones, and, as to said last-named respondents, the judgment and order appealed from are affirmed.

We concur: DE HAVEN, J., FITZGERALD, J.

99 Cal. 612

HUNT v. WARD. (No. 19,152.)

(Supreme Court of California. Oct. 6, 1893.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—
LIMITATION OF ACTIONS.

1. Though under the general rule, as expressed in the title of the statute of limitations, (Code Civil Proc. §§ 312-363,) actions can be commenced within the prescribed periods "after the cause of action has accrued," section 359 declares that the title does not affect actions against stockholders of a corporation to enforce a liability created by law, but that such actions must be brought within three years after "the liability was created," and therefore an action against a stockholder to enforce his liability for a debt of the corporation cannot be brought after three years after the debt was created, even though no cause of action may have accrued.

2. This is not affected by the clause of the constitution declaring the liability of stockholders of corporations, since the statement of a right in the constitution is always subject to reasonable statutory limitations of the time within which it may be enforced, unless the constitution itself otherwise declares.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by John W. Hunt against Edwin Ward. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Lee & Scott, for appellant. Wells, Monroe & Lee, for respondent.

McFARLAND, J. Action to recover of defendant, Ward, his proportionate share of the alleged indebtedness of a corporation in which he was a stockholder. Judgment went for plaintiff, from which, and from an or-

der denying a new trial, said defendant appeals.

Appellant contends, among other things, that the complaint does not state facts sufficient to constitute a cause of action, and that the action is barred by section 359, Code Civil Proc. It is averred in the complaint that on February 20, 1888, a certain corporation called the Exchange Block Company made and delivered to respondent its promissory note for \$7,500, payable one year after date, with 12 per cent. per annum interest, and also executed to respondent a mortgage on certain corporate property to secure said note; that afterwards respondent foreclosed said mortgage, and that after the sale of the mortgaged premises there was a deficiency of \$3,291.50, for which judgment was docketed against said corporation on January 9, 1891, and that the same is wholly unsatisfied; and that during the times mentioned appellant owned such a number of shares of the corporate stock as would make his proportionate share of said deficiency judgment \$827.50, for which last-mentioned sum judgment is prayed in this present action against appellant. It will be observed that there is no averment of the time of the incurring of the indebtedness or liability for which the note was given, or of the nature of such indebtedness,—the facts upon which it was founded; the only averment on the subject being the making and execution of the note and mortgage. The complaint bases the right to recover on the making of the note and the judgment against the corporation; but, as the liability of a stockholder is a separate and independent one, commencing with and dependent upon the original indebtedness, it is doubtful if the averments of the complaint in the case at bar are sufficient. Indeed, such averments were directly held by this court in *Tilden v. Gashwiler*, No. 4,053, decided in 1875, to be insufficient. In that case the complaint did aver that the corporation was indebted to plaintiff's assignor in a stated sum of money, and that in consideration of such indebtedness it made its promissory note, upon which it was sought to hold the stockholder; but the trial court sustained a general demurrer upon the ground that the liability of the stockholder was upon the original indebtedness, and not upon the note, and that there was no averment of facts showing such indebtedness. The plaintiff appealed, and the appellate court, after a most elaborate argument, as shown by the briefs in the record, affirmed the judgment. But as that case was not reported, and there was no written opinion delivered in it,—it being simply noticed in 50 Cal. 668, under the head of "Cases not Reported,"—it cannot be taken as known generally to the bar, and therefore should not have much, if any, weight as authority. We allude to it merely to show how the court viewed the question at that time, and to illustrate the

possible danger of relying upon such averments as those contained in the complaint in the case at bar; and, as we think that appellant's plea of the statute of limitations is a perfect defense to this action, we prefer not to say more upon the question above suggested, leaving its final decision to some case in which it must necessarily be determined.

As the note of the corporation is alleged to have been made on February 20, 1888, the liability of the stockholder was created, under any view, at least as early as the date of the note; and this present action was not commenced within three years after that date. The statutes of limitation of this state are contained in tit. 2, part 2, Code Civil Proc. §§ 312-363; and the general rule, as expressed in said title, is that actions can be commenced within the prescribed periods after the cause of action shall have accrued. But section 359 provides that "this title does not affect actions against * * * stockholders of a corporation * * * to enforce a liability created by law; but such actions must be brought within three years after * * * the liability was created." And it was definitely settled in the cases of *Green v. Beckman*, 59 Cal. 545, and *Moore v. Boyd*, 74 Cal. 167, 15 Pac. Rep. 670, that a stockholder's liability is a "liability created by law," within the meaning of said section 359. We do not see how this plain, clear language of section 359 can be explained away by any rule or any number of rules of construction. There is no room for the play of interpretation when the language under review leaves no doubt as to the meaning of those who used it. The legislature, having in former sections of said title 2 declared the general rule that actions should be commenced within the prescribed periods after the accruing of the cause of action, by section 359 deliberately provided that such rule should not apply to an action against a stockholder to enforce his liability for his proportionate share of the corporate debts, but that such action should be brought within three years after the liability was created. Of course, there is a clear and wide distinction between the creation of a liability and the accruing of a cause of action thereon, and section 359, *ex industria*, emphasizes that distinction. A liability may be absolute or contingent; it may be unconditional or limited; it may be presently enforceable by action, or there may be time given for its performance; but, whatever its character, it is created by the consummation of the contract, act, or omission by which the liability is incurred. If the appellant, before the maturity of the note, had sold his stock to a third person, who held it when the note matured, the appellant, and not the third person, would have been liable as a stockholder; which illustrates, if illustration be needed of a thing so plain, the meaning of the words, "after

the liability was created," as used in said section 359.

It is sought to overcome the plain language of the Code by supposing a case where the corporation had given a note not due until more than three years after date, and suggesting that in such a case the statute would have run against the stockholders before the accruing of any right of action against them. But if we assume that in such a case, according to respondent's view, the stockholders could be sued only upon the note, still the situation—called by counsel "an anomalous condition of affairs"—would be the result of the voluntary act of the creditor done in the face of the law. Such a condition of affairs would not be the necessary outcome of the law, for the Code gives the creditor ample room and time to subject stockholders to their independent liability for the indebtedness of the corporation. But if he chooses to make a contract with the corporation, by which its payment of the indebtedness is postponed beyond the three-years limitation in favor of the stockholders, he simply does an act which practically waives his right against the latter,—assuming, of course, that his only cause of action against the stockholders is upon the note of the corporation. It must be remembered that the right to pursue the stockholder at all does not exist at common law, but is solely the creature of the written law; and that it must be exercised upon the conditions and within the limits which the written law prescribes. The invocation by respondent of the clause of the state constitution declaring the liability of stockholders of corporations does not strengthen his position, for the statement of a right in a constitution is always subject to reasonable statutory limitations of the time within which it may be enforced, unless otherwise declared in the constitution itself; and three years is certainly not an unreasonable period of limitation. We see, therefore, no reason for disregarding the plain language of section 359. We need not inquire into the policy of the section; but, as certificates of stock of many corporations pass frequently from hand to hand, it may well be assumed that the legislature intended to protect temporary stockholders from the power of officers of corporations and their creditors to indefinitely extend the enforcement of liabilities created while they happened to be holders of stock. If the policy be unwise or bad, it is for the legislature to change it.

No cases have been cited where the point here involved was before the court; the question is *res integra*. The case nearest in point is that of *Redington v. Cornwell*, 90 Cal. 63, 27 Pac. Rep. 40, where the corporation had given its promissory note in consideration of a mutual open account, and the court, in considering the application of the statute of limitation to stockholders, used

this language: "The averment as to the mutual open account in the third amended complaint is of doubtful sufficiency to extend the period of limitation even against the corporation. As to the stockholders, it can have no effect whatever, even though sufficiently alleged. The corporation had no more power to extend the period of limitation as against the stockholders by a mutual open account than by making its promissory note. The liability of the stockholders is created and exists by statute. It arises when a debt is contracted by the corporation. It is limited to three years from the time it arises, and it is well settled in this state that the corporation has no power to extend that limitation without direct authority from the stockholders."

As the foregoing views are determinative of the case in favor of appellant, it is not necessary to discuss the admissibility in evidence of the judgment against the corporation, or any of the other questions argued by counsel. The judgment and order appealed from are reversed, and the cause remanded.

We concur: DE HAVEN, J.; FITZGERALD, J.

99 Cal. 604

BANK OF SHASTA v. BOYD et al. (No. 18,149.)

(Supreme Court of California. Oct. 5, 1893.)

ESTOPPEL—NOTE TO CORPORATION—PLEADING—SHAM ANSWER.

1. The maker of a note is estopped from denying that the payee is or was a corporation, by his having dealt with it as such, and received the consideration of the note.

2. Where it appears from the copies of a note and mortgage sued on, and which are set out in the complaint, that the action is not barred, an unverified answer setting up the statute of limitations, since it admits the due execution of the note and mortgage, is properly stricken out as sham.

3. In an action on a note made to plaintiff, an allegation in the complaint that plaintiff is the owner is unnecessary, and may be treated as surplusage, and a general denial raises no issue.

4. In an action on a note, an allegation in the complaint that it has not been paid is material, and, when the complaint is unverified, the issue of nonpayment is raised by a general denial, so that the answer cannot be stricken out as sham.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by the Bank of Shasta against James T. Boyd and another. From a judgment for plaintiff, defendant James T. Boyd appeals. Reversed.

Spencer & Raker, for appellant. Clay W. Taylor, J. Chadbourne, and C. McClaskey, for respondent.

VANCLIEF, C. On August 4, 1884, the defendants made to plaintiff their joint and several promissory note for the sum of \$2,-

000, payable two years after date, and at the same time, to secure the payment of said note, executed to plaintiff a mortgage on certain lands situate in the county of Lassen. This action was commenced in Lassen county on July 28, 1890, to foreclose the mortgage, and to obtain a personal judgment for deficiency, etc. Copies of the note and mortgage were set out in, and made parts of, the complaint. The complaint was not verified. James T. Boyd, for himself alone, filed and served the following,—an unverified answer: "(1) That he denies generally and specifically each and every allegation thereof contained in plaintiff's said complaint. (2) For a further and separate and second defense to plaintiff's complaint filed herein, the said defendant, James T. Boyd, alleges and avers as follows, to wit: That plaintiff's cause of action is barred by the provisions of section 337 of the Code of Civil Procedure of the state of California." Plaintiff's attorney moved, on the complaint and answer, to strike out this answer, on the grounds that it was "sham and irrelevant, because the allegations of the complaint are admitted," and "that said answer is not filed in good faith." The court granted the motion, and decreed a foreclosure, to all which defendant excepted. From this final decree the defendant James T. Boyd brings this appeal on the judgment roll, containing a bill of exceptions showing the facts above stated.

1. Counsel for appellant contend that the answer raised a material issue as to whether the plaintiff was a corporation. It is to be observed, in the first place, that the defendants, having dealt with plaintiff as a corporation, and received from it the consideration of the note, are estopped from denying that it was and is a corporation. *Association v. Clark*, 67 Cal. 634, 8 Pac. Rep. 445; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 10 Sawy. 464, 22 Fed. Rep. 245; *Cowell v. Springs Co.*, 100 U. S. 61; *Close v. Glenwood Cemetery*, 107 U. S. 466, 2 Sup. Ct. Rep. 267; *Bigelow, Estop.* pp. 527-529, and cases there cited; *Mor. Corp. § 750*; *Spel. Corp. § 44*. In the second place, as a general rule, the issue cannot be raised by a general denial of all allegations of the complaint, as in this case. *Navigation Co. v. Wright*, 8 Cal. 585; *Steam-Boat Co. v. Sewall*, 78 Me. 167, 3 Atl. Rep. 181; *Mor. Corp. § 772*; *Spel. Corp. §§ 46, 47*. To say that a plaintiff, suing as a corporation, is not a corporation, is to say it has not legal capacity to sue, and it is said this defense must be specially pleaded; but, inasmuch as defendants in this case were estopped from denying that plaintiff was a corporation, it is unnecessary to decide this question.

2. It is claimed that the plea of the statute of limitations tendered a material issue, and therefore should not have been stricken out. The ready answer to this is that on the face of the pleadings it appeared to be sham. Not being verified, the answer admitted the

due execution of the note and mortgage, copies of which were set out in the complaint, by which it appeared that the plea was false, the action having been commenced within four years after the maturity of the note.

3. It is claimed that the answer raised a material issue as to the ownership of the note, which appears to have been made to plaintiff, not assigned to it. The allegation that the plaintiff was the owner of a note thus made was unnecessary, and therefore surplusage. It tendered no material issue, and the denial of it was therefore irrelevant. *Corcoran v. Doll*, 32 Cal. 83; *Wedderspoon v. Rogers*, Id. 570; *Poorman v. Mills*, 35 Cal. 119; *Frost v. Harford*, 40 Cal. 165; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514.

4. It is claimed that, since the complaint alleges that neither the interest nor the principal of the note had been paid, the answer raised a material issue on that allegation. It is well settled in this state that the allegation of nonpayment, in a complaint on a promissory note, is material to the cause of action, as without such an allegation no breach of the promise would appear; and that, when the complaint is not verified, a general denial puts in issue every material allegation of the complaint. I think the answer in this case raised a material issue as to payment, and therefore should not have been stricken out. *Frisch v. Caler*, 21 Cal. 71; *Davanay v. Eggenhoff*, 43 Cal. 395; *Wetmore v. San Francisco*, 44 Cal. 300; *Bank v. Christensen*, 51 Cal. 572. For this error I think the judgment should be reversed, and the cause remanded.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

4 Cal. Unrep. 261

ADAIR v. WHITE et al. (No. 19,117.)
(Supreme Court of California. Oct. 5, 1893.)

BOUNDARIES—EVIDENCE—APPEAL.

1. On the question of the location of a point called for in a patent and survey, the court may consider the field notes and description in the patent of an adjoining tract, the boundaries of the two tracts being coincident for a distance of several miles, and both having been surveyed by the same surveyor at about the same time.

2. On the question of the proper location of a point called for in a survey and patent, a finding by the court on conflicting evidence will not be disturbed on appeal.

Department 1. Appeal from superior court, Ventura county; W. B. Cope, Judge.

Action of ejectment by George M. Adair against Frank W. White and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. H. Wilde, for appellant. Blackstock & Shepherd, for respondents.

HARRISON, J. Ejectment for certain lands claimed to be a part of the Rancho Santa Paula y Saticoy, in Ventura county. The controlling question in the case is the location of the southerly line of the rancho. This line is set forth in the patent as follows: After leaving station S. P. 13, "thence S. 42, ¼ E., at 30 links enters bed of Santa Clara river, course S. W.; at 4 chains, intersects offset of township line in township 3 N., range 21 W., 39.50 chains east of corner to sections 10, 11, 14, and 15; at four chains and fifty links crosses river, and ascends; thence, along westerly slope of abrupt hills called 'Lomas de Santa Paula,' 492 chains, to stake marked 'S. P. 14' station, at the most southern point of above-named hills, known as the 'Punta de la Loma.'" When the case was here upon the former appeal (85 Cal. 316, 24 Pac. Rep. 663) it was said: "It will be observed that this line terminates at the most southern point of the hills called the 'Lomas de Santa Paula,' which point is known as the 'Punta de la Loma.' This is the natural object or monument, and the station S. P. 14 was there fixed and established by the calls of the patent. If this point can be found, it is only necessary to run a line from S. P. 13 to S. P. 14 to fix the southern boundary;" and the case was remanded for a new trial in accordance with this principle. When the cause came on again for trial in the court below, the greater portion of the testimony was directed to establishing the location of the point upon the Punta de la Loma at which S. P. 14 had been placed, and from the evidence before it the court found that this point was so located that a line drawn from it to S. P. 13 lay to the north of the lands occupied by the defendants, and thereupon rendered judgment in their favor. The position of station S. P. 14, as well as the significance of "Punta de la Loma," were questions of fact to be determined by the court from the evidence before it. There was a sharp conflict of evidence upon both of these questions, and, under the well-established rule, the finding of the trial court thereon must be held conclusive. It is only where there is no substantial evidence in support of a finding that this court can disregard the finding of the trial court; and after a careful examination of the record herein we are unable to say that the evidence before that court did not authorize it to make the findings which it has made upon both of these questions of fact. The stake that had been placed at the station had disappeared, and one of the objects at the trial was to re-establish this monument. Several surveyors were called as witnesses for the respective parties for the purpose of establishing the location of S. P. 14, and the conflict between their testimony arises chiefly from the construction given to the field notes and calls of the patent; the plaintiff contending

that these notes call for the southernmost point of the Punta, or extremity of the hills, while the defendants contend that the Punta is itself designated as the southern extremity of the Lomas, or hills, and that the question to be determined was the position on the Punta at which the station S. P. 14 was originally placed. In his field notes of the survey, which were finally approved for the issuance of the patent, the surveyor describes the course from S. P. 13 as running in a direct line "along western slope of abrupt hills called 'Lomas de Santa Paula,' 492 chains, and to the most southern point of above-named hills known as the 'Punta de Loma,'" and states that he there "set stake marked 'S. P. 14;'" and, in the patent, the boundary of the ranch upon this course is described as "along westerly slope of abrupt hills called 'Lomas de Santa Paula,' 492 chains, to stake marked 'S. P. 14' station, at the most southern point of above-named hills, known as the 'Punta de Loma.'" It thus appears that the extremity of this course, and the station at which the stake marked "S. P. 14" was set, is "the most southern point of above-named hills, known as the 'Punta de la Loma,'" and the literal construction of the language used in its description makes "the above-named hills" include the entire Lomas de Santa Paula, and also makes the "Punta de la Loma" synonymous with the most southern extremity of the entire Lomas, so that the stake marked "S. P. 14" would have been set at the Punta of the Lomas, and not at the southernmost point of the Punta. The topography of the country along which this line extends is confirmatory of this construction. The Lomas de Santa Paula is a range of hills lying to the southeast of the Santa Clara river, and terminating where they enter the plain of the Santa Clara valley in a prominent headland called the "Punta de la Loma." The hills themselves are abrupt on their northerly or northwesterly side, with a gentle slope on their southerly side. This Punta or southern extremity of the hills has a face of about 200 feet, is oval in shape, and abrupt towards the north near the river, but with a gradual slope to the south and west. As the course itself runs along the axis of the hills, or nearly so,—the general trend of the hills from the Punta being about N., 50 deg. E.,—it was natural for the surveyor to terminate the course at the extremity of the hills; and as he designated the slope along which the course ran as the westerly, rather than the northwesterly, slope of the hills, he would also naturally designate the extremity of the hills to which he carried the course as the southernmost point thereof. His subsequent designation of that extremity as the "Punta de la Loma" was only for the purpose of adding another description to the one which he had already given, and is to be taken as

synonymous with it. The court was therefore called upon to ascertain in what point of the Punta the station S. P. 14 had been placed, and was not required to place it at the southernmost point of the Punta itself. For this purpose it was proper to receive in evidence and consider the field notes and description in the patent for the adjoining rancho, Santa Clara del Norte. The boundaries of these two ranchos are coincident for a distance of several miles, and were surveyed by the same surveyor at about the same time, in December, 1860; and it appears from the field notes of the Rancho Santa Clara del Norte that the Santa Paula Rancho was first surveyed, the fifteenth course of the description of the Santa Clara Rancho reading: Thence "to stake marked 'S. P. 14,' a corner of Rancho Santa Paula y Saticoy, on point of hill known as the 'Punta del Loma,' mark stake 'S. C. N. 4,' and run along boundary of Rancho Santa Paula y Saticoy through sandy bottom." As the station S. C. N. 4 in this rancho was identical with S. P. 14 of the Santa Paula Rancho, it was competent to show the location of S. P. 14 by re-establishing S. C. N. 4, in accordance with the calls and monuments referred to in the patent for this rancho. If this station could be thus re-established, it would fix the place "on point of hill known as the 'Punta del Loma,'" which, had been designated as station "S. P. 14," and where the stake had been set. That the evidence introduced for this purpose tended to locate S. C. N. 4 at a point from which a line drawn to S. P. 13 would exclude the land of the defendants is not seriously controverted, and the finding of the court to that effect must be accepted as determinative of the proposition. Certain exceptions were taken to the rulings of the court in admitting evidence, but none of them are of such a character as to have affected the conclusion reached by the court. The judgment and order are affirmed.

We concur: PATERSON, J.; McFARLAND, J.

99 Cal. 621

STORKE v. STORKE. (No. 19,086.)

(Supreme Court of California. Oct. 6, 1893.)

HUSBAND AND WIFE—ACTION FOR SEPARATE MAINTENANCE—ALIMONY AND ATTORNEY'S FEES.

1. In an action by a wife for permanent support and maintenance, under Civil Code, § 137, an order allowing alimony and attorney's fees pendente lite may be made without awaiting determination of an issue raised by an answer alleging plaintiff's insanity, and praying the appointment of a guardian ad litem for her.

2. In an action by a wife for maintenance, after an appeal had been taken by defendant from an order for the payment of \$50 per month alimony and \$50 attorney's fees, the court made another order reciting the fact of appeal, and directing defendant to pay \$350 "in lieu" of the \$50 attorney's fees given by the first order, "to enable her to prosecute said

action," but before notice of appeal from such second order changed it by striking out the provision that it was in lieu of the \$50. *Held*, that the second order was a new order for further attorney's fees, and not a change of the first order after appeal therefrom.

3. In an action by a wife for permanent maintenance, an order that defendant pay plaintiff \$50 per month alimony and \$50 "to her attorney," while erroneous in directing such payment to her attorney, is no ground for reversal where it appears that the notice to show cause why the order should not be made was "to pay the clerk a certain sum of money, to be applied by plaintiff as counsel fees," since the direction to pay the attorney is a clerical error, and may be modified.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Yda Addis Storke against C. A. Storke for permanent support and maintenance. From two orders directing the payment of alimony and attorney's fees pendente lite, defendant appeals. Modified.

W. P. Butcher and C. A. Storke, for appellant. Wright & Day, for respondent.

McFARLAND, J. The plaintiff brought this action against her husband, the defendant, for permanent support and maintenance, under section 137 of the Civil Code; and on August 12, 1891, the trial court made an order that during the pendency of the action defendant pay plaintiff \$50 per month alimony and \$50 to her attorney. From this order, on the day on which it was made, defendant appealed. Appellant had filed an answer averring the insanity of plaintiff, and praying for the appointment of a guardian ad litem for her; and the point made by appellant is that the court had no right to allow alimony until it had heard and determined the issue of insanity. But with respect to the allowance of alimony, the averment of insanity was not different from any other averment which, if proven at the trial, would have defeated respondent's action; and the very purpose of alimony in such a case is to give support to the wife, and enable her to conduct her side of the litigation pending the trial of the issues made by the pleadings. If the court were compelled to try and determine the issues in the case before it could allow alimony, the entire purpose of allowing alimony "during the pendency of such action" would be defeated. That part of the order which directs appellant to pay \$50 "to the attorney for plaintiff" is irregular; but as the notice to appellant to show cause why the order should not be made was "to pay the said clerk a certain sum of money, to be applied by plaintiff as counsel fees in prosecuting the action," it is probable that the direction to pay the money to the attorney was a mere clerical mistake, and we think it a proper case for a modification of that part of the order, rather than a reversal.

There is in the printed record what purports to be another appeal by appellant from

another order of the court made August 14, 1891. On that day the court made an order reciting the fact that defendant had appealed from the order of August 12th, and directing that appellant pay respondent \$350, "to enable her to prosecute said action." This order, as first entered, declared that the \$350 was "in lieu" of the \$50 attorney's fee given by the order of August 12th; but four days afterwards the court modified the said order of August 14th by striking out the provision that the \$350 was in lieu of the \$50. Nearly two months afterwards—on October 12, 1891—the defendant gave notice of appeal from the order of August 14th, and the point made on this appeal is that the court had no jurisdiction to change the order of August 12th, after an appeal had been taken therefrom, by substituting \$350 for \$50. But we see nothing in the point, because, before the notice of appeal, the "lien" clause had been stricken out of the order, and it stood as a new order for further counsel fees. We have noticed this point on its merits, but it is doubtful if there is any record here which presents it.

The court below is directed to modify the order of August 12, 1891, by requiring the \$50 attorney's fee to be paid to plaintiff, and, as thus modified, the order is affirmed, with costs of appeal to respondent. The order of August 14th is affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

99 Cal. 642

MASKELL v. BARKER. (No. 19,187.)
(Supreme Court of California. Oct. 7, 1893.)
WRONGFUL ATTACHMENT—WHEN ACTION LIES—
INCOMPLETE LEVY.

There can be no recovery for the malicious suing out of a writ of attachment against real estate without probable cause, when it does not appear that it was fully executed, as required by Code Civil Proc. § 542, and that a copy of the writ, description of the property, and notice were left with the occupant of the property, or posted thereon, as well as filed with the recorder of the county.

Department 2. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by John Maskell against Charles H. Barker. From a judgment for defendant, plaintiff appeals. Affirmed.

Hugh J. & Wm. Crawford, for appellant. A. M. Stephens, for respondent.

FITZGERALD, J. This is an appeal upon the judgment roll from a judgment on demurrer to the complaint. The action is for damages, and the complaint, in substance, alleges that the defendant maliciously and without probable cause sued out a writ of attachment against plaintiff's property, and extorted from him the money sued for, upon a threat made by defendant that if the same was not paid he would cause the writ to be levied on certain real property of the

plaintiff which he was about to sell, and thereby defeat the consummation of such sale; that the writ was delivered for levy to a constable, who, in obedience to its command, filed with the county recorder a copy thereof, with a description of said property, and a notice that it was attached. It is further alleged that, in consequence of these acts of the defendant and the constable, a notice was published in a certain newspaper that said property was attached, and a similar notice was transmitted to the various commercial agencies of this state, to the injury of the plaintiff's good name and business reputation, thereby causing great anxiety and distress of mind and mental suffering, to his damage in the sum of \$5,500. The complaint was demurred to on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, and its ruling in this respect is brought in question by this appeal. In order to entitle a plaintiff to recover in an action of this character, he must allege and prove that the writ of attachment was executed by attaching his property. The alleged acts of the constable in this case do not constitute a levy, within the meaning of section 542, Code Civil Proc. What he did was but a step in that direction. "Leaving a similar copy of the writ, description, and notice with the occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached,"—was necessary to complete the levy, therefore indispensable to the execution of the writ. The malicious suing out of a writ of attachment without probable cause, without levying it upon the property of the party against whom it was issued, will not authorize a recovery by such party. In addition to this, it does not appear that the defendant caused or was connected in any way with the notices published and transmitted, as alleged in the complaint. We are of the opinion that the demurrer was properly sustained. Let the judgment be affirmed.

We concur: McFARLAND, J.; DE HAVEN, J.

(4 Cal. Unrep. 267)

NELMES v. WILSON. (No. 19,094.)

(Supreme Court of California. Oct. 7, 1893.)

APPEAL—TIME OF TAKING—REVIEW OF EVIDENCE
—NONSUIT—EXCEPTIONS.

1. Under Code Civil Proc. § 939, permitting an appeal within a year of entry of judgment, but inhibiting consideration of an exception to the decision, as being unsupported by evidence, unless the appeal is within 60 days after rendition of judgment, the evidence cannot be considered on an appeal taken after the 60 days.

2. Error in granting nonsuits is an error in law which must be excepted to that it may be considered on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Thomas Nelmes against James G. Wilson. Judgment for defendant. Plaintiff appeals. Affirmed.

Gould & Stanford, for appellant. Johnson & Rodman, for respondent.

SEARLS, C. This action is brought to annul a contract for the purchase of a lot of land in the city of Pasadena, county of Los Angeles, entered into between the assignor of plaintiff and grantor of defendant on the 31st day of August, 1887, and to recover back so much of the purchase money as has been paid on account of such contract. Defendant answered, admitting the execution of the contract, and denying most of the other allegations of the complaint. He also filed a cross complaint, asking for the specific performance of such contract, and judgment for the amount remaining due thereon. At the trial a nonsuit was ordered against plaintiff, and defendant had final judgment in his favor as prayed for in his cross complaint. The appeal is from the final judgment, supported by a bill of exceptions. Said judgment was rendered February 13, 1892, but not entered until March 8, 1892. The appeal was taken May 6, 1892, more than 60 days after the rendition of the judgment, and within 60 days of its entry. Section 939 of the Code of Civil Procedure provides that an appeal may be taken from a final judgment commenced in the court in which the same is rendered within one year after the entry of judgment. "But an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." Under the rule enunciated in *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. Rep. 657, we are precluded from reviewing the evidence contained in the bill of exceptions for the reason that the appeal was not taken within 60 days after the rendition of the judgment. The record fails to show that any exception was taken to the action of the court in granting the nonsuit. An error in granting a nonsuit is an error in law, and must be excepted to, or it will not be reviewed on appeal. *Malone v. Beardsley*, 92 Cal. 150, 28 Pac. Rep. 218; *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. Rep. 1063; *Warner v. Darrow*, 91 Cal. 310, 27 Pac. Rep. 737. The findings are within the issues made by the pleadings, and support the judgment. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

99 Cal. 607

HARRALSON v. BARRETT et al. (No. 19,137.)

(Supreme Court of California. Oct. 6, 1893.)

MORTGAGES — PROVISION FOR PAYMENT OF TAXES ON MORTGAGE OR DEBT THEREBY SECURED — VALIDITY — REVIEW ON APPEAL — CONFLICTING EVIDENCE — NEW TRIAL — MONEY PAID UNDER MISTAKE OF LAW.

1. Under Const. art. 13, § 5, declaring that contracts obligating a debtor to pay a tax on money loaned, or on any mortgage, shall be void as to any interest specified therein and as to such tax, a provision in a mortgage that, in case of foreclosure, the mortgagee may include therein all payments made by the mortgagee for "taxes of this mortgage, or the money hereby secured," is void.

2. Where the evidence is conflicting, the verdict will not be disturbed on appeal.

3. In an action to foreclose a mortgage, defendants claimed that alterations had been made after execution, and plaintiff testified that he went, immediately after the acknowledgment, from the notary's office to the recorder's office. Defendants, after judgment for plaintiff, moved for a new trial on the ground of newly-discovered evidence that the mortgage was acknowledged at least an hour before it was recorded, and that one P., who occupied a part of the office of defendant, saw plaintiff make alterations after acknowledgment. *Held*, that where, from the issue, defendants had reason to believe that plaintiff would deny that the alterations were made after execution, they failed to use due diligence in getting such evidence, and the motion for new trial was properly overruled.

4. Though payment of the interest on the note secured by such mortgage could not be recovered because of the void provision therein, yet, where defendants voluntarily paid such interest under a mistaken belief that they were bound to do so, they cannot recover it back, or demand that it be credited on the principal of the loan.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Harralson against A. W. Barrett and another to foreclose a mortgage. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Modified.

Henry Bleeker and George Denis, for appellants. A. M. Stephens, for respondent.

PATERSON, J. The mortgage upon which this action was brought provides that in case of foreclosure the mortgagee may include therein all payments made by the mortgagee "for taxes on said premises, and the taxes of this mortgage, or the money hereby secured." It is claimed by appellants that this provision of the mortgage is void, and that the court below erred in allowing interest on the note for the payment of which the mortgage was given as security, and this proposition, we think, must be sustained. Section 5, art. 13, of our constitution provides that "every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." To hold that

the clause of the mortgage quoted above is valid would defeat the purposes of this provision. In *Hewitt v. Dean*, 91 Cal. 11, 27 Pac. Rep. 423, Mr. Justice Harrison has clearly set forth the purposes of this provision of the constitution and the circumstances which led to its adoption. The end it attempts to accomplish is "that a portion of the taxes might be collected from the mortgagee, and that the burden upon the mortgagor might not at the same time be increased. A construction such as the respondent seeks to put upon the provision would afford the borrower no relief whatever, for under it the mortgagee could in any case make an agreement that, on his payment of the mortgage tax, it might be added to the indebtedness due him, and collected as a part of the same." *Marye v. Hart*, 76 Cal. 291, 13 Pac. Rep. 325, cited and relied upon by respondent, is not in point. The contract there was entirely different from the one before us. It simply provided that the mortgagee might discharge "at maturity all taxes or assessments, liens, or other incumbrances now subsisting, or hereafter to be laid or imposed, upon said lot of land or premises, and which may be in effect a charge thereupon;" and that such payments should be considered as secured by the mortgage. This provision was held to be entirely consistent with the provisions of section 4, art. 13, of the constitution, which allows the owner of the security to pay the taxes on the property, in which case they become a part of the debt, but does not allow the owner of the security to add the taxes paid by him on his own security to the mortgage debt. It says: "The tax so levied upon the property affected thereby shall become a part of the debt." The section provides for two assessments,—one upon the property, which must be against the owner of the land, and one upon the mortgage, which must be against the owner of the mortgage. It permits the mortgagee, if he pay the tax on the land,—and this is frequently done to protect himself,—to add the amount thereof to the mortgage debt. Section 5 clearly intends that the tax on the security shall be the debt of the mortgagee, and provides a severe penalty in case of any attempt to put the burden upon the borrower.

It was set up in the answer, and claimed at the trial, that, after the execution and delivery of the mortgage, "the plaintiff, without the consent of the defendants, or either of them, intentionally altered said mortgage by striking out the words 'other than,' * * * and inserting in place thereof the word 'and.'" The respondent claims that the change was made by him with the full knowledge and consent of the appellants. The clause is the one hereinbefore referred to, and as originally written or printed in the mortgage read as follows: "And for taxes on said premises other than the taxes of this mortgage, or the money hereby secured." The

court found that no alterations were made by the plaintiff after the execution of the instrument, and that it was executed and delivered to the defendants in the form claimed by the plaintiff. There being a substantial conflict of evidence, we cannot disturb the finding. In the testimony of the plaintiff and the defendant Yoakum there is a sharp conflict; plaintiff testifying that he called the attention of Yoakum to the defects in the mortgage, and that the changes were made at the suggestion of the latter, while Yoakum testified that he never authorized the plaintiff to erase the words "other than," and write in lieu thereof the word "and," and knew nothing whatever of such change having been made. So far as the defendant Barrett is concerned, the preponderance of the evidence, as shown by the record, seems to be in his favor, but we cannot say there is not sufficient evidence to support the finding. The plaintiff testified that the changes in the mortgage were all made by him at the same time. The defendant Barrett admits that the changes in black ink were made before he signed the mortgage, but denies that the erasure of the words "other than," and the insertion of the word "and," in red ink, were in the instrument at that time. He says: "I did not sign the mortgage until it was complete. After all modifications were made, they came back to our side of the house, and I signed it. Then the document was acknowledged." If the court below believed the statement of the plaintiff that the changes were all made at the same time, it was natural to conclude that the defendant Barrett was mistaken in saying that the changes in red ink were not there when he executed the instrument.

The defendants moved for a new trial on the grounds of newly-discovered evidence. Among other things they showed by affidavit that the mortgage was acknowledged at least an hour before it was recorded. This was material, in view of the statement of the plaintiff that he went, immediately after the acknowledgment, from the notary's office to the office of the recorder. It was shown by the affidavit of one Pavkovich that the plaintiff, after the acknowledgment, returned to the office of Yoakum, "sat down near Mr. Barrett's desk, and appeared to be reading it over carefully. While in his hands, affiant saw him take a pen in his hand, and either write something in the mortgage, or erase something that was already in the mortgage." This, of course, was material. But while the evidence offered was material, and not merely cumulative, the court below must have believed that the defendants had not used due diligence in attempting to discover this evidence before the conclusion of the trial. Generally, newly-discovered evidence after defeat is looked upon with suspicion, and the appellate court is always reluctant to interfere with the ruling of the court below on a

motion for a new trial on this ground. There must be a clear abuse of discretion. We cannot say that there was such an abuse in this case. The defendants had reason to believe from the issue that the plaintiff would deny that the changes were made after execution. His opportunity, therefore, to make such changes without the knowledge of the defendants, and before it was recorded, was naturally a subject of inquiry. When and where were the changes made? The notary's book would show the time when the instrument was acknowledged, and the recorder's book would show the time of recording. Pavkovich occupied a part of the apartment rented by the defendant Yoakum at the time of the transaction, and stated that Barrett and Yoakum were present in his office most of that day. He was so close to the parties he heard them negotiating about the loan. The court below doubtless thought the defendants ought to have inquired before the conclusion of the trial as to what, if anything, Pavkovich knew about the transaction.

The court found that the sum of \$360 had been paid on account of interest on the note, and appellant claims that this amount should be credited on the principal of the loan, if the court should find, as we do find, that the clause with respect to payment of taxes on the mortgage prevents the plaintiff, under the provision of the constitution quoted above, from recovering interest. The defendants were not bound to pay to the plaintiff any interest on the note. The payment of \$360 was a voluntary payment. If it was made under a mistake of law, it cannot be recovered, nor can it be allowed as a credit other than as contemplated when the payment was made. Upon the finding of the court the case stands in this way: There is a clause in the mortgage for the payment by the mortgagors of the mortgage tax. This clause, being invalid under section 5 of article 13 of the constitution, supra, releases the mortgagors from any obligation to pay the interest stipulated in the note. The provision was inserted in the constitution for the benefit of the borrower, but it is a benefit which he may waive if he sees fit, and, if he voluntarily fulfills his promise to pay interest, it is through a mistake of law on his part, or a waiver of a known right. In either case he is bound by his own act. The respondent suggests that the decree should not be reversed, but simply modified, in case the court should hold that the plaintiff was not entitled to enforce the stipulation as to interest. In support of this contention it is stated that the appeal was not taken until after the sale, and that the land was sold under the decree for less than the principal of the note. But there is nothing in the record to substantiate these statements,—nothing about a sale. The findings show, however, that the amount allowed plaintiff by the decree should be reduced in the sum of \$883.63, that being the amount of interest

improperly allowed by the court below. The judgment, therefore, can be modified without a reversal. The cause is remanded to the court below, with instructions to modify the decree in accordance with this opinion.

We concur: HARRISON, J.; McFARLAND, J.

99 Cal. 623

BANEGAS et al. v. BRACKETT (No. 19,123.)

(Supreme Court of California. Oct. 7, 1893.)

VACATION OF JUDGMENT—WHEN ALLOWABLE.

Under Code Civil Proc. § 473, providing that the court may relieve a party from a judgment or order taken against him through his mistake, surprise, or excusable neglect, provided that application be made within a reasonable time, but in no case more than six months after the judgment or order, the court which rendered a judgment or order has no power on an ex parte motion to set it aside 13 months after its rendition.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by one Brackett against Manuel Banegas and J. W. Lucas. From an order setting aside a decree and allowing the filing of a supplemental complaint making Nieves Banegas a party defendant, and from an order refusing to vacate the same, said Manuel and Nieves Banegas appeal. Reversed.

Menzies C. Cleveland and J. B. Mannix, for appellants. Sprigg & Barber and Patterson & Sprigg, for respondent.

HARRISON, J. The respondent filed his complaint against Manuel Banegas, the appellant, and J. W. Lucas, for the foreclosure of a mortgage executed to him by said Manuel; and upon the default of Lucas and the answer of Banegas the cause was tried, and judgment rendered in favor of the respondent March 9, 1891. Upon this judgment an order of sale was issued March 14th, and the mortgaged premises sold to the plaintiff for the amount of the judgment April 6, 1891, and the order of sale and judgment returned satisfied. On the 13th of April, 1892, upon the ex parte application of the plaintiff in said action, respondent herein, the court made an order "that all subsequent proceedings herein after the service of summons and the return thereof upon defendants Manuel Banegas and J. W. Lucas be, and the same are, set aside, and said decree opened, without prejudice to the rights of the plaintiff in said decree of foreclosure, and that plaintiff be, and he is hereby, allowed to file an amended and supplemental complaint herein." Thereafter the plaintiff filed an amended complaint, making Nieves Banegas a party defendant, and a summons was issued thereon, and served upon Manuel and Nieves. These two defendants thereupon made a motion to set aside the aforesaid order and the summons issued therein, and to strike from the files the said amended complaint, upon

the grounds that the court had no jurisdiction to make the said order, and that the same had been made without any notice to the defendants, or either of them. The court denied the motion, and the said defendants have appealed from the original order, and also from the order refusing to vacate the same.

Section 473, Code Civil Proc., provides that the court may relieve a party "from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; provided that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken." Under the provisions of a statute in New York similar to this, it is held that a party in whose favor judgment has been rendered is entitled to relief the same as though the judgment had been rendered against him; that the statute is intended to be remedial, and should receive a liberal interpretation. *Montgomery v. Ellis*, 6 How. Pr. 326. See, also, Code Civil Proc. § 4; *Downing v. Still*, 43 Mo. 309. Under the common law a court could amend, modify, or vacate its judgment at any time during the term at which it was rendered; and this power could be exercised of its own motion, and without any notice to the party affected thereby. Having the absolute control over its judgment during the term, it was immaterial whether the party had notice or not. But by the adjournment of the term the court lost all control over its judgments, unless its jurisdiction was preserved by some motion or appropriate proceeding within the term upon which the hearing might be continued to a point after the adjournment of the term. The decision upon such motion had relation to the time within the term when the motion was made, and operated as an order made at that time. This rule was established in this state at a very early day, (*Baldwin v. Kramer*, 2 Cal. 582,) and was rigidly followed until changed by statute, (*Morrison v. Dapman*, 3 Cal. 255; *Lurvey v. Wells*, 4 Cal. 106; *Carpentier v. Hart*, 5 Cal. 406; *Shaw v. McGregor*, 8 Cal. 521; *Bell v. Thompson*, 19 Cal. 706; *Casement v. Ringgold*, 28 Cal. 335.) Under the provisions of section 68 of the practice act, (corresponding to section 473, Code Civil Proc.) as originally enacted in 1851, the court could relieve a party from a judgment taken against him only during the term at which it was rendered; but in 1853 the section was amended so as to authorize the court to relieve a party from a judgment taken against him to the extent of allowing him to answer to the merits of the original action at any time within six months after the rendition of the judgment, if he had not been personally served with the summons and a copy of the complaint. In 1866 (St. 1865-66, p. 843) the section was still further amended by providing that "when for any cause satisfactory to the court or the judge at cham-

bers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the court or the judge at chambers in vacation may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term." The section as thus amended was re-enacted in section 473, Code Civil Proc., upon the adoption of the Codes in 1872, and in 1874 the period of time within which such relief might be granted was extended to "not exceeding six months after the adjournment of the term." Upon the adoption of the present constitution, terms of court were abolished, and at the first session of the legislature thereafter section 473 was amended in its present form for the purpose of adapting it to the provisions of the constitution. The legislature does not attempt to define "a reasonable time," as that would depend upon the circumstances of each case, but by declaring that it shall in no case exceed six months after the judgment was taken it has precluded the court from exercising this power in any case, unless the application therefor shall be made within six months after the judgment was taken.

In the present case the plaintiff did not make his application to set aside the judgment until more than 13 months after its entry, and at that time the court was without authority to grant him the relief he asked. By section 1049, Code Civil Proc., the cause had then ceased to be pending in the court, and the court was without any jurisdiction to render any further judgment therein. It was said in *Carpentier v. Hart*, supra: "Upon the adjournment of the term the court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time, except in the single case provided by statute where the summons has not been served, in which the party is allowed six months to move to set the judgment aside. The reason for this rule is obvious. There must be some finality in legal proceedings, and a period beyond which they cannot extend. The safety and tranquility of parties require that their interest should not be constantly suspended, and their repose liable to be disturbed at any moment by the discretion of the court. * * * The court lost all jurisdiction in the matter. The case was effectually out of court, and could not be reinstated, except, perhaps, by the consent of parties." By the judgment as originally entered herein the obligation of the mortgagor to the plaintiff had become fixed at a certain amount, bearing interest at the rate of seven per cent. per annum. If, however, the court could at any time thereafter vacate this judgment after it had been satisfied, without any notice to the mortgagor, and re-establish the original obligation against him, bearing interest at the rate of 18 per cent. per annum, its judgment would not have been "a final determination of the rights of the par-

ties," and the parties to the action could never feel secure in any action of the court. For the reason that the law does not sanction such injustice, it has been wisely determined by the legislature that the court shall have no power upon a mere motion to vacate its judgment after the lapse of six months from its entry. The orders appealed from are reversed.

We concur: BEATTY, C. J.; PATERSON, J.

4 Cal. Unrep. 269

MOORE v. MOTT et al. (No. 19,158.)

(Supreme Court of California. Oct. 7, 1893.)

ATTACHMENT—ACTION ON BOND—JUDGMENT—PRESUMPTION.

In an action on a bond given to secure release of attached property, conditioned for liability in case judgment was rendered against defendant in attachment, a finding that a judgment was not rendered is not warranted where, in the record of the attachment suit subsequent to a judgment of nonsuit, appears a judgment for plaintiff therein, as to the legality of which there is no evidence, there being a presumption in its favor.

Department 1. Appeal from superior court, Los Angeles county; W. N. Clark, Judge.

Action by Alfred Moore against S. H. Mott and W. C. Furney. Judgment for defendants. Plaintiff appeals. Reversed.

S. B. Gordon, for appellant. John D. Bicknell, J. W. Swanwick, and A. W. Hutton, for respondents.

PER CURIAM. This action is upon an undertaking given to procure the release of property from an attachment. The writ was issued in an action brought by Alfred Moore, as plaintiff, against one Dorward. The undertaking is in the form prescribed by statute, and a copy is attached to the complaint. It recites the issuance and levy of the attachment, that the defendant had applied to the court for an order releasing and discharging the property from the operation of the attachment, and that the court had fixed the value of the property attached at \$1,200; and in consideration of the premises the sureties (defendants herein) undertook and promised that, in case the plaintiff recovered judgment, defendants would, on demand, redeliver the attached property to the sheriff, to be applied to the payment of the judgment, or, in default thereof, the sureties would pay, on demand, to the plaintiff, the sum of \$1,200. It is averred in the complaint that plaintiff, on the 8th of November, 1889, recovered a judgment against the said Dorward, in the said attachment suit, for \$831.63, and that due demand had been made on said defendants for payment. The defendants, appearing by their respective counsel, (1) deny that plaintiff did recover judgment in the attachment suit against Dorward; and (2) aver that, in said

attachment suit, Dorward recovered judgment against the plaintiff, wherein it was adjudged that the plaintiff take nothing by his said action, and that said Dorward recover his costs, which were therein taxed at \$27.50; and that on the 10th of July, 1889, said Alfred Moore paid said judgment in full; and that since such payment no action has been pending in favor of said Moore against said Dorward. And it is contended that, if such were the facts, the judgment upon which the plaintiff depends was absolutely void, and also that defendants were discharged from their obligation on said undertaking by said judgment and its payment. The case was tried without a jury, and among other facts the court found: "(3) That plaintiff did not, prior to July 10, 1889, nor on or about the 8th day of November, 1889, nor at any other time, recover any judgment in said action against said Dorward, or in any other action, as alleged in the complaint, or otherwise; nor was any such judgment in favor of the plaintiff, Moore, ever entered or docketed in the office of the clerk of Los Angeles county at any time."

Upon the motion for a new trial it is contended that this finding was not sustained by the evidence. The sufficiency of the specification is complained of principally, as it seems to me, because more is stated than was necessary. The finding includes but one fact, and the specification is that the finding is not sustained by the evidence. It then proceeds unnecessarily to state what the evidence did show in relation to that issue. Though not required, this did not vitiate the specification. From the transcript it appears that plaintiff put in evidence a judgment in the case of Moore v. Dorward, dated November 8, 1889, and docketed November 12, 1889. In this judgment it is recited that the cause "came regularly on for trial on the 8th day of November, 1889, M. Whaling, attorney, appearing for plaintiff; and a supplemental complaint having been filed and served upon defendant's attorney, and no answer or demurrer having been filed, and the time allowed by law for answering or demurring having expired, a default of the defendants for failing to answer or demur to plaintiff's supplemental complaint was duly entered. And plaintiff produced his proofs as to his amended complaint filed and answered, and it appearing therefrom that there is now due and unpaid plaintiff Alfred Moore from the defendant, W. W. Dorward, the sum of \$31.63," etc., judgment was thereupon entered against said Dorward for that sum, with costs. It is recited in the transcript, "which judgment was duly entered and docketed November 12, 1889, the record of which plaintiff then introduced in evidence." No judgment roll is found in the transcript. Plaintiff then proved execution issued on said judgment, which was returned unsatisfied, and then

rested. Defendants then introduced a judgment roll in the same action,—the attachment suit,—in which judgment it is recited that the "case came on regularly for trial on the 24th of May, 1889, Michael Whaling appearing for the plaintiff, and Reymert, Orfila & Reymert for defendant. * * * Whereupon witnesses on the part of plaintiff were duly sworn and examined, and documentary evidence introduced, and it appearing from the testimony of plaintiff himself that no cause of action existed at the time of the commencement of this action, whereupon the defendant, Dorward, moved the court for a judgment of nonsuit, * * * and after due deliberation thereof the court grants said motion, the plaintiff having failed upon said trial to prove a case for the court, and the court orders a judgment of nonsuit to be entered herein." Whereupon it was "ordered, adjudged, and decreed that said plaintiff is hereby nonsuited, and that plaintiff take nothing by said action," and costs were awarded to Dorward, amounting to \$27.50. Although it is recited that the judgment roll was introduced in evidence, none is found in the statement. Defendants also introduced an execution on said judgment, and the return of the sheriff showing that it had been levied on the real property of Moore, June 12, 1889, and was paid in full by Moore, July 10, 1889. They also proved that Dorward left the state soon after May, and before August, 1889, and has never returned. Defendants then rested, and, in rebuttal, plaintiff proved that in the attachment suit he gave notice of a motion for a new trial, served on Reymert, Orfila & Reymert, as Dorward's attorneys, June 1, 1889, and which was filed on the same day; that a statement on a motion for a new trial in the same case was served June 13th, and was settled and certified as correct on the 26th of June, of the same year; and that, on the 19th of September, 1889, a stipulation was filed, entitled in said cause, signed by Reymert, Orfila & Reymert, as attorneys for Dorward, "that plaintiff may have granted his motion for a new trial." Plaintiff failed to prove that an order granting a new trial was made otherwise than by the second judgment, which he contends conclusively shows that the first judgment was vacated in some lawful mode. In the absence of any bill of exceptions, or other showing to impeach the action of the court, the fact that a second judgment is found in the judgment roll, or upon the records of the court, presumes that it is rightly there, and in any proceeding in which such judgment is collaterally presented it must be assumed as a valid act of the court. *Paige v. Roeding*, 96 Cal. 388, 31 Pac. Rep. 264; *Water Co. v. Swartz*, (Cal.) 33 Pac. Rep. 878. It follows, therefore, that the third finding is not sustained by the evidence, and for this reason the court should have granted a new trial. The order is reversed.

right to place his buildings in the street, and has no right as owner in anything in transit over the street.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by N. W. Stowell against W. J. Waddingham and others for an injunction. An injunction was granted, and defendants appeal. Reversed.

Harris & Gregg, for appellants. William Gird, for respondent.

TEMPLE, C. This case resembles *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. Rep. 750. In fact, the building contract is the same in both cases. Clubine contracted with the defendant Newman to build certain houses, six upon land he had contracted to purchase from Miller, and six on the land purchased from plaintiff. The buildings were alike, and all were building at the same time. Clubine had a contract with plaintiff to purchase from plaintiff about 20 acres of land in the town of Ontario. He was not given possession under the contract, except that he was authorized to divide the land into blocks and lots. He might sell lots at not less than a fixed price, and plaintiff would make the deeds and receive the purchase money. The contract price for the land was \$18,500, and the plaintiff testified that he had received of this about \$5,000. Clubine failed to make the payments agreed upon, and asked for an extension of time, and promised to have some buildings erected upon the land, and thereupon the time was extended. The contract price for the buildings to be erected by Newman upon the land purchased from Stowell was \$4,100, payable in weekly installments. Newman furnished all materials, and did all the work. After the houses had all been commenced, and were from one-eighth to one-fourth completed, Clubine failed to make payments, and informed Newman that he could make no more. Seven hundred dollars only had been paid. It was then agreed between Clubine and Newman that Newman should finish the buildings, and that he should own them unless they were paid for. Under this arrangement the houses were all completed by Newman. Plaintiff testified that he knew nothing of this arrangement between Newman and Clubine; that he did not object to the construction of the houses, but was anxious to have them built. It does not appear that Newman was aware of the understanding between Clubine and the plaintiff. The houses rested upon mudsills placed upon the surface of the ground, and plaintiff testified that upon their removal the land was left substantially as it was before their erection. Newman, after the completion of his contract, filed a claim for a mechanic's and material man's lien upon the houses, but afterwards, as they were not paid for, sold them to the defendant Waddingham, who commenced their removal on Saturday night,

100 Cal. 7

STOWELL v. WADDINGHAM et al. (No. 19,166.)

(Supreme Court of California. Oct. 10, 1893.)

INJUNCTION—MORTGAGES—WASTE—HIGHWAYS.

1. The owner of houses, after they have been removed from his land onto a public street, cannot maintain a suit to enjoin their removal, as he has an adequate remedy at law.

2. Where houses on mortgaged land have been removed therefrom, they are personalty, however they may have been removed, and are no longer under the operation of the mortgage lien, and the mortgagee cannot therefore maintain a suit to enjoin their further removal.

3. The fact that they have been removed into a public street on which the land abuts, and not beyond the center line thereof, does not render their location still on the land, on the ground that the owner of land abutting on a street owns the land over which the street runs to the center line thereof, as he has no

and worked with a body of men all night and all day Sunday. Plaintiff appeared upon the ground while the work of removal was going on, and forbade it, and on the following Monday commenced this action enjoining the work. At that time all the houses had been removed from the premises into the streets, where they still are, except one, which was taken away. The finding upon the subject is as follows: "(12) That all of said houses in said paragraph mentioned and described were at the time this action was brought, and still are, in the public streets and highways of Ontario, in said county of San Bernardino, resting upon blocking, rollers, and moving appliances, which were placed under said buildings by said Waddingham for the purpose of removing said lumber, but upon land the title to which is in N. W. Stowell. Said houses were all so removed into said streets and highways by defendant Waddingham, but not beyond the center lines of any of said highways bordering said premises described in plaintiff's amended complaint."

The complaint avers, and it is found, that, deprived of the buildings, the land constitutes insufficient security for the money still due plaintiff upon his contract for the sale of the land. If it be admitted that, under the circumstances, plaintiff was the legal owner of the houses, he had an adequate remedy at law; but, whether owner or mortgagee, this action to stay waste cannot be maintained. It was commenced too late; the waste had already been committed. He had no right to stop the buildings in the public highway. *Buckout v. Swift*, 27 Cal. 433. In that case the plaintiff was mortgagee, and the house was a part of the land when the mortgage was executed. The premises were in Sacramento, and the house was moved by the great flood of 1862 into the street, a short distance from the lot. There it was purchased by Lowell with a full notice of plaintiff's mortgage. The court said: "So far as legal effect is concerned, it matters not whether the severance is by act of God or the act of man. The severance *proprio vigore* changed the character of the property from real to personal, irrespective of the means by which it was accomplished." It was also said that, by the removal of the house from the premises, "the house was effectually removed from the operation of the mortgage lien." Plaintiff's counsel claims that Stowell's position is that of a mortgagee. In such case his lien was effectually destroyed by the removal of the houses. But, whether he was owner or mortgagee, this suit cannot be maintained.

Respondent's counsel does not appear to dispute this general proposition, but he contends that, inasmuch as plaintiff is the owner of the land over which the street runs to the center line of it,—as to that boundary the mortgaged premises extend,—the houses, though severed from the land, are still on

the premises, and subject to his lien. Conceding, for the purposes of the case, that a suit could be maintained although the fixtures had been severed from the land, put upon rollers and wheels, and were being moved off from the premises, but were not yet entirely off, such a case is not made by the facts. The owner of land, over which a public highway has been established, has no right to place his buildings there in such a way as to obstruct the highway, nor has he any right, as such owner, in anything in transit over the highway. He cannot interfere with persons using the street simply because he owns the land subject to the public easement. Property being carried over the street is no more on his premises there than it would be miles away. I think the order appealed from should be reversed, and the cause remanded.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded.

4 Cal. Unrep. 222

SECURITY SAV. BANK & TRUST CO. v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al. (No. 14,885.) MAIN STREET SAV. BANK & TRUST CO. v. SAME. (No. 14,886.) LOS ANGELES SAV. BANK v. SAME. (No. 14,887.)

(Supreme Court of California. Aug. 31, 1893.)

TAXATION—EQUALIZATION—NOTICE—WRIT OF REVIEW.

1. An order of the board of equalization finding that a bank has omitted property from the list of its taxable property, and should be assessed thereon, and directing the assessor to add such property to its assessment, is not an attempt by the board to add property to the list, and exercise assessorial powers, but is a direction that the assessor make such addition, though the order specifies the value of the property to be added, and is authorized by Pol. Code, § 3681, requiring the assessor, at the request of the board, to list and assess property which he has failed to assess.

2. Pol. Code, § 3681, under which the assessor is required, at the request of the board of equalization, to list and assess property which he has failed to assess, which section the city charter of Los Angeles makes applicable to the common council, sitting as a board of equalization, does not conflict with the constitutional provisions which define the powers and duties of state and county boards of equalization, and which do not give the power to cause property to be added to the assessment list, since it merely extends the power and duty of the assessor.

3. A notice to a bank to appear before the board of equalization, and show cause why its "assessment on solvent credits should not be increased from \$2,774 to \$275,000," sufficiently informs it that it is proposed to add property to the assessment.

4. A person appearing before the board of equalization in response to a notice, and submitting to the action of the board, waives any defect in the notice.

5. A finding by the board of equalization that a person has omitted taxable property from his list to a certain amount is conclusive

on the courts on writ of review, since Code Civil Proc. § 1074, provides that the review on such writ cannot be extended further than to determine whether the inferior tribunal or board has regularly pursued its authority.

6. Even if the fact that property has been so omitted is necessary to give the board jurisdiction, the court cannot review the evidence to determine whether there was evidence to show such fact, since the fact is one to be determined by the board.

Farmers' & Merchants' Bank v. Board of Equalization, 32 Pac. Rep. 312, 97 Cal. 318, followed.

In bank. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Petitions by the Security Savings Bank & Trust Company, Main Street Savings Bank & Trust Company, and Los Angeles Savings Bank for a writ to review an order of the board of supervisors of Los Angeles county, sitting as a board of equalization, directing property to be added to the assessments of petitioners. From a judgment annulling the order the board appeals. Reversed.

James McLachlan, Waldo M. York, and B. M. Marble, for appellant. Graves, O'Melveny & Shankland, for respondents.

PER CURIAM. In *Farmers' & Merchants' Bank v. Board of Equalization*, 97 Cal. 318, 32 Pac. Rep. 312, most of the questions involved in this appeal were determined adversely to the respondent. The additional point now presented, that the legislature could not confer upon the state board of equalization authority to extend the time within which the county board of equalization could act, must also, under the principles declared in that case, be determined against the respondent; and, upon the authority of that case, the judgment is reversed.

99 Cal. 631

DE CAMP LUMBER CO. v. TOLHURST et ux., (WOODWORTH COMMERCIAL CO., Intervener.) (No. 19,182.)

(Supreme Court of California. Oct. 7, 1893.)

MECHANICS' LIENS—ATTORNEYS' FEES.

Code Civil Proc. § 1184, relating to mechanics' liens, requires that "25 per cent. of the whole contract price shall be made payable at least 35 days after the final completion of the contract. Sections 1193, 1195, authorize a claimant, on establishing his lien, to recover costs and an attorney's fee. *Held*, in an action by a material man to enforce his claim against the 25 per cent. of the contract price retained by the owner, that the costs and attorney's fee are chargeable against the premises where the sum so retained was not sufficient to satisfy the claim, and the contractor suffered a default, while the owner contested the claim.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by the De Camp Lumber Company against Shelley H. Tolhurst and wife and John A. McCarty to enforce a lien for materials furnished to defendant McCarty to be used in the construction of a house

which McCarty was building for defendant Tolhurst. The Woodworth Commercial Company intervened for the purpose of enforcing its lien for materials furnished. There was a judgment in favor of the lien claimants, and defendants Tolhurst and wife appeal. Affirmed.

S. P. Mulford, for appellants. Chas. Casat Davis, for respondent.

BELCHER, C. In September, 1891, John A. McCarty entered into a written contract with Shelley H. Tolhurst, appellant, to furnish the materials and construct for him on a lot in the city of Los Angeles a dwelling house with fences and other structures, for the sum of \$2,275. The contract was duly recorded, and by its terms 25 per cent. of the whole contract price was made payable 35 days after its final completion. The De Camp Lumber Company, respondent, under contract with McCarty, furnished materials which were used in the construction of the building, of the value of \$1,023.54, of which sum \$532.14 was still due and unpaid at the time of the commencement and trial of this action. The Woodworth Commercial Company, respondent, under contract with McCarty, also furnished materials which were used in the construction of the building, of the value of \$69.48, no part of which sum had been paid. The building, fences, and other structures were completed on December 5, 1891, and on January 2, 1892, each of the respondent companies filed in the office of the county recorder of Los Angeles county its claim of lien for the materials furnished, in proper form, and duly verified. The De Camp Lumber Company commenced this action against the appellants and McCarty, the contractor, to foreclose its lien. The Woodworth Commercial Company intervened, and filed a complaint for the foreclosure of its lien. McCarty failed to appear, and allowed his default to be entered. The appellants answered both complaints, and denied all their material averments. The case was tried, and the court found upon all the issues in favor of the respondents; and, among other things, that 25 per cent. of the contract price—that is, \$568.75—still remained in the hands of appellants, and that \$75 was a reasonable attorney's fee to be allowed to each of the respondents. And as conclusions of law it found that each respondent was entitled to judgment against McCarty for the amount of its claim, with interest thereon from December 5, 1891, to the date of the judgment, and for costs of suit, including \$75 for attorney's fee, the two claims aggregating, for principal and interest, \$629.25; and also that respondents were entitled to a decree against appellants for the sale of the said house and lot, and the application of \$568.75 of the proceeds thereof to the payment of the

said judgments in proportion to their respective amounts, and for the application of so much of the balance of such proceeds as might be necessary to pay the said costs and attorney's fee. Judgments and decree were accordingly so entered, and the appeal is from that part of the decree directing the payment of the costs and attorney's fee out of the proceeds of the sale. The costs and attorney's fee amounted in the aggregate to \$206.35, and whether or not the appellants could rightly be subjected to the payment of that sum, or any part thereof, is the only question presented for decision.

It is urged on behalf of the appellants that they were not personally liable for the debts of the contractor to any lienholder for materials or labor furnished, and that, if they had paid the demands of respondents before the final determination of the action, they would have done so at their peril, and would have imposed upon themselves the burden of proving that the demands paid were valid debts of the contractor, and secured by valid liens on their property; and that, failing to do this, they would have had no recourse against the contractor for indemnity; and hence it is insisted that the 25 per cent. of the contract price, \$568.75, which still remained in their hands, was the extent and limit of their liability. Section 1193 of the Code of Civil Procedure provides that the contractor can recover on a lien filed by him only such amount as is due to him according to the terms of his contract; that he shall defend any action brought to enforce a lien for work done or materials furnished by a subcontractor at his own expense, and that during the pendency of such action the owner may withhold the amount of money for which the lien is filed; that in case of judgment against the owner or his property upon the lien the amount of such judgment and costs may be deducted by the owner from the amount due or to become due by him to the contractor, "and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally liable." And section 1195 of the same Code provides: "The court must also allow as part of the costs the money paid for filing and recording the lien, and reasonable attorneys' fees in the superior and supreme courts, such costs and attorneys' fees to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant." These sections clearly recognize the rights of the successful lien claimant to recover his costs and a reasonable attorney's fee, and the

only question is, can the payment of such costs and fee be enforced against the owner under circumstances such as are shown here? Section 1184, Code Civil Proc., requires that "at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract." This provision was evidently inserted for the protection of subcontractors, material men, and laborers, thus giving them, if unpaid, ample time after the work is completed to file their claims of lien and secure payment of any sums of money due them. After the completion of the contract the owner holds the reserved money for payment to the contractor or lien claimant, as the one or the other may prove to be entitled to it. If there be a contest between them in regard to the money, it is a matter for them to settle between themselves, and at their own expense, and with which the owner has no concern. In such a case the owner may and should deposit the money in court, and let the contestants then have their rights determined. In this case there was no contest between the contractor and respondents. By permitting his default to be entered, the contractor, in effect, admitted that respondents were entitled to the money. The appellants, however, retained the money, and apparently without cause or right raised a contest on every point, and fought the case through to the end. By so doing they delayed the respondents in recovering money to which they were justly entitled, and put them to unnecessary expense. Under such circumstances, we think the respondents' costs and attorney's fee were properly allowed and made payable out of the proceeds of the property ordered to be sold. The decree should therefore be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the decree is affirmed.

99 Cal. 628

SMITH v. LOS ANGELES COUNTY. (No. 19,153.)

(Supreme Court of California. Oct. 7, 1893.)

COUNTY SUPERVISORS—CONTRACTS.

Act March 14, 1883, (County Government Act,) authorizes the county board of supervisors to issue bonds, and provides that the bonds shall be delivered to the county treasurer, by whom they shall be sold to the highest bidder. Section 25 further authorizes the board to do "all other acts and things * * * which may be necessary to the full discharge of the duties of the legislative authority of the county government." *Held*, that the board did not have authority, under section 25, to employ an agent to procure bids to be made for such bonds.

Department 2. Appeal from superior court, Los Angeles county.

Action by Aaron Smith against the county of Los Angeles to recover for services performed under a contract with the county board. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Houghton, Silent & Campbell, for appellant. James McLachlan, B. M. Marble, and Waldo M. York, for respondent.

PER CURIAM. The complaint in this action substantially alleges that the board of supervisors of Los Angeles county, after a favorable election had for that purpose, duly authorized the issuance of 300 bonds, in denominations of \$1,000 each, bearing interest at the rate of 5 per cent. per annum, for the erection of a county courthouse; that said bonds were duly executed and delivered to the county treasurer for sale, and that he, in pursuance of law, thereafter advertised for and invited bids for said bonds; that no bona fide bid had been made for any of the bonds, and that no sale thereof was or could be made until a bid for 110 of said bonds was procured and caused to be made by plaintiff, in pursuance of his employment by the board of supervisors to procure a bid to be made for said bonds, or a part thereof, by some bidder who would offer and bid therefor a price which said treasurer and said board were authorized by law to accept; that said bid so procured by the plaintiff for 110 of said bonds was accepted, and said bonds so bid for were by said treasurer sold at 5 per cent. premium and accrued interest, to said bidder so procured as aforesaid by plaintiff, and the purchase price thereof paid into the treasury of said county; that said board, acting for said county, agreed to pay plaintiff for such services what they were reasonably worth, and the value of the services so rendered was and is reasonably worth the sum of \$3,300; that, within one year after he performed said services, plaintiff duly presented to said board his itemized claim, duly verified, for said services, which claim, and every part thereof, said board refused to allow, and wholly rejected the same. The complaint was demurred to, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, and, upon plaintiff refusing to amend, judgment was given for defendant, and plaintiff appeals.

The question to be determined on this appeal involves the power of the board of supervisors to make the contract of employment upon which this action is founded. Section 25 of the act of March 14, 1883, commonly known as the "County Government Act," under which it is claimed such power was conferred, provides that "the board of supervisors in their respective counties have jurisdiction and power, under such limitations and restrictions as are prescribed by law," to create a bonded indebtedness, and to issue bonds of the county, as provided by

section 37 of said act; and subdivision 14 of section 25 provides that, "whenever bonds issued under this chapter shall be duly executed, * * * they shall be delivered to the county treasurer, and his receipt taken therefor, and he shall stand charged on his official bond with all bonds delivered to him and the proceeds thereof, and he shall sell the same, or exchange them under the direction of the board of supervisors. * * * He shall also keep a record of bonds sold or exchanged by him, * * * and shall also report, under oath to the board, at each regular session, a statement of all bonds sold or exchanged by him since the preceding report, and the date of such sale or exchange, * * * and the amount of accrued interest received by him on such sale or exchange, * * * but such bonds shall not be sold or exchanged for any indebtedness of the county, except by the approval of the board of supervisors of said county. No sale shall be made of any such bond except to the highest bidder, after advertising bids for the purchase of the same" in the manner prescribed. And subdivision 35 of the same section empowers the board "to do and perform all other acts and things required by law not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government." Section 6 of the same act provides that "all contracts, authorizations, allowances, payments and liabilities to pay, made or attempted to be made in violation of this act, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county. * * *" And section 36 thereof provides that "the board must not for any purpose contract debts or liabilities except in pursuance of law." It is clear that these provisions of the statute confer no express power upon the board of supervisors to make such a contract as the one sought to be recovered on in this action; and unless it can be implied from subdivision 35, referred to, then it follows that no such power exists, and the contract sued on is therefore void, because not made in pursuance of law. As the act of March 14, 1883, distinctly enumerates the acts which the board is required to perform with reference to the issuance and disposal of county bonds; and, as the employment of a procurer of bids for bonds delivered to the treasurer for sale or exchange under the law was not in any way necessary to the full discharge of the legislative authority of the county government, no such implied authority to make such a contract was conferred upon the board as contended for. The board of supervisors cannot sell or negotiate the sale of its county bonds. That power is expressly conferred by statute on the county treasurer, and is to be exercised by him under the direction of the board, and the sale or exchange of bonds by him is made subject to the approval of the board; in other words, the bid for

the bonds is solicited and obtained upon the advertisement by the treasurer for such bid, and the law recognizes no other mode of procurement. The treasurer alone procures the bid, the mode and manner of such procurement being specifically pointed out by statute. The making of the contract in question by the board of supervisors was an unwarranted, if not a pragmatical, interference with the power and duties of the county treasurer, as expressly conferred and defined by law. It therefore follows that the employment of the plaintiff by the board of supervisors of Los Angeles county to procure a bid or bids for county bonds, delivered to the treasurer for sale or exchange, as alleged, was a void act; and the acts of plaintiff in pursuance of such employment, however beneficial they may have been to the defendant, created no liability against it. Let the judgment be affirmed.

(4 Cal. Unrep. 272)

SAN GABRIEL VALLEY LAND & WATER CO. v. DENNIS. (No. 19,148.)

(Supreme Court of California. Oct. 9, 1893.)

CORPORATIONS—RECOVERY OF STOCK ASSESSMENTS.

1. In an action to recover an assessment on corporate stock, evidence that the assessment was made on the same day that defendant purchased the stock is sufficient to show that it was made while defendant was the owner of the stock, as it will not be presumed that the assessment was made a fraction of a day before the purchase.

2. A resolution by the board of directors "that the president and secretary are hereby ordered to commence suit for the collection of assessment" on stock sufficiently shows a waiver of further proceedings under the chapter for the collection of delinquent assessments.

Department 1. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by the San Gabriel Valley Land & Water Company against L. W. Dennis to collect an assessment on stock. There was a judgment in favor of defendant, and plaintiff appeals. Reversed.

A. H. Judson and M. C. Hester, for appellant. Wells, Monroe & Lee, for respondent.

PATERSON, J. This is an action to recover from respondent, who was a stockholder of the plaintiff corporation, the unpaid balance of an assessment upon 1,883 shares of its capital stock. The court below found that the respondent was not, at the time the assessment was levied, the owner of the stock, and that the board of directors had not, before the commencement of this action, elected to waive further statutory proceedings to collect the assessments. It was alleged in the complaint that the defendant was at all times mentioned therein the owner and holder of 1,883 shares of the

Cal. Rep. 32-34 P.—52

capital stock of plaintiff, for which he had subscribed and agreed to pay. The answer simply denied that the defendant "ever was at any time owner or holder of 1,883 shares of the subscribed capital stock of said corporation." This denial in effect admitted that he was the owner and holder of 1,882 shares of the stock. But it is claimed by respondent that the plaintiff, having introduced evidence to prove that Dennis was a stockholder, treated the denial as sufficient, and cannot now be heard to question its sufficiency. But, in order to prove that the defendant was the owner of more than 1,882 shares, to wit, 1,883 shares, the plaintiff was compelled to offer the evidence which he introduced, and the authorities cited by respondent do not apply. But, however this may be, the evidence showed that the defendant was the owner of the stock. It showed that the assessment was made on the day the certificate of stock was issued. It is true it was not shown by the plaintiff that the purchase of the stock preceded the assessment, but no presumption can be indulged that the assessment was made a fraction of a day prior to the purchase by the defendant of the stock, especially in view of the fact that it was shown that the defendant had paid a portion of the assessment, and requested further time to pay the balance.

The court's second conclusion of law is equally untenable. It is based upon the alleged insufficiency of the resolution of the board to show a waiver of further proceedings under the chapter for the collection of delinquent assessments. It is found that all of the proceedings of the board with respect to the assessment were regular and valid, but it is claimed that no action can be maintained under section 349, Civil Code, unless the board in its resolution expressly declared its intention to waive further proceedings. The resolution referred to, and which was passed on the day fixed for the sale of the delinquent stock, reads as follows: "Resolved, that the president and secretary are hereby ordered to commence suit immediately to enforce the collection of assessment No. 5 on the following delinquent stock in the San Gabriel Valley Land & Water Company." Here follows a description of the stock and name of owner. This resolution, we think, is a sufficient indication of the intention of the corporation to waive further proceedings under the chapter for the collection of delinquent assessments, and to proceed only thereafter by action. The court erred in granting the nonsuit, and the motion for a new trial ought to have been granted. Judgment and order reversed, and cause remanded for a new trial.

We concur: **HARRISON, J.; McFARLAND, J.**

(99 Cal. 649)

BEDAN v. TURNEY. (No. 19,159.)

(Supreme Court of California. Oct. 9, 1893.)

APPEAL—BILL OF EXCEPTIONS—CRIMINAL CONVERSATION—WHEN ACTION LIES.

1. Under Code Civil Proc. § 950, providing that any statement used on motion for new trial, or any bill of exceptions settled, may be used on appeal from a final judgment, the fact that a bill of exceptions on appeal is entitled a bill of exceptions on motion for new trial is immaterial.

2. Under Code Civil Proc. § 650, providing that the judge in settling a bill of exceptions shall strike out all superfluous matter, it will be presumed that all matter relevant to rulings complained of has been inserted in the bill.

3. In order to sustain an action for criminal conversation it is not necessary that the intercourse should have been accomplished by force.

4. It is immaterial, in such an action, if the defendant had had criminal intercourse with plaintiff's wife, whether plaintiff was impotent, or whether the child borne by her was begotten by defendant or her husband.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Martin Bedan against Elbert Turney for criminal conversation. Judgment for defendant. Plaintiff appeals. Reversed.

Louis Luckel, for appellant. Henry T. Gage, for respondent.

HARRISON, J. Action of crim. con. Judgment was rendered in favor of the defendant, and the plaintiff has appealed, assigning certain errors of the court in its instructions to the jury. The respondent makes a preliminary objection to the consideration of these errors upon the ground that the appeal is taken from the judgment alone, whereas the rulings are only found in a "bill of exceptions on motion for a new trial." Section 950, Code Civil Proc., however, provides that "on an appeal from a final judgment the appellant must furnish the court with a copy of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for a new trial, or any bill of exceptions settled, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial." The fact that the bill of exceptions in the present case is entitled a bill of exceptions on motion for a new trial, is immaterial.

It is also urged by the respondent that, inasmuch as the bill of exceptions does not purport to contain all the evidence before the court below, the instructions given by the court cannot be regarded as prejudicial, unless they were erroneous in every conceivable view, and that for the purpose of sustaining the judgment in the present case it may be assumed that there was evidence to the effect that plaintiff connived at the criminal conversation of the defendant with his wife. The purpose of a bill of exceptions is to preserve a record of the rulings or deci-

sions of the court, and by section 650, Code Civil Proc., the party desiring to have his exceptions settled is to prepare a draft of a bill, which shall contain all the exceptions upon which he relies, and to this draft the opposite party may propose amendments. The bill does not become effective until it is settled by the judge, and by the same section he is directed "to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible." If in such proposed draft there is inserted a ruling of the court deemed by the party preparing the same to be erroneous, it is the duty of the opposite party to present in his amendments any matters which would obviate the apparent error; and it must be assumed that the judge, in settling the bill, has caused to be inserted therein all matter which is relevant to his ruling, or will explain the same. *Hyde v. Boyle*, 89 Cal. 590, 26 Pac. Rep. 1092. This bill of exceptions forms a part of the judgment roll and of the court's record of its own acts, and for the purpose of determining whether this record contains any error only the record itself can be examined. When an appeal from a judgment is heard upon the judgment roll alone, nothing can be assumed or considered that does not appear upon the face of that roll. If that discloses error, we can no more assume that it was cured by some matter which does not appear therein than we can consider matters outside of the roll for the purpose of impeaching the correctness of the judgment. In each case the record must be judged by itself alone.

The plaintiff requested the court to give to the jury the following instruction: "The jury are instructed that if they believe from the evidence that the defendant debauched Franzisca Bedan, the wife of plaintiff, and had carnal intercourse with her without the consent of the plaintiff, then they are to determine the amount of damages done the plaintiff, not exceeding the sum asked for." The court refused to give this instruction, but at the request of the defendant instructed the jury as follows: "The court instructs you that, in order for plaintiff to recover in this case, it is necessary for plaintiff to establish by a preponderance of evidence that the defendant had intercourse with the witness Franzisca Bedan by means of violence, or against her will, or without her consent. The mere fact of intercourse with her would not be sufficient to entitle the plaintiff to recover; and there is no evidence in this case, as far as the use of artifice or persuasion or anything of that kind is concerned, in the way of seduction. And that the degree of violence necessary to entitle plaintiff to recover is such as would overcome her resistance." The court appears to have proceeded upon the theory that in an action of this character the plaintiff cannot recover, unless it is shown that the sexual intercourse between the defendant and the

wife was accomplished by means of force. In this the court was in error. The foundation of the husband's right of action is the wrong done him by the defendant in violating his personal rights. The husband has the right to the conjugal fellowship of his wife, to her society, her aid, and her fidelity in every conjugal relation. Any act of another by which he is deprived of this right constitutes a personal wrong, for which the law gives him a redress in damages. Her sexual intercourse with another is an invasion of his rights, and it is immaterial whether this invasion is accomplished by force or by the consent of the wife. As the right belongs to the husband, it is no defense to his action for redress that its violation was by the consent or procurement of the wife, for she is not competent to give such consent; and it is not necessary that the husband should show that it was by force or against her will. The original form of this action was trespass *vi et armis*, (3 Bl. Comm. 139,) even though the act was with the consent of the wife, for the reason, as was said by Holt, C. J., in *Rigaut v. Gallisard*, 7 Mod. 78, that "the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her;" but under this form of action it was not necessary to make any proof of force, as that was implied by the law. 1 Chit. Pl. 140. Although seduction is ordinarily the means by which the adulterous intercourse is brought about, yet the action may be maintained without making proof of the seduction. The wrong to the husband consists in the carnal intercourse with his wife by another, and it is immaterial whether this intercourse is accomplished by persuasion or by force. *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. Rep. 654. His right of action is established upon proof of the intercourse, and the means by which this intercourse was effected are but incidents to increase or mitigate his damages. The rule is well formulated by Bishop in his treatise on Marriage, Divorce and Separation, (volume 1, § 1366,) viz.: "One's sexual intercourse with another's wife is a civil wrong to the husband, except where some special circumstance renders it otherwise; and it is more or less aggravated, bringing with it heavier or lighter penalties, according as it is attended by seduction or rape, or other enormity on the one hand, or by the wife's unsolicited willingness or other mitigating fact on the other." "The essential injury to the husband consists in the defilement of the marriage bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the consortium with his wife, of comfort

in her society in that respect in which his right is peculiar and exclusive." *Bigaouette v. Paulet*, 134 Mass. 123. The respondent seeks to uphold these rulings of the court upon the ground that there was no evidence before the jury except such as tended to show that the sexual intercourse between the defendant and the plaintiff's wife was effected by force on the part of the defendant, and was without her consent. It is not necessary here to reproduce the testimony upon this point. It is sufficient to say that, even upon this theory, the jury should have been permitted to determine from the evidence whether the facts sustained the theory. The evidence was not of such a character as would sustain a charge of rape, and the jury should have been allowed to find whether her objections to the intercourse were real or pretended,—whether she manifested a virtuous indignation at the proposal of the defendant, or merely showed a coy resistance, which induced him to continue his advances; for, as was said by Lord Holt in *Rigaut v. Gallisard*, supra: "If a man solicit a woman, and go gently to work with her at first, and when he finds that will not do he proceeds to force, it is all one continued act, beginning with insinuation and ending with force." For this purpose the language in which she described his solicitation and her yielding, the place and manner in which it was accomplished, their relative strength and appearance, her silence to her husband for many months thereafter, and her subsequent interviews with the defendant, were matters to be passed upon by a jury, and should not have been assumed by the court as facts established in the case.

The court also instructed the jury at the request of the defendant as follows: "You are instructed that if you find from the evidence that Martin Bedan, the plaintiff, was not impotent at the time the child born of Franzisca Bedan, about September 14, 1891, was begotten, and if you further find that the defendant, Elbert Turney did not on or about December 15, 1890, by force and violence, or against her will, have carnal intercourse with Franzisca Bedan, wife of plaintiff, you will then find for the defendant." The plaintiff's right of action did not depend upon his impotence or capacity, and if the defendant had had carnal intercourse with the wife, either with or without her consent, it was immaterial for the purposes of this action whether there had been any matrimonial intercourse between the plaintiff and his wife, or whether the child that was born from her was begotten by him or by the defendant. The judgment is reversed, and a new trial ordered.

We concur: PATERSON, J.; McFARLAND, J.

99 Cal. 655

BANK OF SAN LUIS OBISPO v. WICKERSHAM et al. (No. 19,181.)

(Supreme Court of California. Oct. 9, 1893.)

EQUITY — RESCISSION OF CONTRACTS — CORPORATIONS—STOCK—LIMITATION OF ACTIONS—PLEADING.

1. In an action by a corporation against a former stockholder to recover money paid him by its president for his stock on an ultra vires purchase thereof for plaintiff, the complaint does not state a cause of action if it fails to show that plaintiff has returned or offered to return the stock.

2. Plaintiff is not excused from such tender on the ground that its purchase of its own stock extinguished it, since the stock was not actually extinguished, the only effect of the purchase being to lessen the amount of subscribed capital stock, leaving plaintiff free to issue the same number of shares to new subscribers, and therefore it could have issued a new certificate to defendant.

3. Conceding that a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, because it appears on the face thereof that the action is barred by the statute of limitations, is a sufficient plea of the statute, yet, where the demurrer specifies a particular section of the statute as relied upon, that section only is pleaded.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the Bank of San Luis Obispo against one Wickersham and others. From a judgment for defendants on demurrer, plaintiff appeals. Affirmed.

James L. Crittenden and Graves & Graves, for appellant. Wilcoxon & Bouldin and Lippitt & Lippitt, for respondents.

DE HAVEN, J. The plaintiff is a banking corporation, and in its complaint alleges that on September 10, 1876, it was financially embarrassed, and unable to meet its liabilities without borrowing large sums of money, and that the defendant Wickersham was then the owner of 400 shares of its stock, each share being of the par value of \$100, but the actual value of which did not exceed \$75 per share, and that the plaintiff was then offering the unsold shares of its capital stock for \$80 per share, but was unable to find subscribers therefor. It is further alleged that the defendant Wickersham and his codefendants entered into a conspiracy to transfer to the defendant Wickersham \$40,000 of the money and assets of plaintiff, through and by means of a sale of said 400 shares of its own stock then owned by him; and that, for the purpose of concealing from plaintiff the fact that he was the real vendor of the stock, it was further agreed between defendants that the sale should appear to be made by the defendants Steele and Harford, as the owners of such stock; and that, in pursuance of such conspiracy, the defendant Phillips, then president of plaintiff, and acting in its behalf, purchased said stock from defendants Steele and Harford for the sum of \$40,000, and on

September 10, 1876, paid such agreed price therefor out of the moneys belonging to plaintiff, and caused the transaction to be entered in the books of plaintiff as a purchase of said stock by plaintiff from defendants Steele and Harford. It is also alleged that Steele and Harford paid over to Wickersham the money thus received by them. It is also averred in the complaint that defendant Wickersham induced and coerced the defendant Phillips to enter into the agreement for the purchase of said 400 shares of stock by threatening to institute proceedings against him charging him with the embezzlement of moneys belonging to plaintiff while he was such president. The complaint then proceeds to state that Phillips ceased to be president of the plaintiff corporation on October 10, 1876, one month after the transaction complained of in this action; and that he kept in his private custody certain letters written to him by defendant Wickersham in relation to the sale of said stock until on or about March 15, 1891, when he delivered the same to J. L. Crittenden, president of plaintiff, upon being requested by the latter to search for and ascertain whether he still had any letters in his possession written to him while he was president, and in relation to the business of plaintiff, and said Phillips at the same time disclosed to said Crittenden the facts in relation to Wickersham's connection with the sale of said stock, and the threats made by said Wickersham which induced him to agree to the purchase; and in this connection the complaint further states that the facts constituting the fraud in the sale of such stock as set forth in the complaint "were then and thereby first ascertained and discovered by said corporation and its stockholders." It is not stated in the complaint that either of the defendants was a director of plaintiff at the time of the purchase and sale of the stock referred to, with the exception of the defendant Phillips, who is inferentially alleged to have been one of its then directors, and there is no averment that plaintiff has ever offered to return the stock received by it as the result of the purchase complained of. The prayer of the complaint is for a judgment against Wickersham for the amount paid to him upon the sale of the stock, and that he account to plaintiff for all profits made by him from the use of such money, and for such other relief against him and the other defendants as shall be deemed proper. Wickersham and Steele were the only defendants who seem to have appeared in the superior court, and they demurred to the complaint, upon the grounds—First, that the same does not state facts sufficient to constitute a cause of action; and, second, that the alleged cause of action is barred by sections 337, 343, and subdivision 1, § 339, of the Code of Civil Procedure. The demurrer was sustained, and judgment thereupon rendered in favor of de-

fendants Wickersham and Steele. The plaintiff appeals.

The action is one for relief upon the ground of fraud, and the law prescribing the limitation for such an action is found in subdivision 4, § 338, of the Code of Civil Procedure, which provides that actions for relief upon the ground of fraud or mistake shall be brought within three years, "the cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." The demurrer does not present the question whether the cause of action attempted to be stated in the complaint is or is not barred by this provision of the statute of limitations, and we are therefore not called upon to determine whether the complaint shows plaintiff's discovery of the facts constituting the fraud complained of within three years of the commencement of the action, within the meaning of the law. That question has been elaborately argued by counsel, but it is clear to us that it is not raised by the demurrer. It was held in *Brennan v. Ford*, 46 Cal. 7, that it is a sufficient plea of the statute of limitations, by way of demurrer, to say that the complaint does not state facts sufficient to constitute a cause of action, because "it appears therefrom that the cause of action is barred by the statute of limitations;" but, assuming this to be the correct rule when applied to a demurrer upon this ground, we think it must be held that when, as in the present case, a demurrer does specify the particular sections upon which the defendant relies to defeat the action, no other sections of the statute are pleaded, and the only question for decision is whether the cause of action is barred by the particular section or sections mentioned in the demurrer, and thus interposed as a bar. It is only necessary to add upon this point that the plaintiff's cause of action is not barred by either of the sections of the Code of Civil Procedure referred to in the demurrer, as the cause of action attempted to be stated in the complaint is not embraced in either of the classes of actions mentioned in those sections.

The demurrer was, however, properly sustained upon the other ground stated therein. The complaint does not state facts sufficient to constitute a cause of action. The plaintiff is not entitled to any relief because of the alleged fraud practiced upon it in the sale of the stock without a complete rescission of the contract of sale; and to effect this it was incumbent upon plaintiff to act with reasonable diligence, and return, or offer to return, to defendants the stock received from them under the contract. It cannot be permitted to retain the shares of stock thus received by it, and at the same time recover from defendants the money paid to them as the purchase price of such stock. This would be contrary to justice,

and can receive no countenance in a court of equity. There is no averment in the complaint of any offer on the part of plaintiff to return the stock purchased, and plaintiff apparently rested satisfied with the contract for more than 15 years. Counsel for plaintiff do not dispute the general proposition that, to entitle one to rescind a contract, he must restore to the other party everything of value received from him under such contract; but it is claimed by them that the stock was extinguished by the sale, and therefore cannot be legally returned, and that all defendant Wickersham can justly claim is to receive in the statement of the account demanded in the complaint a credit for the value of such stock at the time of the sale. We do not agree with counsel upon this point. The shares of stock were not extinguished by the sale in such sense that they could not be reissued by plaintiff to any one subsequently subscribing for shares of its capital stock. Plaintiff's purchase did not reduce the number of shares which plaintiff was authorized to issue by its articles of incorporation. The only effect of the transaction was to reduce the amount of the subscribed capital stock, leaving the plaintiff free to again issue the same number of shares to any one desiring to subscribe for its capital stock. *Cook, Stock & S.* §§ 282, 314; 1 *Mor. Priv. Corp.* § 114; *State v. Smith*, 48 *Vt.* 266; *Williams v. Manufacturing Co.*, 3 *Md. Ch.* 451; *Railway Frog Co. v. Haven*, 101 *Mass.* 398. The contract of sale was ultra vires, and resulted in an illegal withdrawal of plaintiff's capital actually paid in, but the stock was not actually extinguished, and so long as there remained that number of shares of its capital stock unsold by it the plaintiff could at any time have issued a new certificate therefor, and tendered the same to defendants, which would in legal effect have been a tender of the same shares sold by them to plaintiff. It follows from these views that the judgment must be affirmed.

We concur: MCFARLAND, J.; FITZGERALD, J.

4 Cal. Unrep. 275

NEW ZEALAND INS. CO. v. BRADBEER.
(No. 19,192.)

(Supreme Court of California. Oct. 10, 1893.)

REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE.

Where the evidence, though conflicting, is quite sufficient to support the findings of the lower court, the judgment based on such findings will not be reversed on appeal.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the New Zealand Insurance Company against George Bradbeer. From a judgment for plaintiff, defendant appeals. Affirmed.

Ben Goodrich, for appellant. John D. Pope and Lacy & Trask, for respondent.

PER CURIAM. The plaintiff, a foreign corporation, was engaged in the insurance business in this state from July, 1887, to and including January, 1891. Its principal place of business was in the city of San Francisco, but it had a branch office in the city of Los Angeles. From January, 1888, to January 10, 1891, defendant was the agent of plaintiff, and the manager of its business at its Los Angeles office, and as such was charged with the receipt and disbursement of its funds at that office. In August, 1891, plaintiff brought this action to recover from defendant the sum of \$1,600, alleged to have been collected by him as such agent and manager from various persons to and for the use of plaintiff, and not paid over or accounted for, though demand for its payment had been made. The answer of defendant was a general denial. The case was tried without a jury, and the court found, in effect, that the defendant had received for and on account of the plaintiff sums of money which he had not paid over nor accounted for, aggregating, with the interest thereon, \$798.95. The court accordingly gave judgment in favor of the plaintiff for the sum named, from which, and from an order denying his motion for a new trial, the defendant appeals.

The principal contention on the part of the appellant is that the findings were not justified by the evidence. The evidence brought up in the transcript covers more than 220 printed pages, and it would subserve no useful purpose to attempt to set it out or state its substance. A careful inspection of the record, however, shows that, while the evidence is conflicting in many respects, it is still quite sufficient to uphold and justify the findings. The judgment, therefore, cannot be reversed on this ground.

The only other ground urged for a reversal is that the findings do not cover all the issues raised in the case. This point cannot be sustained. The findings are full and explicit as to all the items for which judgment was given in favor of the plaintiff; and, as to the others, no special findings were necessary, for the reason that as to them the judgment was in effect in favor of the defendant. It results that the judgment and order appealed from must be affirmed, and it is so ordered.

(100 Cal. 1)

PEOPLE v. DOUGLASS. (No. 20,983.)

(Supreme Court of California. Oct. 10, 1893.)

CRIMINAL LAW—DISMISSAL OF PROSECUTION—UNREASONABLE DELAY—INSTRUCTIONS—HARMLESS ERROR.

1. Pen. Code, § 1382, provides that a prosecution must, unless good cause to the contrary is shown, be dismissed if a defendant, whose trial has not been postponed upon his application, is not brought to trial within 60 days after the finding of the indictment of filing of the information. *Held*, that a refusal to discharge defendant under such section would not be reversed on appeal, when it did not appear from the bill of exceptions that a previous postponement of the trial was not assented to by defendant, nor that there was no good cause shown for such refusal.

2. The fact that on the refusal to give an instruction on the ground that the substance thereof had already been given the instruction was simply marked "Refused," without stating the ground of the refusal, is not an error of which advantage can be taken on appeal.

3. An instruction that "where there are

two presumptions, one in favor of innocence, and the other in favor of a criminal course," the former must prevail, is properly refused, as there can be but the one presumption of innocence in a criminal case.

Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Steve Douglass was convicted of grand larceny, and appeals. Affirmed.

J. T. Matlock and A. B. Coffman, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The defendant was convicted of the crime of grand larceny, charged to have been committed April 9, 1892, in Tehama county, by feloniously stealing, taking, and carrying away one cow, the property of H. C. Wilson. The information was filed April 29, 1892, and on May 4th the defendant was arraigned and pleaded not guilty to the charge. On May 9th, by order of court, the trial of the case was set for June 8th. On the last-named day, on motion of the district attorney, the trial was postponed to a day to be thereafter set. On July 2d counsel for defendant moved the court that he be discharged, on the ground that he had not been tried within 60 days after the filing of the information. The motion was denied, and an exception reserved. On August 27th the case was again set for trial on September 21st. At the time so set the trial was commenced, and on the next day concluded with a verdict of "guilty of grand larceny as charged in the information." In due time the defendant moved for a new trial, which was denied, and thereupon judgment was pronounced that he be punished by imprisonment in the state prison for the term of three years. From this judgment and the order denying his motion for a new trial the defendant appeals.

1. Appellant contends that the judgment should be reversed, because under the provisions of section 1382 of the Penal Code, as construed in *People v. Morino*, 85 Cal. 515, 24 Pac. Rep. 892, he was on July 2d entitled to be discharged from further prosecution, and the court had no discretion or right to deny his motion of that date for a discharge. This position is rested upon the theory that the court had no authority on June 8th to postpone the trial without the consent of the defendant, unless upon affidavit showing good cause therefor, and that no such consent was given or showing made. The section of the Code referred to is as follows: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." The bill of exceptions is entirely silent as to the orders postponing the trial and refusing to dismiss

the prosecution, and there is nothing in the transcript in regard to those orders, except the record entries made by the clerk of the court below. These entries are as follows: June 8, 1892. Court met. Title of case. Defendant and his counsel and the district attorney came into court. "The district attorney now states to the court that a material witness for the prosecution is sick, and unable to attend; and the defendant refusing to permit the deposition of said witness taken before the committing magistrate to be read in evidence, on the motion of the district attorney it is ordered that this cause be continued to be hereafter set." July 2, 1892. Court met. Title of case. "Defendant's counsel now moves the court that the defendant herein be discharged, on the ground that the said defendant has not been tried within sixty days after the filing of the information, which motion was denied by the court, and excepted to by the defendant." It will be observed that it does not appear from the first entry that the defendant objected to the continuance, or that it was not granted with his full and free consent. And the rule is that, in the absence of any showing as to what took place when the order was made, the appellate court will presume in support of the action of the court below that the defendant assented to the order. *People v. Swafford*, 65 Cal. 223, 3 Pac. Rep. 809. It will also be observed that it does not appear from the second entry that good cause for denying the motion was not shown. Conceding, then, as held in *People v. Morino*, supra, that the burden was upon the prosecution to show good cause for holding the defendant without trial for a longer time than that named in the statute, and that in the absence of such showing the court had no discretion in the matter, but was imperatively required to grant the defendant's trial, still the rule is settled by decisions of this court, found in nearly every volume of our reports, that on appeal all intendment are in favor of the regularity of the action of the court below, and that error will never be presumed, but must affirmatively appear. Under this rule it was incumbent upon the defendant, if he claimed error, to set out in his bill of exceptions the facts showing it. As he wholly failed to do this, his first contention cannot be sustained.

2. At the preliminary examination of defendant one H. F. Wilson was examined as a witness, and his testimony was taken down by a shorthand reporter, and thereafter written out in longhand, and certified and filed by the reporter, as required by section 869 of the Penal Code. At the trial it was admitted that the said H. F. Wilson was dead, and thereupon the district attorney offered to read in evidence his testimony taken before the committing magistrate. The defendant objected to the testimony being read, "upon the ground

that due diligence has not been shown to bring this witness before the court to obtain his evidence in the regular way." The objection was overruled, and this ruling is complained of as erroneous. The testimony was clearly admissible and the ruling proper. Pen. Code, § 686; *People v. Gannon*, 61 Cal. 476; *People v. Oiler*, 66 Cal. 101, 4 Pac Rep. 1066. Several other objections were made to the admission of evidence, but we see no material error in any of the rulings. If there was error, it was trivial, and those rulings may therefore be passed without special notice.

3. The next point is that the court erred in refusing to give to the jury two instructions asked by defendant. The instructions refused are in these words: "The prosecution must establish the guilt of the accused beyond a reasonable doubt, independent of any hypothesis produced on the part of the defendant." "A presumption is a deduction or conclusion which the law expressly directs to be made from particular facts; and where there are two presumptions, one in favor of innocence and the other in favor of a criminal course, the one in favor of innocence must prevail." The law declared in the first instruction referred to was clearly and fully stated in other instructions given at the request of defendant, and it was not error, as has been many times held by this court, to refuse to give an instruction which had been already given in substance. The court is not bound to repeat itself. The instruction was simply indorsed "Refused," with the name of the judge, and it is further claimed that if the refusal was because the instruction had already been given in substance, the ground of the refusal should have been stated. It is true that such a rule was declared in some of the early cases decided by this court, but, if a failure to comply with it was error, it was an immaterial one, which could not prejudice the defendant, and for which the judgment cannot be reversed. *People v. Ramirez*, 56 Cal. 538. There was no error in the refusal to give the second instruction referred to. There cannot be two presumptions in a criminal case. The accused is presumed to be innocent until his guilt is established beyond any reasonable doubt, and the court, in effect, so charged the jury.

4. Finally, the point is made that, if the defendant was guilty at all, he was guilty of embezzlement, and not of larceny, and hence that the judgment should be reversed. This point cannot be sustained. There was evidence sufficient to justify the verdict, and it cannot be disturbed here on the ground named. It follows that the judgment and order must be affirmed, and it is so ordered.

DE HAVEN, J. I concur in the judgment, and generally in the foregoing opinion. I wish to add, however, that even if it appeared that the court erred in not grant-

ing defendant's motion for a dismissal of the prosecution because of the failure to place him on trial within the time specified in section 1382 of the Penal Code, still that would not be sufficient ground for a reversal of the judgment. A judgment should not be reversed for such an error, except in a case where, if the motion had been granted, the statute of limitations would have been a bar to a new information or indictment for the same offense. In other cases the remedy for a defendant whose motion for a dismissal has been improperly denied is an application for a writ of habeas corpus before judgment of conviction.

(100 Cal. 105)

PEOPLE et al. v. SUPERIOR COURT OF
SAN FRANCISCO et al. (No. 15,469.)

(Supreme Court of California. Oct. 14, 1893.)
BANKS AND BANKING—PROCEEDINGS IN INSOLVENCY—CONSTITUTIONAL LAW—SPECIAL LEGISLATION—TITLE OF ACT—VALIDITY.

1. Bank Commissioners' Act March 30, 1878, provides for the examination of all banks by commissioners appointed therefor. Section 11 of such act, as amended by St. 1887, p. 90, provides that if the bank commissioners find that any such corporation has violated its charter, or is conducting business in an unsafe manner, and refuses to discontinue its illegal practices, the attorney general may bring suit in the proper court to prohibit the transaction of further business, and to wind up its affairs. Section 21 provides that all acts are repealed in so far as they are inconsistent with this act. Insolvent Act 1880, § 8, provides that an adjudication of insolvency may be made for causes enumerated therein on the petition of five or more creditors whose demands amount in the aggregate to not less than \$500; and section 25 requires the assignee, "as speedily as possible, to convert the estate, real and personal, into money." *Held*, that the insolvent act is superseded by the bank commissioners' act as far as banking corporations are concerned, and that an adjudication of insolvency against a banking corporation, and the appointment of a receiver therefor, would not lie on the petition of creditors therefor.

2. A contention that the sole object of the bank commissioners' act is visitation and a report to the attorney general by the commissioners, and that there is no suggestion therein for the sequestration of assets, is untenable; section 11 of such act further providing that if the court shall consider it unsafe for the corporation to continue to transact business, and that it is insolvent, an injunction shall be issued, and thereupon such proceedings shall be taken against the corporation "as may be decided upon by its creditors," and sections 18 and 19 authorizing the commissioners to maintain actions in the name of the people, under the court's direction.

3. A further contention, that there is nothing compulsory about the attorney general's duty to institute such proceedings, because section 11 provides that the institution of such proceedings shall be "in his discretion," and that, if he should fail to do so, the creditors would have no remedy, cannot be considered, since it will not be presumed that sworn officers will fail in duty.

4. The remedies provided by the two acts are not cumulative, nor the powers conferred by the bank commissioners' act auxiliary to those conferred by the insolvent act, the object of the bank commissioners' act being to provide

an entirely different scheme for winding up the business of a banking corporation.

5. The bank commissioners' act is not a contravention of Const. art. 4, § 25, providing that the legislature shall not pass local or special laws granting to any corporation any special or exclusive right, privilege, or immunity.

6. The title of such act, "The Bank Commissioners' Act," sufficiently expresses the subject of the act, and is sufficiently general in its scope, within Const. art. 4, § 24, it being unnecessary that the title should embrace an abstract of its contents.

In bank.

Petition by the people and others for a writ of prohibition directing the superior court of San Francisco and the creditors of the Pacific Bank to cease from prosecuting proceedings to have such bank declared insolvent and placed in the hands of a receiver. Writ granted.

Atty. Gen. Hart and Forbes & Barnard, (A. R. Cotton, of counsel,) for petitioners. Dunne & McPike and Dorn & Dorn, for respondents.

PATERSON, J. The Pacific Bank suspended payment and closed its doors on June 23, 1893. On the 11th of August following, seven of its creditors, representing an indebtedness of \$3,063.29, filed a petition in involuntary insolvency, asking for an order to show cause why it should not be adjudged an insolvent. The grounds of the petition were that the bank, being insolvent, had suffered its property to remain under attachment for more than four days; that in contemplation of insolvency it had conveyed to the People's Home Savings Bank certain real property; that it was concealing and removing a portion of its property, and that it had failed for over 40 days to pay money deposited by depositors. Thereupon an order was made directing the corporation to show cause on the 24th day of August, 1893, why it should not be adjudged an insolvent debtor, and directed to surrender its estate for the benefit of its creditors in the manner required of insolvent debtors. On August 15th the vice president of the bank filed an answer, denying that the transfer of the bank property to the People's Home Savings Bank was without consideration, or to give a preference, or to hinder or delay or prejudice creditors, and denying that it was removing or concealing any of its property; but the insolvency of the bank was admitted. The answer alleged the willingness of the corporation to surrender its property for the benefit of its creditors, and to comply with all the provisions of the insolvent act. On the day this answer was filed an order was made by the court below adjudging the corporation to be an insolvent debtor, directing schedules to be filed, and appointing Mr. McDade, who is sheriff of the city and county of San Francisco, a receiver to take charge of the property and collect debts until the appointment of an assignee. November 15,

1893, was fixed as the day upon which the creditors should appear to prove their debts and elect an assignee. The usual orders were made, at the same time, granting a stay of all proceedings against the insolvent, etc. On August 30, 1893, the board of directors of the bank held a meeting, and by resolution ratified the act of its vice president in filing the answer, and on August 31st the court made and filed another order, substantially the same as the order of August 15th. A motion was made in the court below by the petitioners herein to set aside the orders, on the ground that the court had exceeded its jurisdiction in making the same. This motion having been denied, an application was made here for a writ of prohibition. An alternative writ was issued, a hearing has been had thereon, and the matter submitted for decision.

The attorney general claimed at the argument that the Pacific Bank is a savings bank, and as such is expressly excepted from the provisions of the insolvent act of 1880 by section 8¹ thereof; that the provisions of the insolvent act which relate to involuntary proceedings do not include corporations; that, conceding these points to be not well taken, the order of adjudication was void, because premature,—made before the return day fixed by the order; that the vice president of the bank could not consent to the adjudication, nor could the directors authorize him to do so, or ratify his act after he had done so. But, in view of our conclusion upon another question, it is unnecessary to determine any of these contentions. The act commonly known as the "Bank Commissioners' Act," approved March 30, 1878, provides for the appointment by the governor of three persons, one of whom shall be "an expert of accounts," to act as bank commissioners. It is made the duty of these commissioners to visit and examine all banks and report their proceedings to the governor; and also to ascertain the condition of such corporations, whether any of them is insolvent or unable to fulfill its obligations, and, if so, to report its condition to the attorney general as soon as may be. Penalties are imposed on the commissioners for failure to perform their duties, and upon officers of the bank for failure to make reports as required by the provisions of the act. St. 1877-78, p. 740. Section 11 of this act, as amended in 1887, (St. 1887, p. 90,) reads as follows: "Sec. 11. If such commissioners, on examination of the affairs of any corporation mentioned in this act, shall find that any such corporation has been guilty of violating its charter or law, or the provisions of this act, or is conducting business in an unsafe manner, they shall, by an order ad-

¹ Insolvent Act 1880, § 8, provides that an adjudication of insolvency may be made for causes enumerated in such section, on the petition of five or more creditors whose demands amount in the aggregate to not less than \$500.

ressed to the corporation so offending, direct discontinuance of such illegal and unsafe practices, and a conformity with the requirements of its charter and of law under this act; and if such corporation shall refuse or neglect to comply with such order, or whenever it shall appear to said commissioners that it is unsafe for such corporation as in this act mentioned to continue to transact business, they shall notify the attorney general of such fact, who, after examination, in his discretion may commence suit in the proper court against such corporation to enjoin and prohibit the transaction of any further business by such corporation; and, upon the hearing of the case, if the judge of the court where the case is tried shall be of the opinion that it is unsafe for the parties interested, or for such corporation, to continue to transact business, and that such corporation or institution is insolvent, he shall issue the injunction applied for by said commissioners and attorney general, who shall cause said injunction to be served according to law; and said judge shall further direct said commissioners to take such proceedings against such corporation as may be decided upon by its creditors. If any corporation mentioned in this act which is now insolvent, or which may hereafter become insolvent, or be thrown into liquidation by process of law, or by the order or consent of its stockholders, directors, managing officers, managers or creditors, the affairs of such corporation shall be closed, and the business thereof settled within four years from the time it shall be declared to be insolvent or be thrown into liquidation, as the case may be, unless at the expiration of such time it shall obtain the consent in writing from a majority of the board of bank commissioners to continue in liquidation for a longer period. The bank commissioners shall, however, have no power to grant a continuance for such purpose for a longer period than one year at each time. Any corporation mentioned herein now in liquidation, or that may be hereafter thrown into liquidation, shall make semiannual reports of the condition of its affairs to the bank commissioners in the same manner as the solvent banks mentioned in this act, and in addition thereto shall state the amount of dividends paid, debts collected, and the amount realized on property sold if any since the previous report. The bank commissioners shall have the power, and it is hereby made their duty, to examine the condition of every such corporation in liquidation in the same manner as in the case of solvent banks, and shall have a general supervisory control of any such corporation. They shall have the power to designate the number of officers and employees necessary to close up the business of any such corporation, and fix the salaries of the same; and shall do all in their power to make such liquidation as economical and expe-

ditious as the interests of the depositors and stockholders will admit. The bank commissioners are hereby empowered to examine into the affairs of all banks in process of liquidation at the time of the passage of this act. When any such bank shall have been for two years next preceding the passage of this act in process of liquidation, or when any such bank shall have been in liquidation for two years from the time it was declared insolvent, or thrown into liquidation, the bank commissioners shall have the power to direct that the business of the bank shall be closed, and may designate a time when such closing shall be effected, and may limit the number of officers and employees, fix their salaries, and make such other orders as are necessary for the economical and expeditious administration of the affairs of the bank. If any officer or employee of any insolvent corporation mentioned in this act shall refuse to comply with the provisions of this section, or disregard or refuse to obey the directions of said bank commissioners given in accordance with the provisions of this act, such officer or employee shall be punished by a fine of not less than five hundred dollars, or by imprisonment in the county jail for not less than one year, or by both such fine and imprisonment, as a court of competent jurisdiction may determine."

We have no doubt that this section was intended by the legislature to provide for every case involving the winding up of the business of a banking corporation, and that it necessarily supersedes the provisions of the insolvent act of 1880, so far as this class of corporations is concerned. It is entirely clear that, if substantial effect is to be given to the provisions of this section, the Pacific Bank cannot be put through insolvency under the provisions of the insolvent act. The two acts are utterly repugnant in letter and in spirit. The bank commissioners' act attempts to provide a scheme for the visitation and examination of all banks, and the winding up of the affairs of such as are found to be insolvent, provided it appears that it is unsafe for the corporation to continue to transact business. The act is not as perfect in detail as it might be,—a complaint which has been made in other states with respect to similar statutes,—but it cannot for this reason be held invalid. It is provided (section 21) that all acts are "repealed in so far as they are inconsistent with the provisions of this act." The enforcement of the insolvent act would defeat the plain purposes contemplated by the bank commissioners' act. The question is not so much whether the scheme provided is complete in all matters of detail, but whether the legislature intended to exempt banking corporations from the operation of the insolvent act; and this intention we think is clearly manifested, though not expressly stated. It is provided that if the

commissioners find that the corporation has been guilty of violating its charter or law, or is conducting business in an unsafe manner, and the corporation refuses to discontinue its illegal practices, the attorney general may commence suit in the proper court to prohibit the transaction of any further business, and wind up its affairs. The statute is essentially one of bankruptcy in relation to this class of corporations. *Town v. Bank*, 2 Doug. (Mich.) 556.

Proceedings under the insolvent act are of a summary nature. The assignee is required "as speedily as possible to convert the estate, real and personal, into money." If that were done in the case of the Pacific Bank, it would result in the sacrifice of the assets, a thing that will not occur under section 11 of the bank commissioners' act, which provides ample time for the closing of the affairs of the bank. The law is intended to secure economy in the liquidation of the affairs of a stranded bank. The bank commissioners receive no fee. Their compensation is paid by the state. They designate the number of officers and employees, and fix their salaries, and they are bound by the terms of the act to do all in their power to make the liquidation economical, and as expeditious as the interests of the depositors and stockholders will admit. Under section 28 of the insolvent act assignees are allowed "all necessary expenses in the care, management and settlement of the estate, and shall collectively be entitled to charge and receive for their services commissions upon all sums of money coming to their hands and accounted for by them, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent.; and for all above that sum, at the rate of four per cent." Of course, the fact that large commissions are allowed, and great expenses would be incurred, under the insolvent act, is no reason why the act should not be enforced, but it is a matter for consideration in determining the intent with which the legislature passed the bank commissioners' act. If five creditors, representing five hundred dollars, can throw a banking corporation into insolvency, and enforce a winding up of its affairs, stockholders and creditors generally will receive very little benefit from the provisions of section 11 of the bank commissioners' act. There are very few banking institutions which have passed through periods of financial distress without being in a condition of insolvency,—when enough could not have been realized from their assets in a speedy way to discharge their liabilities. "At such times assets shrink and shrivel in value, but liabilities remain unchanged. They never diminish. Now, it is easy to see, if the court should put forth its power at such a time merely because the corporation assailed had from such causes become insolvent, it would

do harm, rather than good, and that, instead of giving protection to creditors, it would imperil their safety, and instead of preserving the rights of stockholders it would destroy the value of their stock. * * * Mere insolvency is not enough to induce the court to act; but to induce it to act such a state of insolvency must be shown as satisfies it that the corporation will not be able in a short time to resume its business with safety to the public and advantage to the stockholders. Such I understand to have been the view entertained by Governor Pennington. In *Brundred v. Machine Co.*, supra, [4 N. J. Eq. 294,] he said: 'It would be unwise and against public policy to seek an occasion for interference with any corporation, so long as they are striving against adversity, with an honest purpose, unless their case is hopeless, or their course of action so unfair as to jeopardize the interest of creditors and the public.'" *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 406, 23 Atl. Rep. 934. These were the considerations which actuated the legislature in passing this act. It was seen that if the door were left open to a few creditors to bring suit and wind up the affairs of a banking corporation under the summary and expensive proceedings provided in the insolvent act, financial ruin might result to every banking institution in the state. By this act no injustice is done to any creditor or stockholder. The remarks of the court in *Attorney General v. Continental Life Ins. Co.*, 53 How. Pr. 22, are applicable to the case before us: "His [the creditor's] power to wind it up, in which many others besides himself are interested, is only taken away. When, however, public policy and the interests of all, as well as his, demand its death, (and that is practically what is accomplished,—*Neall v. Hill*, 16 Cal. 150,) the officers of the state alone can take its life and administer its assets. That this policy is better, wiser, and safer for all, is most manifest. * * * Rights of stockholders and creditors who have no knowledge thereof should not be jeopardized by suits instituted by any stockholder under the Revised Statutes, and so brought for a fraudulent and wrecking purpose by collusion with the officers of the corporation, which rights can surely be imperiled if the remedies given by the Revised Statutes still exist. The temptation so to do was too great to make every stockholder and every creditor the depository of so great a power for mischief; and hence, it seems to me, that the act of 1853 wisely provided a new method of extinction and administration by which the power which gave the life is alone empowered to take it."

We cannot agree with counsel for respondents in their contention that the sole object and purpose of the act was visitation, and a report to the attorney general by the bank commissioners, or that there is no sug-

gestion of any element of sequestration of the assets. The section referred to plainly provides that if the court should be of the opinion that it is unsafe for the corporation to continue to transact such business, and that it is insolvent, an injunction shall be issued, and thereupon such proceedings shall be taken against the corporation as may be decided upon by its creditors; and sections 18 and 19 of the act authorize the commissioners to issue subpoenas for witnesses, and maintain actions in the name of the people under the direction of the court. These experts will be enabled to administer upon the assets of the corporation with greater safety and more assured economy than such assets could be administered upon under the insolvent act of 1880.

Again, it is said there is nothing compulsory about the duty devolving upon the attorney general; that he is clothed with discretion, and, if he should fail in the proper case to bring suit, the creditors and other persons interested would have no remedy. There is no real danger, we think, to be apprehended from such a source. It is not to be assumed that sworn officers will fail in duty. Where, as in the case at bar, it is made to appear to the attorney general that the banking institution has suspended payment, closed its doors, and refused to pay its depositors the money that belongs to them, it is incredible that the attorney general, sworn to the performance of his duty, should refuse to bring an action under section 11 of this act; and if he did refuse it is not clear that a mandamus would not lie to compel him to act. But, however that may be, if the legislature did, in fact, intend to clothe the attorney general with absolute discretion in the matter, and the effect of the act were in certain cases to prevent the creditors from proceeding to wind up the affairs of the corporation themselves without the assistance of the attorney general, that fact alone would not invalidate the law. The legislature has the right, we think, to provide how proceedings for the winding up of the affairs of a particular class of corporations may be instituted, and by whom. It could, if it desired, exempt—as many states have done—banking institutions from the operation of the insolvent act entirely; and, as a matter of fact, there never was any provision by which either a corporation or an individual could be adjudged an insolvent debtor in involuntary proceedings in this state until the year 1876. The insolvent act of 1852 did not provide for involuntary insolvency proceedings.

It is claimed that proceedings against banking institutions under the insolvent act of 1880 are necessarily recognized by the amendment which includes corporations "now insolvent, or which may hereafter become insolvent, or be thrown into liquidation by process of law, or by the order or consent of its stockholders, directors, man-

aging officers, managers, or creditors;" that this language embraces banking corporations which are insolvent as the result of an adjudication declaring them so to be; but we do not so understand the matter. The language "which is now insolvent, or which may hereafter become insolvent," refers to insolvency in fact, and not to adjudications of insolvency, and the reference to "liquidation by process of law, or by the order and consent of the stockholders," etc., does not necessarily refer to liquidation under the provisions of the insolvent act. If the practical effect of the winding up of the affairs of the corporation is a dissolution, as was said in *Neall v. Hill*, supra, it is equally true that a dissolution practically leads to a winding up of the business of a corporation, and the Code provides that upon the dissolution of any corporation the superior court may, on application of any creditor or stockholder or member, appoint a receiver, with power to collect debts, and divide the moneys and other property among the stockholders or members. Section 565, Code Civil Proc. By the provision of section 11, referred to, the power of the bank commissioners is simply extended to all cases where otherwise the "liquidation" or winding up of the business of the corporation would devolve upon receivers, or upon the directors or managers of the corporation, who are declared to be trustees of the creditors and stockholders upon dissolution, unless other persons are appointed by the court to settle the affairs of the corporation. Section 400, Civil Code.

We see no ground for holding that the remedies referred to are cumulative, or that the powers conferred by the bank commissioners' act are merely auxiliary to those conferred by the insolvent act of 1880. The objects of the new act are to provide new limitations and conditions, and an entirely different scheme for the winding up of the business of banking corporations. The power to arrest the business of the corporation is taken from five creditors, who may represent the comparatively insignificant sum of five hundred dollars in indebtedness, and placed in the hands of disinterested experts, subject to the discretion and approval of the court. The wisdom of these provisions is apparent. They offer security upon which the public may intrust their funds and otherwise deal with banking corporations. The act applies to both savings and commercial banks (*Wells, Fargo & Co. v. Coleman*, 53 Cal. 416) and it is well that this is so, because in their transactions they deal with all classes, and reach a larger number of people than any other kind of corporations. The provisions of the act are a bulwark against hasty action on the part of a few timid creditors in times of financial distress, and at all times against those who, from motives of greed or malice, would wreck the corporation, if it were in their power to do so, regardless of the conse-

quences to others. To hold that the powers conferred by this act are merely auxiliary to those conferred by the insolvent act, would lead to palpable incongruities.

It is claimed by counsel for respondents that the act is unconstitutional, because it contravenes the provisions of article 6, §§ 4, 5, and article 4, § 25, subds. 3, 19, 33, and Id. § 24, of the constitution of this state. The superior court has not by the provisions of this act been deprived of its power to hear and determine matters of insolvency. The court, having jurisdiction of the subject-matter and the parties, is clothed with authority to exercise all means necessary to carry its jurisdiction into effect. Section 187, Code Civil Proc. The act simply names the experts who are to take the place of receivers who would otherwise be appointed. How far the acts of the commissioners may be controlled or reviewed is a question not before us. The act in question does not grant to any particular corporation any special or exclusive right, privilege, or immunity, nor is it subject to the criticism that it is local or special legislation. It does not, therefore, contravene the provisions of section 25, art. 4, of the constitution. We think that the title of the act sufficiently expresses the subject of the act, and is sufficiently general in its scope. It is not necessary that the title to the act should embrace an abstract of its contents. *Abeel v. Clark*, 84 Cal. 226, 24 Pac. Rep. 383; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. Rep. 251. It is ordered that the writ issue as prayed for.

We concur: MCFARLAND, J.; FITZGERALD, J.; HARRISON, J.; GAROUTTE, J.

99 Cal. 677

FOUNTAIN et al. v. SEMITROPIC LAND & WATER CO. (No. 19,142.)

(Supreme Court of California. Oct. 10, 1893.)

VENDOR AND PURCHASER—RESCISSION BY VENDEE
— WHEN ENTITLED TO RESCIND — MEASURE OF
DAMAGES—JUDGMENT.

1. Where vendees of land, as part consideration for the contract, agree to make certain improvements within a specified time, and they do not make the improvements themselves, but procure them to be made by contract, they are not entitled, in case of rescission for failure of the vendor to perform, to recover of the latter the cost of such improvements, but only the reasonable value.

2. In an action by the vendees of land to rescind the contract it appeared that defendant agreed to pipe water to the land, which it failed to do; that plaintiffs agreed to clear and plant to fruit trees one-half the land within seven months, and the balance within a year thereafter; that they knew that water was needed as soon as trees or vines were planted, but they planted half the tract during the first season; that, though no water was piped and two-thirds of the trees died, they planted the other half the following season; and that they did not serve notice of rescission on defendant until they had been in possession over two years, and were in default on three installments of the purchase money. *Held*, that plaintiffs were not entitled to rescind because of defendant's failure to pipe the water.

3. Where such action is tried as an action to rescind, and not as an action for damages, a judgment in plaintiffs' favor for the cost of such improvements, and rescinding the sale, cannot stand.

4. The fact that defendant, by cross complaint, asked a rescission, and that plaintiffs' rights, and all improvements made by them, be forfeited, as provided in the contract, is insufficient to support the judgment where plaintiffs answered such cross complaint only by general denial, instead of setting up the substance of their complaint and assenting to the rescission.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Two actions (tried together) by J. H. Fountain and others against the Semitropic Land & Water Company to rescind a contract of sale of certain land by defendant to plaintiffs, and for damages. From a judgment in each case for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Willis, Cole & Craig and Walter Bordwell, for appellant. Goodcell & McIntyre, for respondents.

TEMPLE, C. Two cases with the above title were tried together, and similar judgments entered in both cases. By stipulation the motion for a new trial, and the appeal from the judgment and from the order denying a new trial, are applicable to both. As the facts are in all material respects similar, it is only necessary to discuss one case, which will be that first set out in the transcript. The complaint in that case, after averring the incorporation of the defendant, sets out a contract between the parties in full. That contract, dated August 7, 1888, states that defendant agrees to sell to plaintiffs 53.09 acres of land in San Bernardino county for the sum of \$6,636.25, with interest at the rate of 8 per cent. per annum, to be paid in installments, the first installment of which, \$2,212.09, was payable one year after date, and the last, \$2,300.08, including interest, August 7, 1891. By the same instrument plaintiffs agree that as part consideration for the purchase of said land they will, on or before October 15, 1888, commence to clear off said land, and with all reasonable diligence proceed with said clearing until said land is entirely cleared off, and plow at least one-half of said tract and plant with good thrifty orange or other fruit trees by the 1st of March, 1889, and the balance within one year thereafter. The parties of the second part (plaintiffs) were given immediate possession, but upon default it is provided the party of the first part may enter and repossess the same, and the parties of the second part shall forfeit all payments made, which shall be taken and considered as rent and as liquidated damages for the failure of the parties of the second part to keep the covenants. It was again stipulated that time is of the essence of the contract,

and that in case of default in making payments the parties of the second part shall forfeit all rights under the contract and all moneys paid thereon. The contract then proceeds as follows: "And the said party of the first part on receiving payment, at the time and in the manner above mentioned, of all of said purchase price, and the surrender of this agreement, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed to said lands, in form of bargain and sale, together with one share of stock in the Lytle Creek Water and Improvement Company for each acre of land above agreed to be sold, which stock shall be issued by the said Lytle Creek Water and Improvement Company upon a basis of ten (10) shares of stock to each miner's inch of water, but no fractional share of said stock shall in any case be issued. The party of the first part also agrees to pipe the water to a point adjacent to each twenty-acre lot of said tract and each town lot above agreed to be sold, after which the second parties and other stockholders in said water company must bear the expense of keeping up the water system."

It is alleged that during the possession of plaintiffs they improved the premises by clearing, plowing, and planting the same with oranges and other orchard trees and grape vines, at a cost actually and necessarily incurred by them of \$5,775, and have kept and performed the terms and conditions of said contract to be kept and performed on their part, except in so far as performance was rendered impossible by the failure of defendant to pipe water for irrigating purposes to a point adjacent to said land, as provided in said contract; that the water which defendant agreed to pipe to the lands was the only water available for that purpose, and without it orchard trees, vines, and trees could not be grown upon the lands; that defendant has ever since the date of the contract failed and refused to pipe water to said lands, though often requested so to do, whereby plaintiffs have been deprived of the use of said water for irrigation, or at all, and it has become impossible to profitably and successfully cultivate said land, or grow orchard or any trees or vines thereon; that plaintiffs have always been ready and willing to perform all the covenants on their part upon the compliance of defendant with his agreement to pipe said water, which it still refuses to do; that on the 29th day of August, 1890, they served upon defendant a written notice and demand for the entire rescission of said contract and transaction, for the repayment by defendant to plaintiffs of said sum of \$5,775, the cost of improvements so made by them under said contract, and offered to return to defendant everything of value they had received from it, and to deliver possession of the land, and to pay the value of the use and occupation, but defendant refused, and still refuses, to rescind the

contract, or to pay the costs of said improvements; that plaintiffs are still ready to perform their offer on condition that defendant pay them said cost, less the value of the use and occupation of said premises; that by reason of the failure of said defendant to pipe said water they have been damaged in the sum of \$5,775, the cost of said improvements. They demand judgment that the contract be rescinded and canceled, for \$5,775 and costs, and such other and further relief as shall be agreeable to equity.

The bill is framed as though the object of the pleader was to obtain a decree declaring the contract rescinded, and to obtain compensation for moneys expended in an attempt to execute it. It is hard to discover, however, any occasion for the interposition of a court of equity. If one party to a contract refuses to perform a covenant which is a condition precedent or concurrent, with the consent of the other party, the first consideration is whether it is such a breach as will justify a rescission. If the covenant be of minor importance, not going to the root of the matter, and one that can be readily compensated in damages, the party injured cannot rescind, but must perform his part of the contract, and seek compensation in damages. If, however, the breach be of a covenant, the nonperformance of which will render it impossible for the other party to perform, or will frustrate the whole purpose of the contract on his part, he still has two courses open to him, provided performance has not proceeded so far that it is impossible to place the opposite party pretty nearly in the position he was in before the contract was entered into. He may, acting promptly, rescind and recover moneys laid out and expended or paid, and the value of labor performed and materials furnished, under the contract, or he may decline to proceed in performance and sue for damages, in which case he may recover all loss occasioned by the breach, including profits he would have made if the contract had been performed, subject to the rule, of course, that remote and speculative damages cannot be recovered. The complaint does not contain a count for moneys laid out and expended, nor for labor performed, nor for materials furnished; nor does it contain any statements which would be the equivalents of such counts. If the plaintiffs are entitled to rescind, it does not necessarily follow that they can recover the cost of their improvements. No specific work was called for in the contract, but certain improvements in the way of clearing, plowing, and planting. The plaintiffs did not perform the work themselves, but caused it to be done through contract. If they could recover this at all, it would not be the cost, but the reasonable value. There is no allegation as to this in the complaint.

But I think, under the circumstances dis-

closed here, plaintiffs could not rescind and recover moneys laid out and expended by them under the contract. They paid no part of the purchase money. The improvements, if the contract had been fully performed on both sides, would have belonged to them. The provision in the contract requiring them was doubtless intended to insure performance and improve the security for the purchase money. We are not authorized to presume that defendant desired an orchard or vineyard as an investment. Plaintiffs, according to their own testimony, knew that water was required at least as early as the planting of the trees or vines. They nevertheless proceeded in March, 1889, to plant on half the land though no water had been piped, and, although two-thirds of the trees died, they went on again in the spring of 1890 and planted the remainder of the land, and did not serve the notice until they had been in possession more than two years, and were in default in the payment of three installments of the purchase money, amounting to \$4,689.51. They might as well have gone on to the end of the term, and then sought to rescind if the speculation proved a bad one. Could they stop work and sue for damages, and is the complaint sufficient for that purpose? The mere fact that the plaintiffs served a notice for rescission would not prevent them from suing for damages. There is some confusion in the use of the word in such a case. It is often said that when one party to a contract is prevented from performing by the other, or the other is guilty of a breach of a condition so material that he may refuse to go on with it, and does thereupon refuse further performance and brings his suit for damages, he thereby rescinds the contract. It is said by Mr. Pomeroy, in his work on Equity Jurisprudence, that a party cannot bring such an action without rescinding. Pom. Eq. Jur. § 110. On the other hand, it is often said, as it was by this court in *Wainwright v. Weske*, 82 Cal. 193, 23 Pac. Rep. 12: "In such an action plaintiff does not seek to rescind the contract. He affirms it, and seeks to recover damages by reason of the fraud arising out of the circumstances accompanying the entering into the contract." This rule seems more in consonance with our Code, which provides that a contract is extinguished by rescission. It is, however, largely a question of words, and cannot affect the rights of the parties. Had the cause been tried as an action for damages, it is possible the judgment might have been maintained. But it is very evident that it was not so tried. The difference is quite material. In the action for rescission in the proper sense, plaintiffs could recover for labor performed and materials furnished, irrespective of the question as to whether the whole adventure was necessarily a failure, even had defendant performed its contract.

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In the action for damages the recovery could only be for the loss occasioned by the breach. It may have been that all moneys expended would have been lost, even had defendant performed. And, again, plaintiffs may be able to prove that they would have realized a large profit if they had been able to complete the contract. Whether the breach, if there was any, was so material as to justify plaintiffs in abandoning performance, is to some extent a question of fact. The evidence shows without conflict that water was furnished, though not in pipes. Plaintiffs accepted and used the water, still insisting, however, that it was not furnished according to the contract. Their complaint was that the supply was not regular, and was generally insufficient. Whether this was so defective a supply as to justify plaintiffs in their refusal to go on with the contract was a question of fact to be determined at the trial. From the reading of the contract it is difficult to say that defendant is required to lay pipes at any time before the deed would become due. If the contract must be construed as requiring water to be piped at once, it is because water was necessary as soon as the ground was planted.

The defendants filed a cross complaint, in which they allege the default of plaintiffs as to the payments due on the contract, and they ask that the contract be rescinded, and the rights of plaintiffs under it be declared forfeited, as also all improvements made by them as rent and liquidated damages, as provided in the contract. The plaintiffs answered this by a general denial. It seems, therefore, that both parties are seeking a rescission of the contract. I am not sure that I see what difference it would make in the consequences at whose instance a rescission was made. In either case each would be required to restore to the other everything of value received, and to pay for labor performed for him under it. *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. Rep. 749; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. Rep. 774. Had plaintiffs set up, in answer to the cross-complaint, the substance of their complaint, at the same time assenting to the rescission, it would have gone far towards furnishing a support for the present judgment, but under the present pleadings I think that judgment cannot stand. I advise that the judgment and order be reversed, and that the parties be allowed to amend their pleadings if they shall be so advised.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the parties are allowed to amend their pleadings if they shall be so advised.

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PEOPLE v. ABBOTT. (No. 20,985.)

(Supreme Court of California. Oct. 10, 1893.)

BURGLARY — POSSESSION OF STOLEN PROPERTY — INSTRUCTION — EVIDENCE TO JUSTIFY — MISCONDUCT OF COURT.

1. In a burglary case it appeared that a Chinaman's trunk and pipe were stolen from the burglarized building. There was evidence that two persons carried a "China trunk" from the lot on which the building was situated about the time the crime was committed; that defendant and others were seen with such a trunk about that time; and that such Chinaman's trunk was found open two days afterwards, a considerable distance from the building. There was no evidence that a "China trunk" is any different from any other trunk. The pipe was put in evidence, but there was no testimony as to where it was found. *Held*, that the evidence did not justify an instruction as to the effect of possession of property recently stolen.

2. It is error to charge that the possession of stolen property soon after the taking, while not sufficient to justify a conviction, is a "guilty circumstance," and that defendant was bound to explain the possession in order to remove its effect.

3. Where a witness for the state, in a criminal case, is absent when wanted, and is brought in by an officer, it is error for the court, in the presence of the jury, to hold a colloquy with such witness, which tends to discredit defendant and his counsel, and lead the jury to believe that, if they were not guilty of a grave offense in procuring the absence of the witness, they were, in the opinion of the court, capable of committing it, and that such conduct on their part could only be induced by consciousness of defendant's guilt.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

George Abbott was convicted of burglary, and appeals. Reversed.

C. C. Stephens, for appellant. Atty. Gen. Hart, for the People.

HAYNES, C. An information charging Amos Abbott, George Abbott, and Albert Acevedo with burglary, committed on the 5th day of September, 1891, in the room of one Ah Sic, in the city of Los Angeles, was filed by the district attorney. The defendants severed. Appellant George Abbott pleaded not guilty, was tried, found guilty by the jury, and sentenced to imprisonment for the term of five years. A motion for a new trial was made and denied, and from the judgment and the order denying a new trial defendant appeals.

A very large number of exceptions were taken by appellant upon the trial, and referred to in the brief of his counsel, but we regret to say that the brief gives us little aid beyond the mere reference to the folio in the transcript where the exceptions are found; and on the part of the people the brief of the attorney general, prepared and signed by his first deputy, is little more than a pert, if not impertinent, denial that there is anything of merit in the alleged errors referred to by appellant's counsel. Where the protection of the people against crime

upon the one side and the liberty of the citizens is at stake upon the other, the questions involved are of such importance as to require a careful examination and discussion by counsel in order that just conclusions may be reached by the court. Ah Sic and Ah Poy, whose property is alleged to have been burglariously stolen, were partners and proprietors of a Chinese drug store on Marchessault street, in the city of Los Angeles. In the rear of the room occupied as a drug store was a room used as a public reception room. To reach this room persons passed from a door in the side of the drug store into a hall which extended back past two or three other rooms to a kitchen, and from this hall was an entrance into the room immediately in the rear of the drug store. The next room in the rear of the reception room was Ah Sic's sleeping room, in which the property alleged to have been stolen was kept. The testimony tends strongly to show that this reception room was visited by many persons, of all colors and nationalities, for the purpose, among other things, of purchasing Chinese lottery tickets; and on the evening of September 5th the defendant, with his brother and many other persons, were in this room for a considerable time,—how long will be hereafter noticed,—but the room appears to have been open, and different persons going to and coming from it from early in the evening until the discovery of the alleged burglary, about a quarter past 10 o'clock. Between the storeroom and this reception room was a small glass window, through which one in the drug store could observe those in the reception room, and those in the reception room could see those coming into the storeroom. The burglary was effected by boring through a board partition between Ah Sic's room and an unoccupied building near or adjoining that room so as to remove the boards for a sufficient space to take out, through the opening, a trunk which is said to have been stolen. The only article, aside from the trunk, shown to have been stolen, was an opium pipe, which Ah Sic testified was on that evening lying upon his bed in the same room. In the trunk was some clothing, not described in the evidence, a small bamboo basket containing silver, and gold in a buckskin bag, amounting in all to some seven or eight hundred dollars. A Chinaman named Ah Tung testified that a little after 10 o'clock the night of the burglary he saw the defendant and another man carrying a chest, coming out of Ah Sic's back yard, and saw them go out through the gate of the fence, but he did not know at that time of the burglary, and did not think there was anything wrong, but next morning learned it was "stealing." Pierce Boyle, a witness on the part of the prosecution, testified that he saw two men coming out of the gate from the Chinaman's back yard; that they went under a pepper tree, and put the

box down there, and then blew a whistle on their fingers, and two more young men came up; and further testified in that connection: "Well, then I saw the other two young men come up round a big load of hay there in the middle of the street. They got the box, and I told them, 'Hello, boys; hold on there;' and I picked up a rock and threw the rock after them, and then they blew a whistle. These two men had a box between them, running, sort of like a Chinaman's. They were what I would call trotting. They came with the box within 15 feet of me. I measured it since. When I first saw them they were coming from the Chinaman's house." This witness did not identify any of the men he saw in connection with the box. This witness fixed the time of this transaction at "10 o'clock, or may be a quarter past." Ah Ngau testified that he saw the defendant and three other men with a Chinese chest or trunk at the corner of Alameda street and the convent; that he was coming up from the old railroad depot towards Chinatown, and they were going towards the convent; that the defendant and another one with him was carrying the chest, and the other two followed two or three steps behind; that when he got to his room, about two blocks from where he met them, it was a quarter after 10; that he had been to a laundry near the old depot to see a friend. Ah Ging testified that he went to the old depot with a friend who was going to take the train for San Francisco; that they went a little after 10 o'clock to the depot. As he was going he saw the defendant, and another whom he did not know, carrying a chest. That he knew the two that were following by sight, but not their names. That where he saw them was between Alameda street and a small street running into it from the west, just opposite the lumber mill. That they were crossing Alameda street, and he was going towards the depot. "The burglary occurred Saturday night, and on Monday at noon the trunk or chest was found in a corn field, down towards the river, a considerable distance from the place of the burglary. The trunk had been broken open and the clothing scattered around. Neither the pipe nor any of the contents of the trunk were at any time found in the possession or in any manner connected with the defendant, and there was no evidence of his possession of the stolen property other than that above stated, namely, that he was seen with others carrying a box or chest, but there was no evidence tending to identify the box or chest which was carried with the one that was stolen, other than the circumstances above stated.

I have stated so much of the testimony for the purpose of showing the materiality of certain instructions given and refused upon the questions of identification of the defendant, and inferences to be drawn from the

possession of stolen property. Upon the latter question the court, at the request of the district attorney, charged the jury as follows: "The mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction; it is merely a guilty circumstance, which, taken in connection with other testimony, is to determine the question of guilt. Yet if you believe from the evidence that the defendant was found in the possession of the property described in the evidence, or claiming to be the owner thereof, after the alleged burglary, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of property stolen from the premises described in evidence, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts or conduct or declarations of the defendant, or any other circumstances tending to show the guilt of the accused. If the jury believe from the evidence the property mentioned in evidence was stolen from the premises described in evidence, and was seen in the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclosed any such." Conceding, for the moment, that the instruction as given correctly stated the law as an abstract proposition, it was not applicable to the facts of the present case. Before a defendant can properly be called upon to account for the possession of stolen property, the circumstances must be such as would make silence as to such possession an evidence of guilt. Here the fact of possession was denied. The defendant could not explain his possession of the goods without admitting that he had possession. If he had been arrested with the trunk in his hands, and had been asked by the officer where and how he got it, he would have been called upon to speak, and his silence, if he refused to speak, as well as his answer, if false, would have been evidence against him. Defendant's alleged possession of the property depended upon a double identification: First, that the trunk or chest carried by the two men was the property stolen from Ah Sic; and, second, that defendant was one of the men who carried it. The only identification of the trunk was that the one found in the corn field on Monday was the one taken from Ah Sic the Saturday night preceding, while the only evidence tending to identify the trunk carried by the men with the one found

in the corn field was that it was "a China trunk;" but there was no evidence that a China trunk is different from any other trunk. No other description was attempted by any of the witnesses who claimed to have seen the defendant helping to carry it. The pipe was produced in evidence, but there is no testimony from beginning to end as to where it was found. It was not in the trunk at the time of the burglary, and it is not probable that it would have been stolen from the bed, and carried to the corn field, and left there with the broken trunk; nor was any part of the contents of the trunk found in possession of the defendant, or in any manner accounted for. Nor was the identification of the defendant as one of the men who carried the trunk more satisfactory. The evidence of the Chinamen who testified that they recognized the defendant as one of the men who carried the trunk was not only open to serious doubt and criticism, but the evidence on the part of the defendant, if true, would seem to make it clear that the man identified by the Chinaman as the defendant could not have been the defendant. Wills, in his work on Circumstantial Evidence, 6th American from the 4th London Ed., p. 63, in discussing the subject under consideration here, says: "The rule under discussion is occasionally attended with uncertainty in its application from the difficulty attendant upon the positive identification of articles of property alleged to have been stolen; and it clearly ought never to be applied where there is reasonable ground to conclude that the witnesses may be mistaken, or where from any other cause identity is not satisfactorily established."

In the cases cited at the end of the above quotation, it will be seen that the circumstances under which instructions similar to the above were given did not involve the uncertainties as to the identification of the property or of the person that were so prominent here. In *People v. Gill*, 45 Cal. 285, four horses were stolen during the night, and the next day the defendant was seen riding one of the horses, accompanied by another man, and the two had the four stolen horses with them. There seems to have been no question whatever as to identity made in the case. In *People v. Clough*, 59 Cal. 438, the defendant was charged with robbery. The person robbed immediately notified the chief of police, who made immediate pursuit, and captured the defendant within a few minutes after the robbery was committed. The property which had been taken from the prosecuting witness was found upon the defendant, and the only explanation he gave of such possession was that he had "picked up the watch." In *People v. Velarde*, 59 Cal. 457, "the property alleged to have been stolen consisted of cattle, which were found in defendant's possession, who undertook to account for his possession and ownership. In such cases as these an instruction upon the

subject of possession of the stolen property shortly after the alleged larceny is proper, but those cases are very different from the one at bar. I think, too, the matter of this instruction is subject to serious criticism. It states directly that the possession of stolen property soon after the taking, while not sufficient to justify a conviction, is "a guilty circumstance." In *People v. Cline*, 74 Cal. 575, 16 Pac. Rep. 391, the jury was instructed that "the mere possession of stolen property recently stolen is not of itself sufficient evidence to convict. The possession of stolen property, supported by other evidence tending to show guilt, is a strong circumstance tending to show guilt." This court said, Searls, C. J., delivering the opinion: "It is not a question of law upon which the court should instruct the jury, but one of fact, which is wholly within the province of the latter. In deducing the ultimate fact of guilt or innocence, they are the sole judges of the weight to be given to the probative fact of possession of property recently stolen, and stamping the character of such possession." In the case of *State v. Hodge*, 50 N. H. 521, in discussing this question, the court said: "The resemblance between inconclusive presumptions of law and strong presumptions of fact cannot have escaped notice,—the effect of which being to assume something as true until rebutted; and, indeed, in the Roman law and other systems where the decision of both law and fact is intrusted to a single judge, the distinction between them becomes in practice almost imperceptible; but it must never be lost sight of in the common law, where the functions of judge and jury should always be kept distinct. Unfortunately, however, the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, sometimes as one which it is obligatory on them to make. * * * The law is burdened and obscured by a great mass of common opinion, general understanding, practice, precedent, and authority (including the presumption from possession of stolen property) that has passed for law, but is in truth not law, but fact, coming down to us largely by descent from the ancient custom of the judge giving the jury his opinion of the evidence. To clear the law of this incumbrance, revive elementary principles strictly legal in their nature, separate the province of the court from the province of the jury, and maintain the latter in its entirety, is a duty put upon us by the constitution. * * * When, therefore, we have come to the conclusion that the presumption from possession of stolen goods is a presumption of fact, we find ourselves prohibited by the constitution from deliver-

ing to the jury the presumption as to a result binding upon them, or a rule by which they are to be governed." The statement, therefore, in the instruction that the possession of the property was a guilty circumstance, required the jury to give weight to some extent to the fact of possession, and, with the further statement that the accused is bound to explain the possession in order to remove its effect, under the circumstances of this case, I think was error. It would have been proper for the court to have informed the jury that the possession of the property by the defendant, if they found as a fact that he had such possession, might be considered by them in connection with all the circumstances of the case, but not that they were bound, as the instruction implied, to give it some weight against the defendant, or that the defendant, if they found he had possession of the property, was placed under such circumstances as required him to account for that possession; for whether the circumstances were such as to require an explanation is itself a question of fact which the jury are authorized to determine, and was not a matter of law which they were bound to observe. The defendant was not apprehended with the property in his possession, and no circumstance transpired prior to the trial requiring him to speak at all in regard to his alleged possession of the trunk. If he had not gone upon the stand as a witness, no comment could be made to the jury upon his failure on that occasion to account for his possession of the property, and, that being true, his failure while upon the stand to give any account of a possession which he denied having is equally placed beyond comment either by the district attorney in his argument, or by the court in its instructions to the jury.

Upon the trial, Pierce Doyle was called as a witness for the people. Upon being sworn, the following colloquy occurred between the court and the witness: "The Court: Why did you leave the court room? Answer. I thought I could go down and get a drink and get back in time. Question. Did Mr. Stephens offer you any money to go away? A. No, sir; no one gave me none. Q. Did he tell you to go away? A. No, sir; he did not speak to me. Q. Did the defendant tell you to go away? A. No, sir. Q. Did the defendant offer to give you any money to go away? A. No, sir; no one did. The Court, in the presence of the jury: This looks very singular, indeed." (Mr. Stephens was defendant's attorney.) The transcript contains the following explanation of this colloquy: "Amos Abbott, a witness and brother of defendant, left suddenly for the Islands the day before this trial was called. A motion for continuance by defendant was based on

such absence. Counsel for defendant refused to have the absent witness' testimony, which was complete and full, taken on former trial of same case, read in evidence, and persisted in his motion. The witness Doyle was wanted the night before, and was absent. He came into the court room before court called, and when wanted was absent, and an officer was sent to bring him in, and the court interrogated him as above." The affidavit for continuance above referred to was made by the defendant, and was sufficient in substance and in form. The fact that the witness had before testified, and that his testimony could be read, the prosecution assenting thereto, did not make it improper that a continuance should be applied for, even though it may have justified the court in refusing the motion. Whether the court erred in refusing the motion need not be considered, as the presence of the witness was procured, and the defendant was therefore not prejudiced by the denial of his motion. There was nothing, however, in that matter, nor in the absence of the witness Doyle, that could possibly justify the grave imputation against the defendant or his counsel implied in the above-quoted examination of the witness by the court. It inevitably tended to discredit both the defendant and his counsel, and to lead the jury to believe that if they were not guilty of a very grave offense against the administration of justice in procuring the absence of the witness, that they were, in the opinion of the court, at least capable of committing it, and that such conduct on their part could only be induced by a consciousness that defendant was guilty of the crime for which he was being tried. That this must have operated to the prejudice of the defendant throughout the trial is apparent, and for this reason, if no other, a new trial should be granted. No improper motive is attributed to the court in this matter, but if the circumstances were such as to impress the court with a grave suspicion that the witness had been tampered with, the investigation should not have been proceeded with in the presence of the jury, further than to inquire of the witness the cause of his absence. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

DE HAVEN, J. I concur in the judgment.

99 Cal. 661

FIELD v. SHORB et al. (No. 19,194.)

(Supreme Court of California. Oct. 9, 1893.)

GIFT—VALIDITY—CAPACITY OF DONOR—REVIEW ON APPEAL.

1. A gift of a check and certificate of deposit is established where the donor, being a business man, after having expressed his intention to make the gift, indorses the check and certificate, which he had left in the hands of the donor for safe-keeping, and redelivers them to the donee, who collects them, the donor never asking for them or their proceeds again.

2. A verdict on a finding of fact will be set aside where it is against the great current of evidence, although one or two general statements of one or two witnesses bring it within the rule which governs where there is a material conflict of evidence.

3. In an action for an accounting and to set aside a gift as made when the donor was insane, it appeared that he was very close in money matters, and uncleanly in habits and dress; that he shrank from the use of water, and objected to changing his soiled clothes; that he talked of women in an obscene way, and when angry swore badly; that he played on the piano without extracting any music, and then walked around the room in a quaint, unnatural manner. These were his characteristics for months before his death, in August, 1890. *Held*, that a finding that deceased was sane until July 1st,—two days before he made the gift,—and insane from that time until the date of his death, was against the evidence.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by D. W. Field, public administrator, against A. S. Shorb and others, for an accounting. Judgment for plaintiff. Defendants appeal. Reversed.

Wilson & Bulla and Stephen M. White, for appellants. W. W. Holcomb and Wells, Monroe & Lee, for respondent.

McFARLAND, J. This action was brought by the public administrator, acting as the administrator of the estate of Daniel J. Harris, deceased; and in form it purports to be an action to obtain an accounting of the transactions between the defendants, A. S. Shorb and his wife, Mattie L. Shorb, and the said Daniel J. Harris in his lifetime. But the main averments of the complaint are that on the 13th day of May, 1890, the deceased drew a check for \$500, payable to Mattie L. Shorb, and delivered the same to her; that on the 3d day of July, 1890, the deceased drew another check for \$1,288.25, payable to said Mattie L. Shorb, and delivered the same to her; and that also on said 3d day of July, 1890, the said deceased delivered to said Mattie L. Shorb a certain certificate of deposit for \$25,000; that said A. S. and Mattie L. Shorb claim that said two checks and said certificate were delivered to the said Mattie L. by the deceased as gifts; but that they were not given to said Mattie L. as a gift, and always remained a part of the property of the deceased until his death, and since then have been assets

of his estate. Several banking companies were also made defendants, upon averments that portions of the money collected upon said drafts and certificate are on deposit with said banking companies. Some twenty different issues were submitted to a jury, who returned specific answers to four or five of the issues, imperfect answers to two or three others, and "no answer" to the rest. The court then made findings, adopting generally the judgment of the jury where it was expressed, and upon the findings judgment went in favor of the defendants for the \$500 check, the court holding that it was a gift, but against the defendants as to the other check and as to the said certificate of deposit. The defendants appealed from the judgment, and from an order denying a new trial.

The complaint seems to go upon three theories: First, that the check and certificate were obtained from the deceased by the defendants (the Shorbs) by means of a conspiracy through which they were obtained by undue influence exerted upon the deceased; second, that they were delivered to Mrs. Shorb merely for safe-keeping, and always remained the property of the deceased; and, third, that at the time they were delivered, on July 3, 1890, the deceased was of unsound mind, and incapable of giving the said certificate and check for any purpose. About seven or eight pages of the complaint, as it appears on the printed transcript, is made up of averments of fraudulent conspiracy entered into by the Shorbs for the purpose of obtaining undue influence over the deceased, and obtaining from him the certificate and check. It is averred, with many details and frequent repetitions, that the defendants, the Shorbs, fraudulently conspired to obtain undue influence over the deceased by great exhibitions of friendship and affection, by trying to persuade the deceased that they were his only friends, by persuading him to employ the said A. S. Shorb as his physician, by supplying him with and inducing him to use large quantities of intoxicating liquor for the purpose of weakening his mental condition, and by many other acts which tended to give them control over him; and that thus having fraudulently according to their conspiracy and plan obtained great influence over him, they induced him by solicitation to give said check and certificate to the said Mattie L. Shorb. With respect to this part of the complaint it is sufficient to say that the court found that none of the said allegations as to said alleged conspiracy and fraudulent purpose to obtain influence over said deceased were true.

With respect to the second theory of the complaint above noticed, we suppose that the findings of the court are to be taken to mean that the said check and the said certificate were given to Mrs. Shorb on the

3d day of July, 1890, merely for safe-keeping, and not as a gift. But we find no evidence sufficient to sustain such a finding,—that is, leaving out of view for the present the question of the mental unsoundness of the deceased at the time. The check was drawn payable to Mrs. Shorb, and was immediately collected by her, and the proceeds deposited in bank to her account, and it does not appear that the deceased ever called upon her afterwards for said proceeds, or made any question about it; and there is no evidence tending to show that the check was not given to her as her own property, while her own testimony is directly to the point that it was a gift. With respect to the certificate, there is the testimony of three witnesses that he had expressed his intention before the 3d of July to give said certificate to Mrs. Shorb as a gift; and there is the direct testimony of Mrs. Shorb that he did so give it to her on that day, and there is no testimony to the contrary. Moreover, there is the unquestioned act of the deceased in indorsing said certificate and delivering it to Mrs. Shorb. This certificate had been in the month of May previous given to Mrs. Shorb for safe-keeping. It was a negotiable instrument, and when given to her in May for safe-keeping had not been indorsed; the legal title thereto had not passed to Mrs. Shorb; and she could not have disposed of it in any way. But afterwards, when the certificate was brought to him on the 3d of July for the purpose, as Mrs. Shorb testifies, of making a gift of it to her, he then indorsed his name on the back of said certificate, and delivered it to Mrs. Shorb. This indorsement and the delivery of the certificate to Mrs. Shorb, transferred to her the entire right to collect said certificate, or to dispose of it as she thought fit. And there is not the slightest evidence, either at that time or afterwards, that he intended her to collect the money and give it to him. The deceased was a man who owned large properties, and was in the habit of keeping bank accounts, both in the territory of Washington and in Los Angeles; and he had certainly the ordinary business knowledge of negotiable bank paper, and the methods by which the title to the same is transferred. Taking all these matters into consideration, we see no evidence upon which to found a reasonable belief that he did not intend to give said certificate to Mrs. Shorb in manner as she testified; that is, presuming, as before stated, that he was not so mentally unsound as not to know the quality of his acts, or to do ordinary business. The only real question in the case, therefore, relates to the condition of the mind of the deceased on the said 3d day of July, 1890, when these transactions took place.

With respect to the mental soundness of the deceased on said 3d of July, the question propounded to the jury, and the an-

swer thereto, are as follows: "Was the mind of Daniel J. Harris during his last illness weak, and if it was, for about how long was it in such condition? Yes; from about July 1st until his death." Upon this subject the court first found as follows: "The mind of Daniel J. Harris during his last illness, from about July 1st until his death, was weak and unsound;" and then as follows: "Prior to the 1st of July, 1890, Daniel J. Harris was not of unsound mind, but then, and at all times thereafter, until the time of his death, he was of unsound mind, and not competent to make a gift of said sum," etc. These findings of the court were, we presume, founded upon the judgment of the jury, as expressed in their finding as above stated. We are adverse to holding that a finding by a jury or trial court on an issue of fact is not warranted by the evidence, whatever we might think as to its preponderance, where there is presented a fair, reasonable ground for a difference of opinion, and where a conclusion either way could not be considered as the necessary result of the exercise of an unsound judgment. But where the great current of the evidence is against the verdict, and we cannot escape the conviction that it is wrong, we should not be deterred from setting it aside by the contention that one or two general statements or assertions of one or two witnesses bring the case within the rule which governs in cases where there is a material "conflict of evidence." And in the case at bar we cannot resist the conclusion that the evidence is insufficient to support the finding of the unsoundness of the mind of the deceased on July 3, 1890. The facts upon which the mental weakness or unsoundness—insanity not being claimed—are based are certain characteristics and conduct of the deceased. As to those characteristics themselves, there is a great conflict of testimony,—some of the witnesses making them very extravagant, and others describing them as little, if any, out of the normal. We assume, however, that the jury had the right to take the most highly-colored picture. Those characteristics were mainly these: That the deceased was very close and penurious in money matters, or, as some witnesses said, niggardly and miserly; that, although a man of means, he worried over the expenses of his last sickness, and said he would become a pauper; that he was loath to buy proper food; that he was untidy and uncleanly in his habits, did not like to be washed, and could with difficulty be induced to make necessary changes of clothing; that he was subject to crying spells, and sometimes without apparent cause; that he frequently grumbled to himself; that he would get mad and swear terribly; that he feared people were friendly to him because they wanted his money; that he talked about women in an obscene way; that he occasionally beat upon the keys of a piano without be-

ing able to play that instrument, and would then walk about the room in a quaint or unnatural way; and that he predicted that the city of Los Angeles would be visited in 1890 by an epidemic which would kill many thousands of people, and which he could avert by going away. These were the main characteristics, although we do not pretend to give the details; and the witnesses differed very much as to the degree or intensity of these traits of character. (We leave out of view the bald assertion of one of the witnesses, who was his nurse from some time in May to the middle of July, and who disliked the deceased, and was evidently very hostile to appellants, that deceased was guilty "every day" of a certain private practice that sometimes impairs the mind. He gave no details, and never mentioned the subject to either of the doctors in attendance while he was acting as nurse; and neither of the three doctors who attended upon the deceased noticed any symptoms of such a practice. Moreover, the weak physical condition of the deceased, produced by heart disease and consequent dropsy, showed to the common mind, even without the information given by Dr. Salisbury, that the thing asserted by the witness was "impossible." We apprehend that neither the jury nor judge gave any weight to the assertion.)

If the jury had found that the foregoing characteristics and acts of deceased were, during the time when they were shown to have existed and to have been committed, sufficient to warrant the conclusion that he was of unsound mind, we might not, perhaps, have felt called upon to set aside the finding, although we would not have looked upon the evidence supporting it as very strong. But the jury, in the face of these characteristics and acts, which were the same for a long period before the 1st of July as after that date, found that the deceased was of unsound mind only "from about July 1st until his death;" and the court, following, no doubt, the judgment of the jury, found that "prior to the 1st day of July, 1890, Daniel J. Harris was not of unsound mind," but that then and afterwards he was. The evidence discloses the deceased afflicted as early as April, 1890, with the last illness—heart disease and dropsy—which caused his death on the 18th of August following; and his characteristics upon which the finding of mental unsoundness was based were exhibited continuously throughout that entire period, and were as full and pronounced during any one part of that period as during any other. The first witness introduced by respondent was a physician who attended the deceased from the 6th of May until the 23d of June, when he was discharged; and he described nearly all the traits of character and conduct of the deceased which are relied on, as existing in their fullest development during the said period of his attendance, and testified that he

was much better in health on June 23d than he was when he first saw him on May 6th. The next witness (Hapgood) testified to the same things as occurring during ten days in May while he nursed the deceased. The next (Hunsaker) testified to many of the same things as occurring nine months before the deceased died. The next, a milkman, (Burch,) testified to the said characteristics and conduct of the deceased as existing during all the months of May, June, July, and August. The next witness on the subject, (Brown,) who was very pronounced in his statements of the condition of the deceased, described his traits of character and conduct as observed by the witness "in the month of May," and said that he "was not much acquainted with him from that time on." The next witness (Anderson) who described the characteristics of the deceased referred to a period so early that the objection of the remoteness of his testimony was made. It referred to visits made by the deceased to the office of the witness before the last illness of the former. This witness testified to the prediction by deceased of the epidemic at Los Angeles, and he said it occurred "during the winter of 1889-90, and up to March and April." The next witness (Davis) testified to the epidemic matter as occurring before the last illness of deceased. The next witness, (Mrs. Trundey,) who also testified to the condition of the deceased, said: "The last time I saw him was in the early part of last year; in the spring or summer." The next (Bryant) testified to the condition of the deceased from "May to August," and when describing his characteristics made no distinction as to time. The next and the strongest witness for respondent (Purssord) was employed as nurse from May 18th to July 15th, and, with one exception, hereinafter noticed, he describes all the facts which he marshals as showing the characteristics of the deceased as continuously existing from the moment he first went to the house on May 18th. The only witnesses introduced by respondent whose testimony as to the conduct and characteristics related solely to a period after July 1st were McCallister, Helander, and B. F. Harris; and their descriptions of the deceased differed in no material way from the descriptions given by the other witnesses for respondent, and which applied to the whole period from April to the 1st of July. And it was testified by witnesses for the appellants that many of the characteristics of deceased above referred to had existed for several years previous to 1890, although in the opinion of these witnesses the said characteristics did not amount to mental unsoundness. Moreover, the long hypothetical question, covering two pages of the transcript, put by respondent to certain medical experts, in which all the characteristics and acts of deceased claimed to be peculiar were described with high coloring, and frequent

repetition, deferred, in terms, to all the months of "May, June, July, and a part of August, 1890," and was substantially as fully applicable to May and June as to July.

It was found, however, that the mind of the deceased was not unsound until the 1st of July; and, that being so, was there any evidence reasonably sufficient to support the finding that his mind became unsound within the three days between the 30th of June and the 3d of July,—the important day on which the alleged gifts were made? There was no such evidence. We are not called upon to determine whether the evidence of the condition of the deceased during the months of May and June would have been sufficient to warrant a finding that during those months he was of unsound mind; for the finding is that it was not sufficient for that purpose. And there was no different evidence—and therefore no evidence—to support a finding that he was mentally unsound on July 1st. It is proper to say that respondent makes some little contention that deceased had a paralytic stroke that might help out the finding under discussion. But there was no evidence of a paralytic stroke which a sensible jury could have attached the slightest importance to. One of the witnesses for the respondent—a nurse—did make the naked assertion that one morning when deceased fell on getting out of bed "he had a paralytic stroke;" but the witness was not a medical expert, and the evidence nowhere shows any symptoms of paralysis. The witness does not pretend that he said anything to the attending physician about a paralytic stroke, and the physician says nothing about any such occurrence. Afterwards, Dr. Salisbury, an entirely disinterested, and apparently an exceedingly intelligent, witness, attended the deceased for a week. He examined the case very thoroughly, and explained very fully and clearly the character of the disease with which deceased was afflicted; but he says nothing of any evidence of paralysis. The deceased during his entire sickness was subject to good and bad spells. At times he was quite weak physically, and his disease made it frequently difficult for him to walk about much, and it was quite probable that he had a fall; but there was certainly no evidence at all sufficient to warrant a finding that he had a stroke of paralysis. Moreover, it is clear that the time alluded to by the witness was after July 3d. He first said that it was "about the 1st of July;" but he afterwards said, "I got Mr. Brown to telegraph for Mr. Harris' nephew sometime about the 1st of July, when he had this stroke." But Mr. Brown testified that he telegraphed for the nephew "about July 9th;" and then, having testified that the telegram would show the exact time, it was produced, and was of the date of July 10th. It appeared also that after this the health of the deceased was better than usual. Under these circumstances, the supposition that the

mind of the deceased suddenly became unsound between June 30th and July 3d, by reason of a stroke of paralysis, affords no prop which helps to sustain the finding in question. Indeed, it is quite probable that the finding was the result of a notion frequently entertained by jurors (and sometimes by courts) that a man should dispose of his property in contemplation of death in such manner as to suit the tastes and ideas of propriety of the jurors. It was probably thought that deceased should not have given so much to one not of his blood, when he had collateral kin; and that the \$500 check which they found him sound-minded enough in May to give was enough for Mrs. Shorb. But, as we said in *Estate of Spencer*, 96 Cal. 456, 31 Pac. Rep. 453, a person in thus disposing of property is "not called upon to consult the wishes or views of jurors or courts." We notice that at respondent's request the jury were instructed that "an unnatural disposition of property is a circumstance," etc. Of course, when a man wills all or most of his property away from his wife or children with whom he lived on apparently friendly terms, or even from other relatives with whom he was intimate, and to whom he seemed attached, that fact should have weight in determining the mental condition of the testator; but such a consideration should have little, if any, force in the case at bar. The deceased was a widower without children or lineal descendants, and had no kith or kin living nearer California than the state of New York. He ran away from home when a boy, and lived most of his life on the Pacific coast, and had not seen any of his collateral relations for 35 years, except a nephew who, at the solicitation of the witness Brown, came out from the east during the last illness of the deceased, and stayed two weeks, the deceased furnishing him money to go back. On the other hand, the defendants, the Shorbs, had been quite intimate with him for several years. They seem to have been about his only family friends, and had done him many friendly offices. The lady whom he married, and who died in 1888, had before her marriage lived with said defendants. During the marriage there was a difficulty between the deceased and his wife, and the latter brought a suit for divorce, but through the efforts and influence of the Shorbs a reconciliation took place, and the parties seemed to live very happily together until the death of the wife. Afterwards the intimate relation was continued between the deceased and the defendants, and during his long final illness Mrs. Shorb and her daughter ministered daily to his wants, taking him delicacies to eat, trying to brighten his gloomy and lonely surroundings, and doing for him many things in their nature unpleasant. Under these circumstances, we see nothing "unnatural" about his making the gifts in question. It is to be observed also that these gifts did not include

all his property. He was worth in round numbers \$100,000, and the gifts amounted to only about one-fourth of that sum.

It is difficult to know what value to attach to the findings (27 and 28) that the Shorbs, by reason of their previous acquaintance, sympathy, attentions, etc., but "not otherwise," could "easily influence and control" the deceased, "but not so as to deprive him entirely of his free will;" for it is expressly found that the said defendants did not use any influence to procure the gifts in question. It is expressly found that "neither the defendant Mattie L. Shorb nor the defendant A. S. Shorb importuned or solicited said Harris to transfer or deliver to Mattie L. Shorb either the check for five hundred (\$500) heretofore referred to, or the check for twelve hundred eighty-eight and 25-100 dollars, (\$1,288.25,) heretofore referred to, or the said certificate of deposit for twenty-five thousand dollars (\$25,000) issued by the Merchants' National Bank of Tacoma;" and all the averments of the complaint as to a conspiracy by defendants to obtain and use undue influence over the deceased are expressly negatived by the findings. If the said findings (27 and 28) mean anything more than that defendants merely had that influence which comes from kindness and affection, and which is not "undue," then they are not supported by the evidence, and are inconsistent with other findings. But, under any view that may be taken of them it is clear that the one pivotal question in the case is, was deceased on July 3d of unsound mind, and incapable of making a gift? Under the foregoing views, we do not deem it necessary to discuss the other questions presented in the record. The judgment and order appealed from are reversed, and the cause remanded.

We concur: DE HAVEN, J.; FITZGERALD, J.

5 Cal. Unrep. 759

MESERVE et al. v. POMONA LAND & WATER CO. et al. (No. 19,112.)

(Supreme Court of California. Oct. 10, 1893.)

HARMLESS ERROR.

Where the record shows that evidence offered by plaintiff was admitted subject to defendant's objections, plaintiff cannot complain of the subsequent failure of the court to rule on the objections.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by E. A. Meserve and others against the Pomona Land & Water Company and others. There was a judgment in favor of defendants, and plaintiffs appeal. Affirmed.

Chapman & Hendrick and Edwin A. Meserve, for appellants. Olney, Chickering & Thomas, for respondents.

PER CURIAM. The plaintiffs claim to own, and to be entitled to divert and use upon their lands, 567-10,000 of all the waters flowing in and from the San Antonio canyon, which is located partly in Los Angeles county and partly in San Bernardino county; and they brought this action to have their title to the part of the said waters, so claimed by them, quieted, as against the defendants. The answer denied all the material averments of the complaint, and set up in bar of the action the statute of limitations. The court below found the facts and gave judgment in favor of the defendants, and the plaintiffs appeal from an order denying their motion for a new trial. The findings cover all the issues, and the principal contention of the appellants is that they were not justified by the evidence. The evidence set out in the statement is oral and documentary, and, while much of it is only briefly stated in substance, it still extends over more than 150 pages of the printed transcript. The facts of the case are numerous, and in many respects complicated, and to state them so they could be intelligently understood would require a long opinion, which would never be of use in any other case. Counsel on both sides have argued the questions presented at great length, and with marked ability; but to follow them, and state their points, would subserve no useful purpose. It is enough to say that, after carefully going over the record, we think the evidence must be held sufficient to justify the findings, and hence that they cannot be disturbed on appeal.

The statement contains but one specification of errors of law occurring at the trial, and that is as follows: "The court erred in not ruling upon the objections interposed by the plaintiffs to the introduction of evidence in this case, where the rulings of the court were reserved." The action of the court, complained of, is this: The plaintiffs offered in evidence a certain written agreement, and the defendants objected to it "on the ground that it was an agreement between other parties, and was incompetent, irrelevant, and immaterial. The Court: It will be allowed, subject to your objection, and passed upon hereafter." It is said for appellants: "If the court ever ruled upon this question, it nowhere appears; and we say that the court erred in not ruling, and that we are entitled to a new trial for that reason." The word "plaintiffs," in the specification, should probably be read "defendants," for otherwise the specification would not be at all applicable. Assuming, however, that the specification is sufficient, and no ruling was made by the court upon the objections of defendants, still no error prejudicial to the plaintiffs is shown. They offered the written agreement, and the court admitted it in evidence, and, so far as appears, did not afterwards exclude it. Presumptively,

therefore, they got all the benefit from the agreement which they were entitled to, and have nothing now to complain of. It follows that the order appealed from must be affirmed, and it is so ordered.

MESERVE v. POMONA LAND & WATER CO. (No. 19,113.)

(Supreme Court of California. Oct. 10, 1893.)

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Edwin A. Meserve against the Pomona Land & Water Company for damages and an injunction. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Chapman & Hendrick and Edwin A. Meserve, for appellant. Olney, Chickering & Thomas, for respondent.

PER CURIAM. This is an action to recover damages, and for an injunction. The defendant had judgment, and the plaintiff appeals from an order denying his motion for a new trial. The case, in every material respect, is like the one just decided, numbered 19,112. 34 Pac. Rep. 508. The two cases were submitted at the same time, and on the same briefs, and must be decided in the same way. For the reasons stated in the opinion in the other case, the order appealed from in this case must be affirmed, and it is so ordered.

99 Cal. 672

CAVANAUGH v. JACKSON. (No. 18,119.)
(Supreme Court of California. Oct. 10, 1893.)

ADVERSE POSSESSION—PAYMENT OF TAXES.

Code Civil Proc. § 325, provides that one claiming title by adverse possession must have paid all the taxes during the five years of his adverse occupancy. Held that, the adverse claimant having paid the taxes for that number of years, it was immaterial that some of the taxes during that time had also been paid by the original owner.

Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Joseph Cavanaugh against Samuel Jackson for the recovery of realty. Judgment for defendant. Plaintiff appeals. Affirmed.

H. B. Warren and Gillis & Tapscott, (T. M. Osmont, of counsel), for appellant. Brown & Farraher, for respondent.

GAROUTTE, J. This is an action for the recovery of real estate. The defendant set up title by adverse possession, and his claim was held to be well founded by the trial court. The sole question arising upon this appeal rests upon the construction of that provision of the statute which declares that, before the plaintiff can be deprived of his title by an adverse occupation, the party in possession must "pay all the taxes, state, county, or municipal, which have been levied and assessed upon such lands." Defendant's occupation dates from 1881, and the court found as a fact that the land in controversy was assessed to him, and the taxes

thereon paid by him, every year from the date of its occupation down to and including the year 1887. The court also found that the same land was assessed to plaintiff for the years 1885, 1886, and 1887, and the taxes paid by him for those years.

As an element entering into the creation of defendant's title, the payment of all taxes levied upon the land during the five years' term of occupation is necessary, but it was never intended by the lawmaking power that he should pay the taxes for any stated year more than once. Having had the land assessed to him, and having paid the taxes levied thereon, we think he has fulfilled the conditions of the statute, and that it is immaterial as to the number of times the land may have been assessed to, and the taxes paid by, other parties. If it had been intended by the legislature, in enacting this provision of the statute, that no title by adverse possession could be created against the true owner as long as he paid the taxes upon the land, it was very easy for that body to have so provided. But the provision is not so worded. It does not require the owner to do anything, but requires the claimant, in order to secure the benefit of the statute of limitations, to do something, namely, to pay the taxes upon the land. Illinois has a provision of law quite similar to the one under present investigation, and it is there held (*Bolden v. Sherman*, 101 Ill. 489) that, in case of double payment of the taxes for any one year, priority of payment prevails. That court has also held that the statute of limitations begins to run from the date of the payment of the taxes, and not from the date of the possession or occupation. But in *Brown v. Clark*, 89 Cal. 196, 26 Pac. Rep. 801, this court declined to follow that rule, and neither are we, in the present case, willing to hold that priority of payment by the true owner of itself nullifies the time which has actually run, and starts anew the statute. We see no great necessity for the enactment of the provision in the first instance. If for the purpose of giving notice to the true owner that, perchance, an adverse claimant has appeared upon the scene, his payment of the taxes as notice of that fact is entirely insignificant when compared to the circumstance of his open and notorious possession of the land. Whatever may be the object and purpose of the law, it should receive a reasonable construction, and to hold that priority of payment by the true owner of itself defeats the occupant's plea of the statute of limitations would be an unreasonable construction. If such were the law, upon the first day that taxes became due and payable it would result in a scramble at, or a race to, the tax collector's office by the respective parties to secure priority of payment. The destruction of old titles and the creation of new ones would thus be dependent upon the strongest man or fleetest horse. We do not

think the provision should be so strictly construed against the adverse claimant as the foregoing illustrations would suggest. Even if the collector should arbitrarily refuse to receive the taxes from the party in possession, if properly tendered, we do not think his title would be jeopardized by his failure to make the payment. There is reason in the law, and impossible things are not demanded. In the present case the court has found that the taxes were paid by defendant. This satisfies the statute, and it is ordered that the judgment be affirmed.

I concur: BEATTY, C. J.

HARRISON, J., (concurring.) State and county taxes can be assessed upon the same property but once for the same fiscal year. "Nothing in this Code shall be construed to require or permit double taxation." Pol. Code, § 3607. The assessment which forms the basis of the taxes must be upon the property, and the assessor "must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock M. of the first Monday of March next preceding; but no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." Section 3628. There is no authority for making more than one assessment upon the same parcel of land, even though different claimants may return it to the assessor in their lists. "Lands once described on the assessment book need not be described a second time, but any person claiming the same, and desiring to be assessed therefor, may have his name inserted with that of the person to whom such land is assessed." Section 3657. When the taxes upon a parcel of land have been once paid the burden is removed, and there no longer remains any tax to be paid. Such payment may be made by any person claiming an interest in the land, and the effect of such payment will be to discharge the land from the burden of the tax, and, as there is thereafter no obligation upon any one to pay the tax, no right can be acquired by making a payment of the amount of the tax to the tax collector.

Section 325, Code Civil Proc., requires that one who seeks or claims to obtain title by adverse possession shall have paid "all the taxes, state, county or municipal, which have been levied and assessed upon such land during the five years of his adverse occupancy." If, when he offers to make a payment to the tax collector, the tax which has been levied has been already paid, he cannot comply with one of the requirements of the statute, and must fail to acquire a title by adverse possession. There is no hardship in this construction. If the owner of the land pays the taxes as they fall due, there is no reason why his title should be impaired by a subsequent payment by an-

other. The statute makes the payment of taxes as important an element as actual occupancy of the land for the purpose of gaining a title by adverse possession, and the burden is upon the claimant to do the acts required to create the adverse title. He should be as vigilant in paying the taxes as in holding possession of the land. He is seeking to gain the title of another through statutory authority, and it is for him to see that he does all of the acts which the statute requires. In the present case the court finds that each party paid the taxes on the land for a portion of the period required to create an adverse possession. The evidence is not before us, so that we can determine therefrom which payment was first in time; but, as the court rendered its judgment in favor of the defendant, we are at liberty to assume that the evidence upon which it made its findings showed that the payment by the defendant was prior to that made by the plaintiff. It was incumbent upon the appellant to show that any error was committed by the court in rendering its judgment, and if there is any ambiguity in the findings they are to receive that construction which will sustain, rather than defeat, the judgment. I therefore concur in affirming the judgment.

100 Cal. 18

CITY OF LOS ANGELES v. CITY BANK.
(No. 19,090.)

(Supreme Court of California. Oct. 10, 1893.)
MUNICIPAL CORPORATIONS — DEPOSIT OF CITY FUNDS—AGREEMENT WITH BANK—RECOVERY OF INTEREST.

Plaintiff, the city of Los Angeles, in pursuance of section 44 of its charter, (Act Jan. 31, 1889,) authorizing the deposit of the city funds in such bank as would agree to pay the highest rate of interest, appointed defendant bank the city depository for the ensuing year, and deposited the city funds therewith. Before the expiration of the year, the state supreme court decided that said section of the charter was void, and thereupon plaintiff withdrew from defendant the amount deposited by it. Held, in an action for the interest accrued on such deposit, that since under the previous decision, the contract for the payment of interest was void, and the making of it constituted a felony, plaintiff could not recover thereunder.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the city of Los Angeles against the City Bank to recover interest on money deposited by plaintiff with defendant. From a judgment for plaintiff, defendant appeals. Reversed.

Burnett & Gibbon, for appellant. C. McFarland, for respondent.

SEARLS, C. The forty-fourth section of the city charter of the city of Los Angeles provided a mode by which the funds of the city should be deposited in such bank of deposit of the city as would pay the highest

rate of interest thereon, etc. St. 1889, p. 467. Pursuant to such section of the charter a contract was, after due notice, on the 10th day of March, 1890, entered into by and between the plaintiff and defendant, by which the former appointed the latter the depository of the public money of said city for the term of one year from the date of the agreement. The city agreed that the city treasurer should deposit with the bank defendant the public moneys then on hand, and all that should come to his hands during the term. Defendant agreed to pay interest on the deposit at the rate of three-eighths of one per cent. per month; interest to be paid monthly, and to be computed on daily balances. The contract was executed by the mayor on behalf of the city, and by the defendant. On the same day a city ordinance was duly passed by the council, and approved by the mayor, appointing the bank the depository of the public funds, and directing the treasurer to deposit the same accordingly. The public moneys were thereupon deposited with defendant until the interest thereon amounted to \$9,721.54, according to the contract. Before the expiration of the year, section 44 of the city charter was, in the case of *Yarnell v. City of Los Angeles*, 87 Cal. 603, 25 Pac. Rep. 767, decided unconstitutional and void by this court. Thereupon the money was withdrawn from the bank, except the accrued interest, which was not paid, although afterwards demanded. The defendant is a commercial bank, engaged in the transaction of a general banking business, and receives money upon deposit, upon which it pays no interest, except in special cases, and upon specific contracts therefor. The cause was tried by the court without the intervention of a jury, written findings filed, and judgment entered thereon in favor of plaintiff for \$9,721.54, and interest thereon from April 24, 1891, at 7 per cent. per annum, amounting in the aggregate to \$10,165.74. Defendant appeals from the judgment and from an order denying a motion for a new trial.

The complaint contained three causes of action,—one upon the special contract, a second upon an account stated, and the third for money had and received by defendant to plaintiff's use. A demurrer was interposed by defendant to each of the causes of action, and sustained as to the first, and overruled as to the other two. The findings negative the right of plaintiff to recover upon the account stated, and the judgment is based upon the count for money had and received to the use of plaintiff. The question as to whether or not there was an account stated between the parties, upon which respondent has dwelt in the brief on file, need not be considered. That question is foreclosed by the action of the court below, which found against respondent on that point, and from which no appeal has been taken. The real question involved may be

stated thus: (1) Plaintiff and defendant entered into a contract, which they in fact deemed valid, but which was illegal. (2) By that contract, defendant was to receive the public moneys, and pay interest thereon, for one year. (3) At the end of 10 months, plaintiff, on discovery of the illegality of the contract, demanded and received all the moneys deposited, but without any interest. (4) Can plaintiff, under such circumstances, recover the interest, in an action for money had and received?

A special agreement to pay interest gives a right of action to recover the interest whenever, under the contract, it becomes due. It is a part of the contract, and may be enforced either separately, or in connection with other obligations of the same contract; but, when it is not specially contracted for, it is but an incident of the contract or obligation upon which it depends, and cannot be recovered in a separate action after payment of the principal. In such cases, except as provided by statute, it is recovered, not as interest *eo nomine*, but as damages for the detention of the principal debt, or for failure to discharge the obligation. *Bible Soc. v. Wells*, 68 Me. 572. In that case it was said: "If, by the terms of a contract or a bequest, a party is entitled to interest, undoubtedly an action may be maintained to recover it, even after the principal has been paid. But when the contract or bequest is silent as to interest, so that, if it can be recovered at all, it can only be recovered as damages, an action to recover it cannot be maintained after payment of the principal." In *Tillotson v. Preston*, 3 Johns. 229, it was said, in a case where interest was not specially contracted for, that, "if the plaintiff has accepted the principal, he cannot afterwards bring an action for the interest." *Seag. Dam.* (8th Ed.) § 338; *Fake v. Addy*, 15 Wend. 76; *Southern Cent. R. Co. v. Town of Moravia*, 61 Barb. 180; *Tenth Nat. Bank v. Mayor, etc., of New York*, 4 Hun, 429. Wherever the question of the application of payments is left in doubt, the law will apply them first to the extinguishment of interest due at the date of payment, and the rule we have mentioned has no application. In the present instance, no such doubt arises. It was stipulated at the trial that the first cause of action in the complaint states correctly the history of the transaction between the city and the City Bank, but defendant objected to its relevancy. The objection was overruled, and the statement admitted in evidence. That statement is, in part, as follows: "That there is now due said city of Los Angeles, from said defendant, the City Bank, for interest upon the public moneys deposited with said bank as aforesaid, the sum of \$9,721.54," etc. Again, M. D. Johnson, the city treasurer, as a witness on behalf of plaintiff, testified as follows: "Witness received every cent that was claimed to be due the city, except these items of interest;" and, further, "at the time the

witness withdrew all the money except the interest, the city had no claim against the City Bank for anything except the interest that had accrued under the terms of that contract." There is other testimony in the record of like import, from all of which we think it clear that defendant paid and plaintiff received, as such, the entire amount of the principal sum deposited with it, and that the balance due, if any, was on account of the accrued interest, which, as we have attempted to show, cannot be recovered. We have spoken of the rule in reference to interest as defined by the courts, independent of statutory provisions. Civil Code, § 3290, would seem to apply a similar doctrine to express contracts for the payment of interest with that applied to implied contracts. It reads as follows: "Accepting payment of the whole principal, as such, waives all claim to interest." But was any interest due? That the attempted contract was void, is conceded on all hands. The case, then, stands thus: Plaintiff, without any contract for interest, deposited with defendant, a commercial bank, (which, as was well known, received general deposits, but did not, in the absence of a special contract, pay interest thereon,) certain money, which, upon demand, was returned to it. Under such circumstances, no implied agreement to pay interest can be evolved from the transaction. If it be contended that the law provides for interest, and that such law, in every case, becomes a part of the contract, whether express or implied, the answer must be that, in the absence of an express contract, the law only awards interest upon money from the time it falls due. Civil Code, § 1917. It is given "on moneys received to the use of another and detained from him." In the present instance the money was not due until demanded. It was not detained from plaintiff, for the reason that, upon demand, it was paid over. The position of plaintiff is ingenious, but analyzed, it amounts to this: Plaintiff deposited money with defendant under a contract for the payment of interest by the latter, and providing that the deposits should continue to be made, and to include all the public moneys, for the space of one year. At the end of, say, 10 months, it violated the contract, by ceasing to so deposit, and withdrew all funds on deposit.

Had the contract been valid, and an entire contract, plaintiff could not have recovered under it at all. If a divisible contract, plaintiff could have recovered as to the portion completed, and separable from the part violated, subject to a recoupment by defendant to the extent of the damages suffered by the violation. But the contract was void. Plaintiff had no right to make it. To do so was a violation of the constitution and general law. It was a felony. *Yarnell v. City of Los Angeles*, 87 Cal. 603, 25 Pac. Rep. 767; Pen. Code, § 424. Hence, plaintiff is in a better position than it would have been,

had the contract been valid. And we are, in effect, asked to hold that the law will presume a contract to pay interest, where to have agreed directly to do so would be a felony. We say "in effect," because it is apparent that it is the interest which is sought to be recovered, and to call it profits does not alter the principle. It is submitted that an agreement to pay interest on a contract will not be implied, where the parties could not, by a special contract, have provided therefor. Plaintiff was not entitled to recover the money loaned to or deposited with the defendant, by reason of the special contract, but independent of it. Its right to recover the money, in such a case, is founded upon the equitable principle that defendant has money of the plaintiff, which it would be unjust for him to retain, and hence may be required to return; and usually, in such cases, the void contract cuts no figure. So long as the void contract is executory, either party thereto, having paid money on account thereof, may recover it back. If the defendant refuses to return money so paid, on demand, he will be liable for interest from the date of his refusal, or, in a proper case, may be converted into an involuntary trustee, and held for profits. There is a wide distinction between that class of contracts which are unlawful in the sense that the law will not enforce them, and which we usually term "void contracts," and that other class which are designated as "illegal contracts." Wharton, in discussing this distinction, at section 336 of his work on Contracts, says: "A void contract is to be distinguished in this respect from an illegal contract. Money paid in furtherance of an illegal contract cannot be recovered back. But it is otherwise as to money paid in furtherance of a contract which by statute is void, but not illegal, as is the case of contracts void under the statute of frauds. An illegal contract may be repudiated by either party." Again, it is said at section 340: "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." And at section 741 it is said: "As we have already seen, money which has been paid for an illegal purpose cannot be recovered back when the purpose has been put in operation. It is otherwise as to money paid on an executory illegal agreement, when the party suing is not implicated in a continuous criminal design." We have seen that, independent of the illegal contract, there is nothing in the evidence upon which to predicate a claim on the part of the plaintiff for interest. To treat the con-

tract as in existence,—a contract which would render all the parties concerned criminals in the eyes of the law,—and to say that plaintiff can, under such circumstances, recover a profit upon the public moneys, in violation alike of the constitution and the statutes, would tend to encourage public officers to violate their duty. Nor can the contract serve as a shield to earn illicit gains, and then be repudiated for the purpose of recovering them by an action for money had and received. To permit this would be, in effect, to enforce the illegal transaction. Neither law nor equity, in such a case, converts the defendant into an involuntary trustee, or does more than to say that a plaintiff thus situated can gain no profit by an open and palpable violation of the law. The exceptions to this rule arise in cases where the parties are not in pari delicto, or where one of the parties is the victim of duress or fraud, or superior influence, and have no application to the case at bar. The judgment and order appealed from should be reversed, and the court below directed to dismiss the action.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to dismiss the action.

(99 Cal. 645)

RHOTON et al. v. BLEVIN. (No. 18,126.)
(Supreme Court of California. Oct. 7, 1893.)

WILLS — CONSTRUCTION — INTENTIONAL OMISSION OF GRANDCHILDREN.

A will reciting that testator, knowing that his wife would ever continue the same kind, devoted mother to their children which she had always proven herself, gave all his property to his wife, expressly excluding said children. Held, that an intentional omission to provide for issue of deceased children appeared on the face of the will, within Civil Code, § 1307, providing that in case of an omission to provide for any child or the issue of a deceased child, unless it appears that such omission was intentional, he shall take as though there had been no will.

Commissioners' decision. Department 2. Appeal from superior court, Sutter county; John C. Gray, Judge.

Action by Ida Rhoton and others, by R. E. Robinson, guardian ad litem, against Ona Blevin, executrix. Judgment for plaintiffs. Defendant appeals. Reversed.

J. H. Cramdock, for appellant. R. E. Robinson, for respondents.

SEARLS, C. This action was brought by Ida Rhoton and Elenora Rhoton, minor children of Amanda Rhoton, deceased, and Marion Sitton, a minor child of Eliza Sitton, deceased, to construe the last will of William T. Blevin, deceased. William T. Blevin, deceased, was a resident of the county of Sut-

ter, and on the 28th day of April, A. D. 1888, made, executed, and published his last will and testament, in which the following language is used: "First. Knowing that my beloved wife, Ona Blevin, will ever continue the same kind, devoted mother to our children which she has so thoroughly proven herself on all occasions, I make no provisions for said children further than herein mentioned, but I grant, give, and bequeath to my said beloved wife, Ona Blevin, all and singular the property, real, personal, and mixed, wheresoever situated, and all moneys, goods, and chattels of whatsoever name, nature, or description, belonging to me, of which I may die possessed, or to the possession of which I may be in any manner entitled. In thus bequeathing all my estate to my wife to the exclusion of all my children I am moved by no want of paternal affection for any of said children, but by the belief that their own interests will be better served thereby, and well knowing that my wife will make the best use and disposition of the estate which her industry has largely contributed to acquire." The testator then proceeds to appoint his wife, Ona Blevin, as the sole executrix of the will, to act as such without giving bonds or security, and confers upon her power and authority to lease, sell, and dispose of all the property, real or personal, absolutely, without applying to any court for permission so to do, and generally confers upon her all the powers necessary and requisite to dispose of the property, pay his debts, etc.

At the time of making said will, and on the 9th day of January, 1889, at which time the said William T. Blevin departed this life at Sutter county, Cal., he left surviving him as his next of kin and heirs at law, beside Ona Blevin, his wife, four children of full age, and the plaintiffs herein, who were his grandchildren, and the children, respectively, of Amanda Rhoton and Eliza Sitton aforesaid, deceased, daughters of the said William T. Blevin and one Ona Blevin. The will is set out in full in the complaint, to which complaint the defendant demurred upon the grounds (1) that the complaint did not state facts sufficient to constitute a cause of action against defendant; (2) that it appears from the copy of the will set out in the petition that testator did not omit to provide in his will for the petitioners herein, being the issue of his deceased children; (3) that, if the testator omitted to provide for petitioners herein as the issue of his deceased children, it further appears from said will that such omission was intentional on the part of said testator. The demurrer was overruled by the court, and, defendant declining to answer, a judgment was entered, in which it was decreed and determined that the petitioners or plaintiffs herein are heirs of said William T. Blevin, deceased, and as such are entitled to succeed to the same shares of the estate of the said deceased

as they would have succeeded to had he died intestate, viz. the said Ida Rhoton and the said Elenora Rhoton to an undivided one eighteenth (1-18) interest or share each in said estate; and the said Marion Sitton an undivided one-ninth (1-9) interest or share in said estate; and that, upon a final settlement and distribution of the residue of said estate, they receive their shares or proportions thereof accordingly.

The contention of respondents is that, being grandchildren of the testator, William T. Blevin, whose parents are not living, and the testator having failed in his will to make any provision for them, and that it failing to appear that such omission was intentional, they are entitled, under section 1307 of the Civil Code, to the same share or interest in his estate as if he had died intestate. Section 1307 is as follows: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, said child or the issue of such child must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." It will be perceived from the foregoing section that a child or children, and the issue of any deceased child or children, are placed in the same category so far that if omitted to be provided for in the will they are entitled to a share in the estate as though no will had been made, unless it appears that such omission was intentional. We must look to the face of the will itself to determine the question whether or not the petitioners were intentionally omitted therefrom by the testator. The correct rule is said to be that the words of the will must show that the testator had the person omitted in his mind, and, having him so in his mind, has omitted him from the provisions of his will. In re Estate of Garraud, 35 Cal. 339; Estate of Stevens, 83 Cal. 322, 23 Pac. Rep. 379, and cases there cited. "A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent it must have effect as far as possible." Civil Code, § 1317. Again: "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." Id. § 1325. The intention of the testator in this instance to bequeath and devise all his property to his wife is about as clearly apparent as language could render it. Having full faith in his wife, and satisfied that she would "ever continue the same kind, devoted mother to our children which she has so thoroughly proven herself on all occasions," he makes no provision for said children, but proceeds to devise all his property to his said wife, and then again declares that he is not moved to this action by want of paternal affection, but by the belief that

the interests of the children will be best subserved by this course. Having thus photographed his intention to exclude all his children, and given satisfactory reasons therefor, reasons which apply as clearly to the children of his deceased daughters, his grandchildren, as to his immediate children, we are satisfied that a construction which eliminates from the class of those proscribed his grandchildren, however grammatical the construction may be, violates the clear intention of the testator, which was to use the word "children" in an enlarged sense, including alike children and grandchildren, and at the same time violates the principle of interpretation which requires effect to be given to every expression in a will. We do not doubt but that the terms "children," "grandchildren," "nephew," "niece," "cousin," or any similar term, must ordinarily be presumed to have been used in its primary and natural sense, and that this sense cannot be enlarged or qualified, unless there be something on the face of the will clearly indicating such intent in the mind of the testator at the time of making the will. In gathering this intent of the testator, the necessity of enlarging or modifying terms of this character, in order to give effect and operation to the will, is a consideration not to be overlooked. The only question here is, did the testator intentionally omit to provide in the will for the issue of his deceased children, and does that intention appear upon the face of the the will? We think the will, taken together, shows that the term "children" was used in that enlarged sense which includes descendants of the second as well as of the first degree, and that the grandchildren, who are plaintiffs here, are precluded by the will from any share in the estate. Estate of Schedel, 73 Cal. 594, 15 Pac. Rep. 297. It follows that the judgment of the court below should be reversed, and the court directed to sustain the demurrer to the complaint.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to sustain the demurrer to the complaint.

(4 Cal. Unrep. 286.)

PEOPLE v. LARSEN. (No. 20,991.)

(Supreme Court of California. Oct. 10, 1893.)

ROBBERY—EVIDENCE OF ACCOMPLICE—CORROBORATION.

Where the only evidence to convict defendant of a robbery is that of an accomplice, who testifies that defendant planned the robbery, and received part of the proceeds, and that of two witnesses, that they had seen defendant and the accomplice together on two occasions before the robbery, there is no such corroboration of the evidence of the accomplice, as required by Pen. Code, § 1111, as to justify conviction.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

Albert Larsen was convicted of robbery, and appeals. Reversed.

Frank H. Short and G. C. Freeman, for appellant. Atty. Gen. Hart, for the People.

VANCLIEF, C. The defendant and George Green were, by information, jointly accused of the crime of robbery. They demanded separate trials, and upon the separate trial of the defendant the jury returned a verdict of guilty, recommending defendant to the mercy of the court. Thereupon the court sentenced him to imprisonment in the state prison for the term of 40 years. He appeals from the judgment, and from an order denying his motion for a new trial.

The principal point upon which appellant relies for a reversal of the judgment is that the only evidence tending to connect him with the commission of the crime was the testimony of an accomplice,—one Cliff Ragan,—whose testimony was not corroborated as required by section 1111 of the Penal Code, which reads as follows: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense, or the circumstances thereof." It appears that the robbery was committed at a store owned by a Chinaman named Sun Kee, about 7 o'clock in the evening of April 27, 1892. Sun Kee was absent at the time, and the store was in charge of a Chinaman named You Kam, with whom was another Chinaman, named Wong Yee. Another Chinaman, named Wong Ki, was at his cabin somewhere near the store. The three Chinamen last named testified to the effect that they had known the defendant two or three years; that he lived three or four miles from China store; that he came to the store on horseback about 15 minutes before 7 o'clock on the evening of the robbery, while You Kam and Wong Yee were at supper, and told them that he wanted to purchase certain articles from the store; that You Kam knew he had traded at the store before, and had an unsettled account there. Thereupon the two Chinamen, You Kam and Wong Yee, went with defendant from the kitchen, where they had been eating, into the store, carrying a lighted lamp with them; You Kam going behind the counter, and Wong Yee taking a seat in front of the counter. While they were in this position, two robbers armed with a pistol and a rifle,—one of them masked,—rushed in. The masked robber, pointing his pistol at defendant and Wong Yee, drove them into a corner; and the other pointed his rifle at You Kam, who ducked under the counter. The masked robber then backed out of the door, and shot through the win-

dow at You Kam, inflicting a slight flesh wound on one of his arms. Upon being thus wounded, You Kam fell upon the floor, feigning to be dead, and did not arise until after the robbers left. Immediately after the shot was fired, both robbers tied the defendant and Wong Yee together, and one robber guarded them with a drawn pistol while the other searched the house for money and other portable things of value. This done, they led defendant and Wong Yee out to a barn, where they left them still tied together, and departed. Soon after the robbers left, You Kam untied defendant and Wong Yee. After being untied, defendant remained at the store about three-quarters of an hour, and then left for his home. The robber who was not masked was recognized by the Chinamen as George Green, who was accused of the crime jointly with the defendant, and had been separately tried before the trial of the defendant, but the masked robber was not recognized by any of the Chinamen. The foregoing is the sum and substance of the testimony of the three Chinamen; and there was no other witness to the fact of the robbery, except Cliff Ragan, who testified that he was the masked robber; that Green had a mask on, but it fell off; the robbery had been planned and concocted by defendant, George Green, and himself a week or two before it was committed; that the part enacted by defendant at the robbery was in accordance with their plan; and that the proceeds of the robbery were divided between defendant, Green, and himself. It appears that, at the time of the trial of the defendant, Ragan was in jail on a separate charge of having participated in this robbery, and also on a charge of an assault to murder, and on the trial of defendant he testified that he had served one term in the state prison for a felony, of which he was convicted in 1888; that his reason for confessing his guilt of the crime of robbery in this case was to get through with it, and get off lighter, if he could; that the district attorney had told him that it would be easier on him if he told all he knew about it, and he might get off with two or three years, though the district attorney said he had no control over the amount of the punishment, which depended entirely upon the court. Darwin Lewis testified that he had seen defendant, Green, and Ragan together in defendant's corral, near his house, about a week or 15 days before the robbery, where they were castrating colts. William Downey testified that, about noon on the day of the robbery, he saw defendant and George Green in the town of Raymond, some two or three miles from the residence of defendant,—first saw them tying their horses in front of his store; did not know they came together; Green came into witness' store and bought some cartridges; defendant did not enter his store. James Downey saw Green in Raymond in the afternoon of the same day, but does not say he

saw defendant on that day. The foregoing is the substance of all the evidence on the part of the prosecution, and no evidence was introduced by defendant.

We think that, without aid from the testimony of Ragan, the other evidence did not tend to connect the defendant with the commission of the robbery, and therefore did not sufficiently corroborate the accomplice. *People v. Thompson*, 50 Cal. 480; *People v. Ames*, 39 Cal. 403. No brief appears to have been filed on the part of the people in this case, but we understand that the attorney general submitted this case on his brief in the case of *People v. Green*, 34 Pac. Rep. 231. We have examined that brief, but find in it no attempt to answer the point above considered. I think the judgment and order should be reversed, and the cause remanded.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded.

(4 Cal. Unrep. 289)

KLAUBER et al. v. SAN DIEGO STREET-CAR CO. (No. 19,189.)

(Supreme Court of California. Oct. 10, 1893.)

APPEAL—REVERSAL—RES JUDICATA.

On an appeal on the judgment roll by plaintiff from a judgment for defendant, the supreme court reversed and directed the court below to enter a judgment on the findings for plaintiff in accordance with the prayer of the complaint. The court did so, and defendant excepted and appealed. *Held*, that the question whether the complaint stated a cause of action was decided on the former appeal, whether the demurrer was in the record or not. 32 Pac. Rep. 876, reversed.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by A. Klauber and others against the San Diego Street-Car Company for specific performance. Judgment for defendant was reversed on appeal. 30 Pac. Rep. 555. Defendant appeals. Motion to dismiss denied. 32 Pac. Rep. 876. Judgment affirmed.

Gibson & Titus, for appellant. Parrish, Mossholder & Lewis and Luce & McDonald, for respondents.

PER CURIAM. In this case judgment was originally entered in the court below for defendant. An appeal was taken by the plaintiffs to this court from the judgment upon the judgment roll, and this court reversed the judgment, and directed the superior court "to enter a judgment upon the findings in favor of plaintiffs, in accordance with the prayer of the complaint." When the case went back to the superior court judgment was there entered for plaintiffs in strict pursuance of the said direction of this court. The defendant then procured the

court below to settle a bill of exceptions, and upon the judgment roll, including said bill of exceptions, he now appeals to this court. Respondents moved to dismiss the appeal upon the ground that the judgment of the court below, entered in accordance with the directions of this court as aforesaid, was final, but the motion to dismiss the appeal was denied in department, upon the ground that the bill of exceptions presented some questions that had not been passed upon at the former appeal. 32 Pac. Rep. 876. The main contention of appellant on this appeal is that the complaint does not state facts sufficient to constitute a cause of action, but that point was clearly and necessarily decided against the appellant's contention on the former appeal. It appears that the demurrer to the complaint was not included in the judgment roll as it came to this court upon the former appeal, but the appellant could easily have supplied it by a suggestion of diminution of the record; and the question of the sufficiency of the complaint to constitute a cause of action was before the court, whether the demurrer was in the record or not. The only other points made by appellant are that the findings are not sustained by the evidence, and that certain deeds were improperly admitted in evidence; but neither of those contentions can be maintained, and we see nothing in them demanding special notice. The judgment appealed from is affirmed.

CITY AND COUNTY OF SAN FRANCISCO
v. RUSSELL. (No. 15,348.)

(Supreme Court of California. Oct. 10, 1893.)

In bank. Appeal from superior court, city and county of San Francisco.

Action by the city and county of San Francisco against J. E. Russell. From a judgment for plaintiff, defendant appeals. Dismissed.

Pierson & Mitchell and Horace G. Platt, for respondent.

PER CURIAM. It appearing from the certificate of the clerk of the superior court that appellant herein has not filed his transcript on appeal within the time prescribed by the rules of this court, the appeal herein from the judgment and order denying a motion for a new trial is, on motion of respondent, hereby dismissed.

(4 Cal. Unrep. 291)

LUCO v. DE TORO. (No. 19,229.)

(Supreme Court of California. Oct. 10, 1893.)

APPEAL—REMAND—OBITER DICTA.

The supreme court, in its opinion reversing a case for lack of a certain and unambiguous finding on a material question of fact, added that, if the finding could be construed as in favor of respondent, it was enough to say

that in the court's opinion it was not supported by the evidence. *Held*, that said remark was clearly obiter, and did not preclude the trial court from finding for respondent on substantially the same evidence, strengthening its conclusion by other new findings, based on the evidence, and probative of the main finding.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Juan M. Luco against Juan de Toro for partition. The facts are recited in the opinion on the former appeal. 27 Pac. Rep. 1082. Judgment for defendant. Plaintiff appeals. Affirmed.

I. N. Thorne and Oliver P. Evans, for appellant. Smith & Winder and Works & Works, for respondent.

HARRISON, J. The appellant's right of recovery depends upon the performance by Hartman of his contract with Olvera to procure the issuance of a patent for the Rancho Ex-Mission of San Diego. This agreement is set forth at length in the opinion of this court rendered upon the former appeal. 91 Cal. 405, 27 Pac. Rep. 1082. Upon that appeal the judgment of the court below was reversed for its failure to make a sufficient finding upon this issue. The finding which it had made was held to be ambiguous and uncertain, inasmuch as in one part thereof the court found that immediately after the execution of the agreement Hartman entered upon the performance of the stipulations therein contained to be performed on his part, and that, in connection with the plaintiff herein, he continued to prosecute them to a final conclusion, while in a subsequent portion of the same finding the court found that there had not been a full and complete or substantial performance of that agreement. It was also said in the opinion that the appellant "was entitled to an unequivocal finding on the question of performance." Upon the subsequent trial of the cause, from which the present appeal is taken, the court finds that "the said contract was not fully or substantially performed by the said Hartman, nor did the said Hartman procure to be issued the patent for the said rancho," and it also finds as a fact that after the case was sent on to Washington, in 1871, Hartman rendered no services, but abandoned the case. As there was evidence before the court in support of these findings, the findings themselves must be accepted in this court as forming the basis of the judgment, irrespective of any conflict or preponderance of evidence upon which they were made. It is, however, contended by the appellant that, as it was said in the opinion upon the former appeal, after determining that the finding was ambiguous and uncertain, that "if, however, the finding can be construed as a finding in favor of respondent on that subject, it is sufficient to say that in our opinion it is not supported by the evidence," and, as the evidence at the last trial was substantially the

same, the opinion upon the former appeal has become the law of the case, and that the trial court should have made its finding in conformity thereto.

The determination by this court of the rights of the parties in an appeal from the superior court is a final adjudication of those rights, and the questions of law decided by this court become a rule for the guidance of the trial court as well as of this court if the same questions are again presented in that controversy upon a retrial of the issues or upon a subsequent appeal. The principle upon which this rule rests is that the judgment is an estoppel binding upon the parties, and to be enforced by the court. *Klauber v. Car Co.*, 32 Pac. Rep. 876. The rule is not limited to controverted questions of abstract law, but is equally applicable when the point determined upon the appeal is whether the evidence before the trial court was sufficient to justify a decision drawn therefrom, which confers or withholds a legal right for either party. As the principle upon which this rule rests is that of an estoppel by judgment, it follows that it is only the matters which are actually adjudged or determined as the basis of the judgment of this court that can be considered as the law of the case, and binding upon the parties in its subsequent stages, and that when the judgment or determination is made upon a certain state of facts, it ceases to be of binding force if the facts presented at the retrial or upon a subsequent appeal are essentially different. The ground upon which the former judgment of this court was rendered was the failure of the trial court to make a finding upon this issue, and the statement in the opinion that the finding which it had made was ambiguous and uncertain rendered what was subsequently said about the insufficiency of the evidence to support the construction placed upon it by the respondent in his argument merely obiter. As the court had not made a finding upon the issue, there could be no basis for this court to make a determination respecting the sufficiency of the evidence to support that finding. It has been often held that when the trial court has failed to make a finding upon an issue in the case, although the entire evidence is before this court, we have no power to make a finding therefrom, but must remand the cause to the trial court for that purpose; that the act of drawing a conclusion from the evidence is peculiarly the function of the trial court, and that this court, in the exercise of its appellate jurisdiction, has power to correct only errors of law, and cannot correct errors of fact committed by that court. The same principles preclude any opinion which this court may give upon the character of the finding which should be drawn from the evidence in a case from having any binding force upon the trial court to which the case should be remanded, or in the de-

termination of any subsequent appeal. See *Wixson v. Devine*, 80 Cal. 385, 22 Pac. Rep. 224.

The record, as presented upon this appeal, contains findings of certain facts which were not made at the former trial, and which, of course, could not have been considered by this court on the former appeal. In addition to finding that the contract was not fully or substantially performed by Hartman, the court also finds that, while he did render some services in the surveyor general's office in this state, yet after the case was sent to Washington, in the early part of the year 1871, "no further services were performed by the said Hartman, nor did he appear in the said proceeding before the commissioner of the land office or secretary of the interior, but the case was wholly abandoned by him;" and also that the employment of Denver by Olvera was after the abandonment of the case by Hartman, and that the patent was procured to be issued by Denver. The evidence before the court was ample to sustain findings, and as probative of these facts they are controlling in support of the ultimate fact found upon the issue of performance. It follows that the judgment and order must be affirmed, and it is so ordered.

We concur: FITZGERALD, J.; McFARLAND, J.

DE HAVEN, J. I concur in the judgment.

4 Cal. Unrep. 294

LOS ANGELES FARMING & MILLING CO. v. HOFF et al. (No. 19,180.)

(Supreme Court of California. Oct. 10, 1893.)

PUBLIC LANDS—INCLOSURE—COLOR OF TITLE.

A judicial decree, followed by possession under a bona fide claim, is color of title, within the meaning of Act Cong. Feb. 25, 1885, prohibiting inclosures of public lands unless under "claim or color of title made or acquired in good faith," and, such possession having lasted for 25 years, the holder can maintain ejectment against persons assuming to enter on the premises as being "public lands of the United States." *Cameron v. U. S.*, 13 Sup. Ct. Rep. 595, 148 U. S. 301, followed.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Ejectment by the Los Angeles Farming & Milling Company against Hoff and others. Judgment for plaintiff. Defendants appeal. Affirmed.

J. M. Dameron, for appellants. Graves, O'Melveny & Shankland and Stephen M. White, for respondent.

PER CURIAM. This is an action of ejectment brought against the defendant Hoff and over 100 others, to recover possession of the south half of the San Fernando rancho in Los Angeles county. Upon the facts shown at the trial we think there can be no question as to the right of the plaintiff

to recover in this action, and the question of error in the instructions becomes immaterial. The supreme court of the United States, in a recent decision, has construed the act of congress of February 25, 1885, and in effect answered every proposition upon which the appellants rely herein. *Cameron v. U. S.*, 148 U. S. 301, 13 Sup. Ct. Rep. 395. The plaintiff has been in the possession, under sanction of a judicial decree, for about 25 years. Its claim has been made in good faith and under color of title, while the defendants are mere naked trespassers. The case comes squarely, therefore, within the decision above referred to, and requires no further consideration. See, also, *U. S. v. Brandestein*, 32 Fed. Rep. 740, and *Rourke v. McNally*, (Cal.) 33 Pac. Rep. 62. We find no error in the record. Judgment and order affirmed.

4 Cal. Unrep. 295

Ex parte CARROLL. (No. 21,048.)

(Supreme Court of California. Oct. 12, 1893.)

CONTEMPT—COMMITTING OFFICER OF COURT—VALIDITY OF JUDGMENT.

A commitment for contempt of court, in disobeying an order requiring the person committed to restore to the administrator of an estate in process of settlement money which he had obtained, as attorney for such administrator, by false pretenses, is void, where the judgment on which the commitment issued fails to show that he was in fact such attorney.

In chambers. Petition in habeas corpus by John S. Carroll for the release of John F. Burris from custody on a commitment for contempt. Petition granted.

John S. Carroll, in pro. per.

BEATTY, C. J. This is a proceeding upon habeas corpus instituted by the petitioner, Carroll, on behalf of John F. Burris, who is alleged to be unlawfully restrained of his liberty. The return to the writ consists of nothing more than the commitment under which the prisoner is held, which recites certain proceedings on attachment for an alleged contempt of court. These recitals show that Burris obtained from the administratrix of an estate in progress of settlement in the superior court the sum of \$108 by false pretenses; that he was ordered by the court to restore the money, and, failing to do so, was committed to the custody of the sheriff, to be confined in jail until he obeyed the order. The authority of the court to make such an order is rested upon the suggestion that Burris was attorney for the administratrix, and obtained the money from her by abuse of his privileges as an officer of court. It may be that a court has the power to make such an order, and enforce it against an attorney by process of contempt, but there is nothing in the return to show that Burris was an attorney for the administratrix at the time he obtained the money in question, and therefore the order appears to be void. Leave has been asked, since the

hearing and submission of the case, to amend the return by showing that the complaint in the contempt proceeding alleged that Burris was attorney for the administratrix. But, even if it were proper to allow such amendment at this time, it would not cure the defect, for the judgment of the court—copied in the commitment—nowhere finds that Burris was such attorney. It speaks of him merely as one John F. Burris, i. e. as an entire stranger to the probate proceedings, and as much beyond the jurisdiction of the superior court in attachment for contempt as any other stranger. In contempt cases the facts necessary to confer jurisdiction should not only be alleged, but found, and here they are not found in any form, specific or general. The prisoner is discharged.

100 Cal. 61

OVERALL v. TULARE COUNTY. (No. 18,116.)

(Supreme Court of California. Oct. 13, 1893.)

SHERIFF — MILEAGE — UNSUCCESSFUL PURSUIT OF ESCAPED PRISONERS—SEVERAL ARRESTS AT SAME TIME.

1. Act March 5, 1870, (St. 1869-70, p. 159,) § 9, relating to sheriff's fees, provides that the sheriff is entitled to receive, "for every mile necessarily traveled in going only, in executing any warrant of arrest, * * * or for mileage in any criminal case or proceeding, * * * thirty cents." St. 1887, p. 207, § 211, provides that the fees provided in the act shall be in full compensation, "provided further, that the board of supervisors shall allow to the sheriff his necessary expenses for pursuing criminals or transacting any criminal business without the boundaries of his county." *Held*, that the sheriff was not entitled to mileage while unsuccessfully hunting for escaped prisoners for whose arrest he had warrants. *Broughton v. County of Santa Barbara*, 3 Pac. Rep. 877, 65 Cal. 257, followed.

2. Where a sheriff arrests two or more persons at the same time he is not entitled to one mileage at such statutory rate for each person arrested.

Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by D. G. Overall against Tulare county to recover for certain fees claimed to be due him as sheriff of such county. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals. Reversed.

Bradley & Farnsworth, for appellant. Chas. G. Lamberson and W. W. Middlecoff, for respondent.

PER CURIAM. The plaintiff was sheriff of Tulare county from January 7, 1889, until January 5, 1891. During that time no salary was attached to his office, but he was entitled to charge and receive for official services such fees as were allowed by law. On November 29, 1890, he presented to the board of supervisors for allowance a claim against the county for \$770.40. Of this claim \$284.70 was for "miles traveled hunting for" one

McFarlane, and \$485.30 for "miles traveled in hunting for" one McKinney, both of whom had been charged with the commission of crime. On January 12, 1891, the board allowed and ordered paid \$201 on this claim. On January 30, 1891, plaintiff presented to the board of supervisors for allowance another claim against the county for \$690.50. This claim was for services in traveling to places away from the county seat, and arresting and bringing before justices of the peace a large number of alleged criminal offenders. On March 5, 1891, the board allowed and ordered paid \$461.50 on this claim. Plaintiff was not satisfied with the amounts so allowed, and refused to accept the same, and thereupon he commenced this action to recover the full amount of his two claims, setting out a separate cause of action upon each claim. Attached to the complaint are copies of the claims presented to the board, duly itemized, and marked respectively "Exhibit A" and "Exhibit B." The gist of the first cause of action is stated in the complaint as follows: "That between the 26th day of November, 1889, and the 1st day of February, 1890, the plaintiff, as such sheriff, necessarily traveled 2,568 miles within said state in executing warrants in criminal cases; and that thereby said defendant became, and still is, justly indebted to plaintiff in the sum of \$770.40, no part of which has been paid." And the gist of the second cause of action is thus stated: "That between the 10th day of November, 1890, and the 5th day of January, 1891, defendant became, and still is, justly indebted to plaintiff for services performed as such sheriff, for mileage necessarily traveled, and for serving subpoenas and warrants in criminal cases to the amount of \$689.50, no part of which has been paid." The answer denied all the material averments of the complaint, and upon the issues thus raised the case was tried by the court without a jury. The court found that the plaintiff was entitled to recover the full amount claimed, less the sum of \$27.60, which had been twice charged in "Exhibit B." Judgment was accordingly entered in favor of the plaintiff for the sum of \$1,432.30 and costs of suit. From this judgment, and an order denying its motion for a new trial, the defendant appeals.

The law fixing the traveling fees of the sheriff of Tulare county during the time plaintiff held that office, is found in section 9 of the act of March 5, 1870, (St. 1869-70, p. 159, and see St. 1877-78, p. 559.) The provision is as follows: "For every mile necessarily traveled in going only, in executing any warrant of arrest, subpoena, or venire, bringing up a prisoner on habeas corpus, taking prisoners before a magistrate or to prison, or for mileage in any criminal case or proceeding; provided, that in serving a subpoena or venire, when two or more jurors or witnesses live in the same direction, but one mileage shall be charged, thirty

cents." And the county government act provides: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, * * * provided further, that the board of supervisors shall allow to the sheriff his necessary expenses for pursuing criminals or transacting any criminal business without the boundaries of his county." St. 1887, p. 207, § 211. In support of the first cause of action it was shown that McFarlane and McKinney were in the county jail, and escaped therefrom during the night of November 25 or 26, 1889. On the morning of the 27th plaintiff started out hunting for them, having warrants for their arrest, and continued such hunting until December 14th. While so engaged he traveled 940 miles, most of which traveling was outside of his county. After December 14th plaintiff discontinued his hunting until January 9, 1890, when he started out again in quest of McKinney, and arrested him in Rawlins, Wyo. In going and returning on this last trip he traveled 670 miles within this state. Subsequently, in December, 1890, plaintiff started out again after McFarlane, and found and arrested him in the town of San Marcial in New Mexico. For this last service he afterwards presented another claim against the county, and it was allowed and paid in full. The 949 miles and 670 miles traveled as before stated, the first number, however, being duplicated, because the hunting was for two alleged criminals at the same time, constitute the plaintiff's claim as set forth in his "Exhibit A;" and the only question is, was he entitled to a larger allowance on it than was made by the board of supervisors? Plaintiff testified: "During the time I did this traveling, hunting for McKinney from and including November 27, 1889, to December 14, 1889, I did not arrest McKinney or have him in my custody. These places where I traveled in hunting were several hundred miles from where I finally arrested McKinney. Between the 14th day of December, 1889, and January 9, 1890, I did not do any traveling in hunting for McKinney. It was nearly a month after I did this traveling in hunting for McKinney before I arrested him; nearly a month before I started out again to hunt him. * * * I arrested McFarlane some time in December, 1890. I arrested him several hundred miles from the place where I did the hunting for him as set forth in my complaint in 'Exhibit A.' * * * I arrested both McFarlane and McKinney in opposite directions from the places where I traveled in hunting for them as set forth in my claim marked 'Exhibit A;' not exactly opposite, but in a different direction. The arrest of McFarlane by me was made nearly a year after the time I traveled hunting for him, as set out in my claim marked 'Exhibit A.'" It will be observed that the plaintiff was allowed by the supervisors all that he was entitled to

claim under the statute for the 670 miles traveled in making the arrest of McKinney, and also all that he claimed for making the arrest of McFarlane, and that only his claim for the miles traveled which did not result in any arrest was disallowed. In *Broughton v. County of Santa Barbara*, 65 Cal. 257, 3 Pac. Rep. 877, the sheriff of that county sought to recover, under section 9 of the statute of 1869-70, above quoted, a certain sum of money as "mileage" for traveling to serve a warrant of arrest on one charged with felony; and it was held that the statute did not allow mileage for traveling in different directions in looking for one charged with a crime who is not arrested. That case we consider directly in point, and decisive of the first cause of action in this. It is true that McFarlane and McKinney were subsequently found and arrested, but that fact, under the circumstances shown, does not materially distinguish this case from that. It follows that the plaintiff was not entitled to recover for the miles traveled in his unsuccessful hunt, though possibly he might have rightly claimed pay for his necessary expenses. That question, however, does not arise here, as no such claim was presented for allowance.

In support of the second cause of action it was shown that between November 10, 1889, and January 5, 1890, a deputy of the plaintiff went several times to Goshen and Tulare, and arrested at the former place 18 and at the latter 49 different persons. The arrests were all made without any warrants, and it was admitted "that the plaintiff went to Goshen without any knowledge of any crime having been committed by any of the defendants in any of the said cases, and that while at Goshen he arrested each of said defendants, and took each of said defendants to Visalia, where he swore to a complaint before the justice against each of said defendants, upon which a warrant was issued in each of said cases, which warrant was thereupon at said Visalia served by plaintiff upon each of said defendants." And there was a like admission as to the arrests made at Tulare. It was further admitted that each of the defendants named in the admissions was charged with a misdemeanor. The deputy testified: "Some of these parties were arrested for vagrancy, some for malicious mischief, and I think there were two or three for disturbing the peace. * * * At the time I arrested any of the defendants at Goshen I did not have any knowledge or notice that any particular defendant had committed any offense before I started from Visalia. In each and all of these cases the crime was committed at Goshen, after I arrived there, and was done in my presence while there. I also state that each and all the defendants whom I arrested at Tulare were arrested by me for a crime committed in my presence at Tulare. I had no notice or knowledge of any of these de-

fendants committing a crime before I started to Tulare." The distance from Visalia to Goshen was eight miles, and to Tulare twelve miles. In making up his claim, as shown by "Exhibit B," plaintiff charged, and now insists that he is entitled to recover, mileage at the rate of 30 cents per mile from Visalia to the place of arrest, for each of the 18 and 49 persons arrested; and whether he was entitled to such mileage or not is the only question which need be considered, the allowance made by the board of supervisors being sufficient to cover all the balance of his claim. As before stated, the plaintiff was entitled to such fees only as were allowed by law. No statute or rule of law is cited authorizing such a charge as that in question, and we know of none. It seems clear, therefore, that this claim for mileage was properly disallowed by the supervisors, and improperly allowed by the court below. It follows that the judgment and order must be reversed, and the cause remanded. So ordered.

100 Cal. 78

In re PINGREE'S ESTATE. (No. 18,186.)
(Supreme Court of California. Oct. 13, 1893.)

PUBLIC ADMINISTRATOR—RIGHT TO LETTERS.

A public administrator does not, by filing his petition for administration on an estate before the ending of his term of office, become entitled to administer thereon as against the incumbent of the office at the time of the grant of administration.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

In the matter of the estate of W. C. Pingree, deceased. From an order refusing letters of administration to J. Phelps, and granting them to J. D. Bentley, the former appeals. Affirmed.

L. J. Maddux, for appellant. Eastin & Griffin, for respondent.

BELCHER, C. On the 30th day of December, 1892, W. C. Pingree died intestate in the county of Stanislaus, in this state. He was a resident of the county at the time of his death, and left an estate therein, consisting of real and personal property, of the value of more than \$15,000. He had no relatives or heirs at law residing in this state. On December 31st, the next day after the death of Pingree, J. Phelps, then the public administrator of the county, filed in the superior court thereof his petition in proper form, asking that letters of administration on the estate of the deceased be issued to him. On January 2, 1893, J. D. Bentley became the public administrator of the county, and on the next day (January 3d) he, as such officer, filed in the superior court his petition in proper form, asking that letters of administration on the estate of the said deceased be issued to him. Due notices of

the petitions were given, and they were both set for hearing at the same time, on January 14, 1893. At the time set for the hearing, Phelps was sworn as a witness, and among other things testified: "I filed my petition for letters of administration on the 31st day of December, 1892, before I had ever seen the deceased, before his burial, and before I had held the inquest on his remains. I had not at that time ever seen any of his property or taken charge of it. I had made no search for his will, except to talk with some one at Knight's Ferry through the telephone. I did not then know anything about his property. I have not taken charge of the property under an order of court, and have not had charge of it since the special letters of administration were issued to J. D. Bentley. I wrote to Mr. Means to take charge of the property, but I don't know whether he did or not. I have never been in charge of it personally. I have not been public administrator since the 3d day of January, 1893, and am not now." Other witnesses were also sworn and examined in behalf of both petitioners, and at the conclusion of the evidence the court made an order denying the petition of Phelps, and granting that of Bentley. From this order Phelps appeals, and his contention is that inasmuch as Pingree died, and he filed his petition, during his term of office, he became interested in the estate to the extent of his commissions, and was therefore entitled to administer upon it and recover the commissions, notwithstanding his term of office expired before his petition was heard; and, in support of this position, *Rogers v. Hoberlein*, 11 Cal. 120, and *In re Aveline's Estate*, 53 Cal. 260, are cited. The Code names 10 classes of persons who may be appointed to administer on estates, and among them are public administrators. Section 1365, Code Civil Proc. It provides that petitions for letters of administration must be in writing, etc., (section 1371,) and that any person interested may contest the petition, and may assert his own rights to the administration, and pray that letters be issued to himself, (section 1374;) and also that on the hearing the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto, (section 1375.) A public administrator, like any other person, can administer on an estate only when there has been made to him a special judicial grant of administration thereon. He does not, by virtue of his office, acquire the right to administer upon any particular estate. *Beckett v. Selover*, 7 Cal. 216; *In re Hamilton's Estate*, 34 Cal. 464. The cases cited by appellant are only to the effect that where letters of administration have been granted to a public administrator he may continue his administration of the estate after the expiration of his term of office, and until his authority is set aside or revoked by another

appointment. Those cases are not in point here. The appellant did not, by virtue of his office or by filing his petition, acquire any interest in the estate of Pingree, or in the commissions to be earned by administering upon it; and when his term of office expired he ceased to be one of the persons specially named to whom letters might be granted. It was his status at the time of the grant of administration, and not at the time of filing his petition, that determined his competency. The court did not, therefore, err in ordering that letters of administration on the estate be issued to Bentley as "the party best entitled thereto." The order appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(100 Cal. 87)

PEOPLE v. VOLCANO CANYON TOLL-ROAD CO. (No. 18,118.)

(Supreme Court of California. Oct. 13, 1893.)

QUO WARRANTO — RESTRAINING COLLECTION OF TURNPIKE TOLLS—PLEADING—EVIDENCE.

1. In an action in the nature of a quo warranto, brought by the attorney general, to have a certain road declared a highway, and to enjoin defendant from collecting tolls thereon, defendant's claim and exercise of the franchise being admitted, the burden is on defendant to show by what warrant or authority such claim is made.

2. An averment in the complaint in such action, that "for more than six months last past defendant has had no franchise or right to demand or take toll," is not an admission of the existence of such franchise or right previous to that period.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; W. H. Grant, Judge.

Information in the nature of a quo warranto against the Volcano Canyon Toll-Road Company. From an order denying a new trial, defendant appeals. Affirmed.

Clitus Barber and John M. Fulweiler, for appellant. F. P. Tuttle and A. K. Robinson, for the People.

TEMPLE, C. This action was brought to have a certain road in Placer county declared a public highway, and to enjoin defendant from collecting tolls thereon. Plaintiff had judgment, and defendant appeals from an order denying a new trial. It is averred in the complaint that defendant claims and is exercising the franchise of collecting tolls for the privilege of traveling upon and passing over the road, and is maintaining toll-gates, thereby obstructing the road, and preventing its use and enjoyment by the public, except upon condition of paying toll to the defendant; further, "that, for more than six months last past, defendant has had no franchise or right to demand or take toll from

passengers or travelers upon said road for the privilege of passing over or along the same with their animals, or at all, or to establish or maintain any tollgate or other gate or obstruction thereon," etc. The answer admits, by not denying, that the defendant claims and is exercising the disputed franchise, but denies that it is doing so without right, and avers that the board of supervisors of the county granted defendant a franchise to collect tolls upon the road, which has not expired.

This being an information in the nature of a quo warranto brought by the attorney general, and the fact that the defendant claimed and was exercising the disputed franchise being admitted, the burden was on the defendant to show by what warrant or authority it claimed and exercised the franchise. There was no attempt to show any warrant or authority whatever. The judgment, therefore, was proper.

The statement shows that but one witness was sworn, and that was one Bunker, who testified for the defendant. He testified that the road belonged to his wife, who took it as legatee under the will of witness' brother, and since they had owned it they had built a bridge, and repaired the road. That toll had always been charged for traveling the road. He also said they had never claimed to be incorporated, and that the name used as defendant was simply the name of the road, and was convenient for that purpose. Yet we are referred in the brief of appellant to a case in which this same name figured as a plaintiff in a case to compel the board of supervisors to fix the rate of tolls, which case was appealed to this court. *Volcano Canyon Road Co. v. Board of Sup'rs of Placer Co.*, 88 Cal. 634, 26 Pac. Rep. 513. In that case it was said that the board, on that application, could not inquire whether the plaintiff was legally incorporated, or owned the road. It seems a very startling proposition that a person taking a name, apparently of a corporate body, and in his complaint asserting it to be such, can take possession of a public highway which was laid out and built, and is being controlled, by this very board, and compel that body to fix rates of toll, and allow the applicant to appropriate the highway, without the right to question the corporate character, although no such pretended body ever existed, or claimed to exist, save in the petition to have the rates fixed. *Weaverville & M. W. R. Co. v. Board of Sup'rs of Trinity Co.*, 64 Cal. 69, is relied upon as authority for this proposition. But in that case it was proven and found that the plaintiff was an acting corporation, and it was simply held that in that proceeding this was sufficient and conclusive. In this case there are no persons acting under the name. There are no directors or officers, and no acts in corporate form.

As to the other proposition, it has been held in numerous cases that the board, when

such application is made, may and should inquire as to the right of the applicant to a franchise; and it has been held that, because the board on such an application has determined this right, an individual who is using the road cannot question it. *Turnpike Road Co. v. Campbell*, 44 Cal. 89. In *Blood v. Woods*, 95 Cal. 78, 30 Pac. Rep. 129, it was said that all toll roads are public roads, and to some extent under the control of the board of supervisors, and that the roads upon which they may be required to fix rates of toll are those laid out and built as toll roads under the provisions of the Code. This is not a proceeding for fixing rates, but an inquiry on behalf of the state as to the authority of the defendant, if there be one, to collect tolls. No such right has been shown. It seems to be claimed that, in the allegation quoted from the complaint, it is admitted that prior to six months immediately preceding the action the defendant had a franchise. But this is not so. It is a very cautious statement, but is entirely consistent with the proposition that defendant never had a franchise at any time. The pleader might have contented himself with merely stating the fact that the defendant was claiming and exercising a franchise, and averred that it was without right, or he might have averred the existence of a franchise at some time, and shown that it had terminated, or been forfeited. In the last case the facts showing that it had ended or had been forfeited should have been stated. The complaint here, though containing some unnecessary statements, is quite sufficient for a complaint of the first character, but is insufficient for a complaint in the other class of cases. The corporate character of the defendant is admitted in the pleadings; still the evidence shows, beyond doubt, that there is no defendant. It is *nominis umbra*, merely. I advise that the order be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(100 Cal. 11)

WARNER v. WARNER et al. (No. 19,080.)

(Supreme Court of California. Oct. 10, 1893.)

CHANGING PLACE OF TRIAL—ACTION FOR DIVORCE.

1. Civil Code, § 128, as amended by Act March 10, 1891, providing that a divorce must not be granted unless plaintiff has been a resident of the county "in which the action is brought three months next preceding the commencement of the action," does not prevent a change of the place of trial of an action for divorce to the county in which defendant resides, since Code Civil Proc. § 395, provides that "in all other cases (excepting actions relating to real property, for the recovery of penalties, and those against municipal corporations and public officers, etc.) the action must be tried in the county in which the defendants,

or some of them, reside at the commencement of the action." De Haven, J., dissenting.

2. Code Civil Proc. § 393, provides that if the county in which the action is commenced is not the proper county for the trial thereof the action may, notwithstanding, be tried therein, unless defendant demands in writing that trial be had in the proper county. *Held*, that where the bill of exceptions recites that a "notice in due form" of the motion by defendant for a change in the place of trial was filed, and no objection was raised to the absence of a demand in writing, it will be presumed on appeal that the notice included a proper demand. Beatty, C. J., dissenting.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Warner against Warner and another. From an order changing the place of trial, plaintiff appeals. Affirmed.

Rolfe & Freeman, for appellant. Wells, Monroe & Lee, for respondents.

PATERSON, J. This is an action for a divorce and a division of the community property. It is alleged that F. R. Warner, who is joined as a defendant with the husband of the plaintiff, received from the husband a fraudulent conveyance of certain real property, situated in San Bernardino county, with the intent to defraud the plaintiff of her community interest therein. The prayer is for a divorce, a cancellation of the conveyance, and a division of the property fraudulently conveyed. The action was brought in the county of San Bernardino, the complaint alleging that the plaintiff had resided in the state for more than one year, and in the county of San Bernardino for more than three months, next preceding the commencement of the action. The court, on motion of the defendants, changed the place of trial from San Bernardino to Los Angeles county, upon the sole ground that the defendants were residents of the latter county. Appellant contends that under section 128 of the Civil Code an action for divorce must be brought in the county of the plaintiff's residence, and cannot be removed therefrom except on account of the convenience of witnesses, or where it is made to appear that an impartial trial cannot be had, or that the judge of the county is disqualified from acting. The section referred to, as originally incorporated into the Codes, provided that "a divorce must not be granted unless the plaintiff has been a resident of the state for six months next preceding the commencement of the action." As amended by the act of March 10, 1891, it now reads that "a divorce must not be granted unless the plaintiff has been a resident of the state for one year, and of the county in which the action is brought three months next preceding the commencement of the action." It is said it would lead to an absurdity to hold that a husband could compel his wife to bring an action in a county other than the one in which he lived,—in the county where she resides,—

and afterwards, on his own motion, have the cause removed to the county of his residence; but in making this new provision the legislature was looking out for the interests of the public, as well as the interests of the parties. Prior to the passage of this amendment, reproach had been brought upon the administration of our divorce laws by the frequency of proceedings commenced by complainants in counties where neither of the parties resided, the purpose being generally to avoid notoriety in the community where the plaintiff was known, and in some instances to obtain a decree by collusion, or to vex the defendant, or make it impossible or inconvenient for him or her to present a defense. It was the purpose of the amendment to correct this abuse. The state has an interest in the result of such cases. The public welfare demands that the bonds of matrimony should not be lightly set aside, and there is less probability of successful collusion or unfair advantage where the parties have both resided and are known, than there is in a county where neither has resided, and which the plaintiff may select for the purpose solely of procuring a divorce. It is true, before the amendment, a defendant had the right to have the cause transferred to his or her place of residence for trial, and to this extent the defendant's rights were protected; but the amendment tends to discourage the practice referred to, saves the defendant in a great many instances from the necessity and expense of moving for a change of the place of trial, and renders it less probable that the parties will allege or admit grounds of divorce which their friends and neighbors know to be false. Thus are the interests of not only the defendant, but of the public, in a measure protected.

Section 128 must be read in connection with sections 395 and 397, Code Civil Proc. The former is a limitation as to the place for the commencement of actions of divorce; the latter provide for the place of trial. The absurdity suggested is no greater than that which may arise under section 5, art. 6, of the constitution. That section provides that "all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon, real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated." The plaintiff may be morally certain that the action would have to be tried in another county, either because of the convenience of the witnesses or disqualification of the judge, and yet the action must be commenced in the county where the real estate is situated. It has been held here that there is no inconsistency between this section and the provisions of the Code relating to the place of trial. *Hancock v. Burton*, 61 Cal. 70. We do not look to the Civil Code for

methods of procedure. The legislature has, for the reasons suggested, provided that no divorce shall be granted unless the plaintiff has resided in the county where the action is commenced for three months, but we look to the Code of Civil Procedure to determine all questions relating to the place of trial.

The inconvenience and injustice suggested by appellant is more fancied than real. The cases in which the plaintiff will be put to inconvenience must necessarily be rare. Furthermore, when the question of inconvenience is considered, it will be found not entirely one-sided. A party desiring to secure a divorce may under the construction claimed by appellant, by establishing a residence in a distant county, put the defendant to the trouble and expense of having the case tried away from the place of his residence, unless he can show inconvenience of witnesses or disqualification of the judge. But all such speculation has nothing to do with the matter. It is the duty of the court to give effect to the law as it finds it, and not be led away from the rules of construction by considerations of inconvenience. It is sufficient for us to know that effect can be given to both provisions by the construction which we give them, while the construction contended for would in effect nullify the provisions of section 395, Code Civil Proc., so far as actions for divorce are concerned.

It is further contended by the appellants that the action, being one in part to set aside a fraudulent sale and conveyance of land, necessarily involves the determination of a right or interest in real property, and therefore comes within the provision of section 392, Code Civil Proc. That section provides that an action "for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest," must be tried in the county in which the subject of the action is situated, subject to the power of the court to change the place of trial. The object of the action, however, was not simply to procure the cancellation of the deed and reconveyance of the property. Another and probably much greater object was to secure a dissolution of the bonds of matrimony, and, so far as this last matter was the subject of the action, the proper county for the trial thereof was the county of the defendant's residence. It has been held here that, if real and personal actions are joined in the same complaint, the case falls within section 395, Code Civil Proc., and must be tried in the county of the defendant's residence. *Smith v. Smith*, 88 Cal. 572, 26 Pac. Rep. 356; *Ah Fong v. Sternes*, 79 Cal. 33, 21 Pac. Rep. 381; *Le Breton v. Superior Court*, 66 Cal. 30, 4 Pac. Rep. 777. The defendant F. R. Warner might perhaps have insisted upon the action being retained in the county of San Bernardino for trial, but, if any such right existed, he waived it by joining the other defendant in the application for a

transfer to Los Angeles county. O'Neill v. O'Neill, 54 Cal. 187. In the bill of exceptions, facts are cited sufficient upon which to base an order changing the place of trial. The order is affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

DE HAVEN, J. I dissent from the judgment.

HARRISON, J., (concurring.) I think the order appealed from should be affirmed. In my opinion the amendment of 1891 to section 128, Civil Code, was intended to prescribe a residence of three months in some particular county as a jurisdictional condition to be shown by the plaintiff before he should be entitled to a divorce, just as the previous requisite, which is also retained, of six months' residence in the state, is a jurisdictional condition to entertaining his application for a divorce. The right to a divorce is particularly a matter of statutory creation, and the legislature has the same right to prescribe the conditions in procedure upon which a suit shall be instituted in its courts as it has to limit the causes for which the divorce may be granted. This construction of the section is consistent with the provisions of the Code of Civil Procedure for changing the place of trial of the action after it has been brought, and gives full force to the several provisions of both Codes.

No objection was made in the court below to the absence of a demand in writing for a change of the place of trial, and, as the bill of exceptions states that a "notice in due form" of the motion therefor was filed by the defendant, it can be assumed here that the notice included a proper demand.

BEATTY, C. J. I dissent. There was no demand in writing for a change of the place of trial ever filed by the defendants, or either of them, and such demand has more than once been held by this court to be essential to the validity of an order changing the place of trial. Code Civil Proc. § 396;¹ Estrada v. Orena, 54 Cal. 407; Byrne v. Byrne, 57 Cal. 343. Unless these decisions are to be reversed, the order appealed from should be reversed. As to the point discussed in the opinion of the court, I concur in the main in the views expressed by Justice PATERSON, but for the reason above stated I must dissent from the judgment of affirmance.

¹ The section provides: "If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county."

(Supreme Court of California. Oct. 14, 1893.)

PARTNERSHIP—ACCOUNTING—NOVATION.

A lumber firm agreed with two of its members to sell them sawed lumber at a certain price. The two members formed a new firm, and one of them sold his interest in the contract to the other, and the latter sold interests therein to two strangers. The old firm continued to sell to the purchasing concern under the agreement, and to receive payment therefrom, without regard to its personnel, the bills being in all instances made out in the name of the purchasing concern. There was no evidence of any agreement to release the original contractors. *Held*, that there was no novation, and the lumber firm could sue one of the purchasing members for an accounting without joining his new associates in the purchasing contract.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. E. Chapin, T. E. Peckinpagh, and Charles Peckinpagh against Albert Brown for an accounting. Judgment for plaintiffs. Defendant appeals. Affirmed.

R. P. Davidson, for appellant. J. R. Webb and L. L. Cory, for respondents.

VANCLIEF, C. On August 15, 1887, the plaintiffs and the defendant were copartners doing business in the firm name of Sugar Pine Mill & Lumber Company. Their business was that of manufacturing and selling lumber. They owned 160 acres of timber land, upon or near which they had built a sawmill. On August 15, 1887, a written contract between the copartnership and two of its individual members, namely, Chapin and the defendant Brown, was executed, by which the copartnership agreed to sell to Chapin and Brown, and the latter agreed to purchase, all the lumber to be sawed from the timber then standing or fallen on the said 160 acres of land, "or that may be sawed in the mill of the said parties of the first part [the copartnership] from other claims before finishing sawing the timber from the above-described claim, [the 106 acres,]" at the price of \$9 per thousand feet, to be delivered in the mill yard. The parties of the first part further agreed that after the year 1887 they would deliver, as aforesaid, "an annual amount of one million feet or more, at the option of the said second parties." The agreement contains other stipulations not relevant to the issues in this case. On the same day (August 15, 1887) another agreement was executed between the copartnership and two others of its members, namely, T. E. Peckinpagh and Charles Peckinpagh, by which the latter agreed to cut, haul, and saw into lumber all the timber on said 160 acres of land, and to stack the lumber in said mill yard, for which they were to be paid \$6 per thousand feet. As to the amount of lumber to be sawed, they

² Reversed in banc. See 35 Pac. 1051, 101 Cal. 500.

agreed to be governed by the above-mentioned contract with Chapin and Brown. For the purpose of performing this contract they were to have the use of said mill, but were to keep it in repair. This contract also contains matters not material to this case. Chapin and Brown assumed to constitute a distinct copartnership under the firm name of North Fork Lumber Company, and transacted the business under their contract with the Sugar Pine Mill & Lumber Company in that name; but at some time prior to January 1, 1888, Chapin assigned his interest in their contract with the Sugar Pine Mill & Lumber Company to Brown, who agreed with him to perform all its obligations, and withdrew from the North Fork Lumber Company. Brown continued the business under the contract in the name of North Fork Lumber Company until January, 1888, when he assigned an interest in the contract to John Bartram, and on May 1, 1888, assigned another interest to B. F. Ellis. After these assignments, Brown, Bartram, and Ellis constituted the North Fork Lumber Company, and conducted the business with the Sugar Pine Mill & Lumber Company under the lumber contract in that name. In the fall of 1888, T. E. and Charles Peckinpagh assigned their contract with the Sugar Pine Mill & Lumber Company of August 15, 1887, (above set out,) to the North Fork Lumber Company. By the performance of this contract on the part of the Peckinpaghs, the North Fork Lumber Company became entitled to receive from the Sugar Pine Mill & Lumber Company \$6 per thousand feet for manufacturing the lumber which they were to purchase from the latter company at the price of \$9 per thousand. From and after this assignment by the Peckinpaghs, Charles Peckinpagh was employed by the North Fork Lumber Company, at a salary, to do the sawing, and he continued in that position during the years 1890 and 1891.

The object of this action is to dissolve the Sugar Pine Mill & Lumber Company, to compel an accounting between its members, and especially between the copartnership and the defendant, who, it is alleged, owes the concern a balance of \$3,090 for lumber delivered to the North Fork Lumber Company during the year 1890, under the contract first above mentioned, called the "purchasing contract." The court found him to be individually responsible on that contract, and that he was indebted on that account to the other members of the company as follows: To Charles Peckinpagh, \$427.45; to T. E. Peckinpagh, \$471.85; to J. E. Chapin, \$483.80,—amounting to \$1,383.18; and consequently that he was indebted to the copartnership (of which he was an equal member) in the sum of \$1,844.14. The judgment was in accordance with this finding. The defendant appeals from the judgment and

from an order denying his motion for a new trial.

1. The appellant contends that there was a novation of the purchasing contract by which the assignees of portions thereof were substituted for the original contractors (Brown and Chapin) by consent of the Sugar Pine Mill & Lumber Company, and therefore that appellant is not individually liable, as found by the court. It is not claimed, however, that there was any evidence of such novation, or consent thereto, by the Sugar Pine Mill & Lumber Company, other than the facts that the lumber was delivered to and paid for (so far as payments were made) by the North Fork Lumber Company, as constituted at the times of such delivery and payments. Brown never assigned all his interest in the purchasing contract, but remained a member of the North Fork Lumber Company during all its transactions with the Sugar Pine Mill & Lumber Company. Nor is there any evidence that the latter company ever agreed or consented to discharge him or Chapin from their obligation on that contract, to accept Bartram or Ellis in their stead for any part of such obligation. No objection on the ground of misjoinder or nonjoinder of parties to the action was made by demurrer or answer, or otherwise, in the court below, nor is any point made here on this ground. All the parties to the purchasing contract, and all the members of the Sugar Pine Mill & Lumber Company were before the court, and, as there as no novation of that contract, neither Bartram nor Ellis was a necessary party to the accounting. The state of accounts between the members of the North Fork Lumber Company is immaterial for any purpose of this action.

2. The only other point requiring consideration arises on the following additional facts: During the year 1890, while Charles Peckinpagh was doing the sawing for the North Fork Lumber Company, as aforesaid, he and a Mrs. Bearden sold and delivered to the North Fork Lumber Company a lot of logs cut from other lands than the 160 acres belonging to the Sugar Pine Mill & Lumber Company, and to which the latter company held no title. These logs were sawed by Charles Peckinpagh during 1890, while employed by the North Fork Lumber Company, as aforesaid, and produced 683,923 feet of lumber, which was piled in the mill yard, and thence removed by the North Fork Lumber Company. The evidence tends to prove that these logs were sawed with the knowledge and consent of the plaintiffs, and with an understanding between plaintiffs and the North Fork Lumber Company that the latter was to pay the Sugar Pine Mill & Lumber Company, for the use of their mill in sawing those logs, 50 cents per thousand feet; and it appears that a large portion of the lumber sawed from those logs must have

entered into the estimate of the 1,030,000 feet alleged and found to have been delivered to defendant in 1890, under the contract set out in the complaint. The appellant contends that the lumber produced from those logs purchased by the North Fork Lumber Company never was the property of the Sugar Pine Mill & Lumber Company, and therefore could not have been sold or delivered as such, under the contract set out in the complaint, and that the Sugar Pine Mill & Lumber Company were entitled to charge only for the use of the mill in sawing those logs at the agreed price of 50 cents per thousand instead of \$3 per thousand, which they were to receive for the lumber sawed from timber taken from the land of the Sugar Pine Mill & Lumber Company. Thus far, perhaps, appellant is right, but his assumption that in the accounting the court credited the Sugar Pine Mill & Lumber Company \$3 per thousand for the lumber sawed from the logs purchased by the North Fork Lumber Company is not sustained by the record. Assuming that all the lumber sawed before January 1, 1890, had been paid for before the commencement of this action, as seems to be admitted, and that only the lumber sawed in 1890 and 1891 is involved, as appears by the findings of the court, and also assuming that only 50 cents per thousand was credited to the Sugar Pine Mill & Lumber Company on account of the 683,923 feet produced from the logs purchased by the North Fork Lumber Company, and \$3 per thousand for all the lumber sawed from other timber during 1890 and 1891, viz. 735,121 feet, yet the judgment against the defendant would seem to be considerably less than it should have been. The 735,121 feet sawed from other timber than logs purchased by the North Fork Lumber Company, at \$3 per thousand, would amount to \$2,205. Deduct from this one-fourth thereof for defendant's share, and the remainder due the other three partners is \$1,654, whereas only \$1,383.18 was allowed them by the court. This result is justified by the fact that the accounting was not confined to the year 1890, during which the logs purchased by the North Fork Lumber Company were sawed, but included, without objection, the 389,044 feet of lumber produced from other timber during 1891. It may be that the defendant was properly credited with payments or set-offs not shown by the record, which accounts for this result. However this may be, it is enough for the disposition of this appeal that the records shows no error prejudicial to the appellant. I think the judgment and order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

100 Cal. 67

GRIBBLE et al. v. COLUMBUS BREWING CO. et al. (No. 18,091.)

(Supreme Court of California. Oct. 13, 1893.)

CORPORATION — MORTGAGE BY PRESIDENT — AUTHORITY — RATIFICATION — FORECLOSURE — ATTORNEY'S FEES — RIGHTS OF ASSIGNEE — DENIAL ON INFORMATION AND BELIEF.

1. A corporation authorized its president to execute a mortgage to secure a loan, at a rate of interest and for a length of time specified. The mortgage executed by him was for a shorter period than authorized, and provided that the interest should be paid monthly, that a failure to pay interest when due rendered the principal due, and that the mortgagees should recover attorney's fees in case of foreclosure. These conditions were not authorized, but the company accepted the money and used it for the purposes intended, and paid the interest on the mortgage monthly for four months. Held that, in an action to foreclose the mortgage for default in interest, the corporation and its assignee were estopped from denying the authority of the president to execute it.

2. Where the answer, in such action, simply denies the "due execution" of the mortgage for want of authority, but does not deny the facts shown by the pleadings which constitute a ratification, plaintiffs are entitled to judgment without proof of authority.

3. In such case plaintiffs are entitled to recover the attorney's fees, also, provided for in such mortgage.

4. Such assignee, in the absence of fraud, is in no better position than such corporation.

5. A denial in answer by such assignee, on information and belief, that certain appliances connected with property described in the mortgage were attached to the realty and were fixtures, was insufficient, since he must be presumed to be in possession and to have knowledge as to such fact.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by H. Gribble and Seth Gainsley against the Columbus Brewing Company, and Lee Stanley, its assignee, to foreclose a mortgage. From a judgment entered on the pleadings in favor of plaintiffs, defendant Stanley appeals. Affirmed.

Holl & Dunn, Clinton L. White, and Add. C. Hinkson, for appellant. Armstrong & Plattauer, for respondents.

SEARLS, C. This is an action to foreclose a mortgage. A decree in favor of the plaintiffs was entered upon the pleadings, from which Lee Stanley, the assignee in insolvency of the Columbus Brewing Company, (a corporation,) defendant, appeals.

The admitted facts of the amended and supplemental complaint, coupled with certain affirmative allegations of the answer, show that the property described in the pleadings, and known as the "Columbus Brewery," with the machinery, trade fixtures, tools, etc., was formerly owned by Chris. Wahl and wife, who, on the 27th day of October, 1890, conveyed the same to the defendant the Columbus Brewing Company, subject to a debt of \$16,000, secured by a mortgage upon the real property and a chattel mortgage upon the personalty, held by the Germania Building & Loan Association, and evidenced by a prom-

Issuory note drawing interest at 10½ per cent. per annum. This mortgage contained a provision that for a failure to pay any installment on said note when due, or any interest thereon when due, a foreclosure might be had for the whole at the option of the mortgagee, and for counsel fees on foreclosure. On the 9th day of March, 1891, the defendant corporation, being desirous of paying off the debt so secured by mortgages upon its property, negotiated a loan of \$17,000 of the plaintiffs, and to secure the same with interest at 10 per centum, by its president, authorized as hereinafter stated, made its promissory note to plaintiffs for said sum of \$17,000, with interest at 10 per centum, interest payable monthly, and, if not so paid, then the whole of the principal and interest to become due and payable. To secure the payment of said promissory note the defendant, by its president, authorized as hereafter stated, executed a mortgage upon its property, including fixtures, tools, etc. The mortgage provided for a counsel fee on foreclosure, and that a receiver might be appointed, etc.

The following is a copy of the motion and resolution under which authority was given to the president of the corporation defendant to make the note and execute the mortgage, except that the resolution as offered and passed contained the words "one year" as the period for the loan, and by inadvertence and mistake in making a record of the resolution the words "five years" were written instead of "one year:" "The following motion was made by E. Gunn, seconded by J. Schneider: Whereas, this corporation is indebted to the Germania Building and Loan Association in the sum of sixteen thousand dollars, (\$16,000,) and it is desirous to transfer said loan to other parties; and whereas, further, H. Gribble and Seth Gainsley have offered to loan to said corporation the said sum of sixteen thousand dollars and one thousand dollars more, making seventeen thousand, (\$17,000,) and to take a mortgage on the real and personal property belonging to said corporation: It is therefore resolved that the president be, and he is hereby, authorized and directed, in the name and for the use and benefit of said corporation, to negotiate said loan of seventeen thousand dollars, (\$17,000,) with interest thereon at the rate of 10 per cent. per annum, from the said Gribble and Gainsley, for the period of five (5) years, and in the name and for the benefit of said corporation to execute, acknowledge, and deliver to said Gribble and Gainsley a mortgage on all the real and personal property belonging thereto, or so much thereof as may be necessary to secure said loan; and the president is further authorized and directed to do any and all acts in the name of the corporation that may be necessary to secure said loan."

Plaintiffs advanced to the corporation defendant the \$17,000, with which the latter paid off and discharged the prior mortgage

held by the Germania Building & Loan Association, and used the residue of the loan in its business. That the defendant corporation had full knowledge of all the facts stated herein, including the fact that the loan was made for one year, that interest was payable monthly, and as to all stipulations and covenants of the note and mortgage, and with such knowledge it paid the interest on the promissory note monthly, as the same became due, until July 5, 1891, when for one month it failed to pay the interest which became due, whereby by the terms of the note the principal and interest became due, and this action was brought to foreclose the mortgage. The corporation answered the amended and supplemental complaint, admitting all the allegations thereof except the claim therein of a counsel fee of \$857, and averred that \$500 is as much as should be allowed by the court as a counsel fee. Subsequent to the commencement of the action the corporation defendant was adjudged insolvent, and defendant Lee Stanley was duly appointed assignee of said insolvent, qualified as such, and is still assignee. He was made a defendant herein, and has answered, raising the questions presented by the foregoing facts. Succinctly stated, his answer admits the indebtedness to the plaintiffs, but denies the authority of the president of the corporation defendant to contract the loan for one year, or to make the interest payable monthly, or to provide that, if not so paid, the principal should become due, or to provide for the payment of a counsel fee upon a foreclosure of the mortgage. He also avers as to certain property, averred in the complaint to be fixtures attached to the building and necessary to the brewing business conducted therein, a want of information or belief sufficient to enable him to answer, and therefore denies the truth of the allegations relating thereto. Plaintiffs' mortgage was recorded upon execution, and notice lis pendens filed, when the action was commenced. The prayer of the complaint, among other things, demands that the plaintiffs may be subrogated to the lien and rights of the Germania Building & Loan Association; that defendant Stanley be estopped to deny that the president of the corporation defendant had authority to execute the note and mortgage as therein specified; that the resolution of the corporation be reformed so as to read "one year," instead of "five years," etc.

Conceding, without deciding, that the president of the corporation defendant was without authority to execute a mortgage for the term, and with the conditions as to the dates at which interest was to be paid, the penalty following nonpayment of such interest, and the provision as to a counsel fee upon foreclosure, and we still think the decree was proper. The note and mortgage were such as the corporation had a right to authorize, and consequently were not ultra

vires. The most that can be claimed is that the contract as executed was in excess of the power conferred by the board of directors upon the president,—that it varied from the authority given him. In this respect the transaction does not differ from that of an agent of an individual who has exceeded his authority. That which a principal may authorize an agent to perform, he may ratify when performed by the latter without authority; and where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter; and this doctrine applies to corporations equally with individuals. *Main v. Casserly*, 67 Cal. 127, 7 Pac. Rep. 426; *Pixley v. Railroad Co.*, 33 Cal. 198; *Foulke v. Railroad Co.*, 51 Cal. 365; *Bradley v. Ballard*, 55 Ill. 413; *Jones v. Clark*, 42 Cal. 180. Taylor, in discussing the question of acquiescence by private corporations in the unauthorized acts of their agents, at section 211 of his work on Corporations uses the following language: "If an unauthorized act is done on behalf of a corporation, although the corporation may not be bound by the act as done, yet if the corporation, or that corporate authority which would have been competent to do the act, knowingly ratifies it or accepts the benefit of it, or if all the persons having a right to object to the act knowingly acquiesce in it, the act will be as binding on the corporation as if it had been originally authorized. This proposition is but an application of the doctrine of the law of agency that, when a person ratifies the unauthorized act of another who has purported to act on his behalf, the legal effect of the act will be the same as if it had been authorized before it was done." "A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Civil Code, § 1589; *Borel v. Rollins*, 30 Cal. 409. It is not deemed necessary to pursue this inquiry further, or to quote at greater length from the multitude of authorities in support of the position. The foregoing remarks must be understood as applying to private corporations and to executed contracts. The rule as to municipal corporations and as to executory contracts by private corporations is quite different.

The admitted facts of this case which bring the defendants within the doctrine enunciated may be epitomized thus: (1) The president of the corporation defendant included in the note and mortgage terms and conditions which the corporation had power to authorize, but which it did not authorize him to

insert. (2) The defendant corporation received the consideration of \$17,000 from the plaintiffs, and applied the money to its uses, including the payment of a prior mortgage upon its property and the extinguishment of the lien thereof. (3) The corporation defendant, by its representations, declarations, and acts, through its directors, intentionally led the plaintiffs to believe, and they did believe, the president of the corporation was authorized to execute the note and mortgage for one year, with interest payable monthly. (4) The defendant corporation, with full knowledge of the terms and conditions of the note and mortgage, received and used the consideration of \$17,000, and paid the interest thereon monthly as the same became due, from March 9, 1891, to July 5, 1891.

These facts are sufficient to constitute a ratification of the acts of the president of the corporation, and are sufficient to support the invocation of an estoppel in pais set out in the complaint.

A review of the answer of defendant Lee Stanley shows that he admits the indebtedness of \$17,000 and interest; that he nowhere denies that the note and mortgage were in fact executed, as set out in the complaint, but he does deny the due execution of those instruments, or that the president of the corporation defendant was authorized so to do, or that the defendant ever promised to pay interest except annually, etc. The second defense sets out the motion and resolution of the defendant authorizing the president to negotiate the loan and to execute the mortgage, and avers the mistake by which "one year" was changed so as to read "five years." He further avers that at the date of the mortgage the defendant corporation was indebted to divers persons in large sums of money, which have not been paid, etc. The denials of the answer do not extend to the facts constituting a ratification, hence we are enabled to say they are strictly true; and yet the plaintiffs, by reason of the additional facts which are not denied, are entitled to a judgment.

The cases of *Read v. Buffum*, 79 Cal. 77, 21 Pac. Rep. 555, and *Association v. Bustamente*, 52 Cal. 192, are authority for the necessity of proof as to the authority of corporate agents, but have no application to a case like the present, where the want of authority in such agent is admitted, and the validity of the contract is based upon the ratification by the corporation of the confessedly unauthorized act of its agent.

Schallard v. Navigation Co., 70 Cal. 144, 11 Pac. Rep. 590, and *Hardin v. Construction Co.*, (Iowa,) 43 N. W. Rep. 543, are relied upon to defeat the right of plaintiffs to recover an attorney's fee on foreclosure. The same considerations apply to this contention as to that touching the authority of the agent. There was no suggestion in

either of those cases as to a ratification by the defendants of the unauthorized acts of their agents.

The defendant Lee Stanley is in no better situation than the corporation defendant, and is equally concluded with it. There is no suggestion of fraud, and the creditors whom he represents are not subsequent purchasers in good faith for valuable consideration, nor are they shown to have any specific lien, or any lien, upon the property. The estate of the insolvent constitutes a fund for their payment, and that estate must be supposed to be enriched just so much by the \$17,000 furnished it by the loan of the plaintiffs, and, being secured by a specific lien, they, like any other holders of like liens, are entitled to precedence to the extent of their lien over general creditors. In *Darst v. Gale*, 83 Ill. 136, and *Beecher v. Mill Co.*, 45 Mich. 103, 7 N. W. Rep. 695, the courts held that subsequent purchasers of the mortgaged property could not show that the corporations had executed the mortgages in excess of their corporate powers.

The denial upon information and belief by defendant Lee Stanley that certain appliances in the brewery were attached to the realty and were fixtures was insufficient. Defendant, as assignee in insolvency, must be presumed to have been in possession of the property, and to have known whether or not the appliances named were so attached, and hence the denial should have been positive in form. *Loveland v. Garner*, 74 Cal. 298, 15 Pac. Rep. 844, and cases there cited.

The judgment appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

(100 Cal. 202)

MITCHELL et al. v. DONOHUE. (No. 19, 213.)

(Supreme Court of California. Nov. 2, 1893.)

HOLOGRAPHIC WILL—VALIDITY—EVIDENCE—INSTRUCTIONS.

1. An instrument as follows: "This is to serifey that ie levet to mey wife Real and persnal and she to dispose for them as she wis,"—dated and signed, is not vague and uncertain, and devises to the wife all the real and personal property of the husband.

2. Where a will is contested on the ground that the husband, while sick, was importuned by his wife to make it in her favor, against his wishes, the court properly restricted evidence of the inharmonious life led by the parties to the last three or four years of testator's life.

3. Where a holographic will is offered for probate, and the court states that the only evidence of its execution is that given in detail by the wife, which, if believed, would establish the will, the charge is not erroneous, as excluding from the jury evidence offered by contestants that deceased did not mean it to be a will, where such an issue has already been presented to the jury under proper instructions.

Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Application of Kate Donohue for the probate of the will of her husband, Patrick Donohue. From a judgment admitting the will to probate, Kate Mitchell and others appeal. Affirmed.

The following is the opinion of the commissioners:

"**BELCHER, C.** Patrick Donohue died in San Luis Obispo county on the 19th day of February, 1892, leaving surviving him his wife, the respondent, Kate Donohue, but no children, and also leaving an estate consist-

ing of real and personal property of the value of about \$15,000. His heirs at law, other than his widow, were one sister, and several nephews and nieces, children of two deceased brothers. In due time the widow filed in the superior court of San Luis Obispo county her petition, in proper form, asking that a paper accompanying the petition be admitted to probate as the last will of her deceased husband. The accompanying paper, as is shown by a photographic copy thereof brought here in the record, reads as follows: 'Crolldepdro, february 3, 1892. this is to serifey that ie levet to mey wife Real and persnal and she to dispose for them as she wis. Patrick Donohue.' A day was set for hearing the petition, and on that day the sister and one nephew and four nieces of the decedent appeared, and filed written grounds of opposition to the probate of the alleged will. The grounds stated were as follows: (1) 'Said instrument is not a will, nor is it the last will or testament of said Patrick Donohue, deceased.' (2) 'Said instrument was not written by said Patrick Donohue freely or voluntarily, or at all.' (3) 'At the time of the execution of said instrument, said Patrick Donohue, in executing the same, was under duress, menace, fraud, and undue influence, and he was not then competent to make a last will and testament. At the time of the execution of said instrument, and for some time prior thereto, said Patrick Donohue was at his home at Corral de Piedra, in the above-named county, and was sick, and in great pain and suffering of body and mind; that his wife, Mrs. Kate Donohue, who now petitions to have said instrument admitted to probate as a will, constantly and repeatedly importuned, harassed, and annoyed said Patrick Donohue, deceased, concerning his and her property, and the disposition thereof, and gave him no rest, peace, or quiet upon the subject, and repeatedly urged him to transfer such property to her by deed or will; that in order to put a stop to such importunities, and thereby obtain for himself some peace, said Patrick Donohue, being by his said wife thereto coerced, and unduly influenced as aforesaid, did sign the aforesaid instrument, but not intending the same as or for his last will or testament, and the same is not his testament or will.' The petitioner served and filed her answer to the opposition, fully controverting thereby all the facts alleged by the contestants. The case was thereafter tried before a jury, and the following special issues were framed and submitted to them for decision: (1) Is the document presented for probate the last will of Patrick Donohue, deceased? (2) Was said document entirely written, dated, and signed by the hand of Patrick Donohue himself? (3) If said document was written and signed by said Donohue, was it written and signed freely and voluntarily? (4) If said document was writ-

ten and signed by said Donohue, was the same executed by him under duress? (5) If said document was written and signed by said Donohue, was the same executed by him through menace? (6) If said document was written and signed by said Donohue, was the same executed by him through fraud? (7) If said document was written and signed by said Donohue, was the same executed by him through undue influence? (8) Was said document executed by said Donohue as and for his last will? (9) Did Patrick Donohue intend this paper as his last will and testament? (10) Is this paper the last will and testament of said Patrick Donohue? To the first, second, third, eighth, ninth, and tenth questions thus submitted, the jurors by their verdict answered, 'Yes,' and to the fourth, fifth, sixth, and seventh questions they answered, 'No.' The court adopted the findings of the jury, and, in accordance therewith, further found that the said document 'is the last will and testament of Patrick Donohue, deceased; that it was executed in all particulars as required by law; and that said testator, at the time of the execution of the same, was of sound and disposing mind, and not acting under undue influence, menace, fraud, or duress.' And thereupon an order was made and entered, admitting the proposed will to probate, and appointing the petitioner administratrix of the estate of the decedent, with the will annexed. From this order, and an order denying their motion for a new trial, the contestants appeal.

" 'An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state and need not be witnessed.' Civil Code, § 1277. And such a will may be proved in the same manner that other private writings are proved. Code Civil Proc. § 1309. A will may be informally drawn, and may consist of one or more papers. No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death, and parol evidence as to the attending circumstances is admissible. And courts, in reading wills, always supply obviously omitted words, wherever the word omitted is apparent, and no other word will supply the defect. Estate of Wood, 36 Cal. 75; Clarke v. Ransom, 50 Cal. 595; Estate of Skerrett, 67 Cal. 585, 8 Pac. Rep. 181; 6 Lawson, Rights, Rem. & Pr. § 3140; Redf. Wills, pt. 1, p. 454. Counsel for respondent contend that the document in question here was intended by decedent as a testamentary disposition of his property, and that it was sufficient in form to meet the requirements of the law, and to justify its admission to probate as a will. As they read the paper, it is as follows: 'Corral de Piedra, February 3, 1892. This is to certify that I leave to my wife (my) real and personal (property,) and

she to dispose of them as she wishes. Patrick Donohue.' Counsel for appellants, on the other hand, contend that the document was not entitled to probate as a will, because it is vague and uncertain as to the subject-matter, presenting a case of patent ambiguity which renders it absolutely void. This contention is rested upon the theory that it cannot be determined from the face of the paper whether the word 'levet' should be read as 'leave' or 'left,' nor what real or personal property is referred to, and, therefore, that the construction given to the paper by respondent is unauthorized. We are unable to see any such patent ambiguity in the language used as would render the paper void on its face. The court below evidently read the word 'levet' as 'leave,' and supplied the word 'my' before and 'property' after the words 'real and personal;' and in our opinion it was justified in doing so. As thus read, the paper shows a testamentary intent, which entitled it to probate.

"Counsel for appellants also contend that the court below committed numerous errors in the admission and exclusion of evidence. All of these alleged errors may be considered together, and a brief statement of the facts proved, and sought to be proved, will be sufficient: The decedent and respondent were married in 1869. They never had any children. Early in 1870, they went to San Luis Obispo county, and thereafter continued to live in that county. At the time of their marriage, she had about twenty-two or twenty-three hundred dollars in money, but he had no money or property. In May, 1870, they commenced working for wages; he doing farm work, and she household work, and continued in such employment until October, 1875, receiving most of the time \$75 per month for their services. About the time they thus commenced working out, they loaned to their employers \$1,900 of her money at 1¼ per cent. per month interest. This money, and their accumulated earnings, they subsequently invested in land, which they afterwards sold for about twice the sum it had cost them. In January, 1875, they purchased another tract, a part of the Rancho Corral de Piedra, containing 157.79 acres. Both of them were named in the deed as grantees, and the consideration expressed therein was \$8,100. In December, 1877, he conveyed to her 57.79 acres of this tract, and the consideration expressed in his deed was \$2,000. He also at some time gave her a bill of sale of one horse. In 1881, and again in 1888, they purchased a few acres of adjoining land; and the parcels thus purchased in 1875, 1881, and 1888 were owned by them, and constituted their home, at the time of his death. Seven or eight years before his death, he made a will, but it had been lost or destroyed. By that will, he devised all his property to his wife during her life, and after that it was to go to his other heirs. A few days before he wrote

the paper in controversy, he became sick, resulting from an abscess in his back, and he continued to grow worse till he died. His mind, however, was clear and vigorous up to the day of his death. On the morning of February 3, 1891, he was up, and sitting by the dining-room table. He asked his wife for a sheet of paper, and when he obtained it he began to write. As to what then occurred, she testified as follows: 'So, when I saw him writing, I took my chair, and sat down. It was between eight and nine in the morning. When he got through writing, he passed it over to me. He says: "That's for you, for fear anything should happen, to protect you from them, because I know they will go for you. I made that will for you to save you. There is nothing there but your own hard earnings. I will tell you what to do with it. Sell it, put it in two banks, or put it in three banks, and sit down, and take comfort, and don't be no longer a slave for them. It is no more than right that there should be some person in here to sign that." There was no man I could call, and Mr. Gaxiola was off with the horses. He says: "Never mind. Take it, and put it in your trunk, and put it away; and every one in town knows my signature." And again: "When this paper was written, there was not one in the house but my husband and me. Nobody saw this paper, after it was written and put in my trunk, until Monday, February 22d, the day after the burial, and I did not inform a living being that it was in existence.' The contestants sought to prove that Mrs. Donohue became insanely jealous of her husband a dozen years or so before his death, and that she thereafter entertained and often expressed suspicions that he had or would transfer to others, without her knowledge or consent, all the real and personal property which he had conveyed to her, and would also dispose of his own property so that she would get nothing from it, and would be left destitute; that he and others had often told her that he had not conveyed away her property, and could not do so, and that all her suspicions and fears were groundless, but that their efforts in this behalf were futile, and failed to convince her. The court admitted all of this offered evidence as to what had been said and done by respondent within three or four years before her husband's death, but, on objection, excluded all of it relating to earlier dates. Counsel now insist that the paper presented as a will was not intended as such at all, but simply as a certificate that the writer 'left'—that is, transferred—to his wife several years before certain real and personal property, which was still hers, and subject to her disposal, and that his only purpose in making the paper was to allay her suspicions that he had subsequently transferred the same property to others; and it is claimed that the action of the court, in excluding the offered evidence, was erroneous, because, if admit-

ted, it would have tended strongly to sustain the appellants' theory as to the true meaning and purpose of the paper. We fail to see any material error in any of the rulings complained of. The court, in allowing the contestants to go over the married life of the parties for three years and more, and to show up their little disputes, bickerings, and dissensions, seems to have been quite as liberal as any rule of law or common justice could require. Besides, as said in another contested will case, (In re Spencer, 96 Cal. 448, 31 Pac. Rep. 453:) 'It is difficult to conceive how the verdict and judgment could have been different, if the court had ruled throughout the trial as asked by appellants; and in such a case a judgment will not be reversed, even though some errors have occurred during the progress of the trial.'

"Counsel for appellants further contend that the court erred in striking out, and refusing to give to the jury, portions of two instructions asked by contestants, and in giving a portion of one of the instructions which it gave of its own motion. The clause stricken out from one of the instructions asked was, in effect, that the proponent of the alleged will must prove by a preponderance of evidence that the paper was intended by Patrick Donohue as his will, and that in this connection the jury might consider certain specified testimony. And the clause stricken out of the other instruction was that, 'as to the paper, the rule of law is that where an instrument is equally susceptible of two interpretations,—one in favor of natural rights, and the other against it,—the interpretation favoring natural rights is to be adopted. By 'natural rights' is meant the rights of the parties under the law if no will was made. And I instruct you that, if Patrick Donohue had made no will, the natural rights of his brothers and sisters, and of the children of any deceased brother or sister, would entitle them to a share of his estate.' There was no prejudicial error in striking out these clauses. The instructions, as given, plainly told the jury how, in the absence of a will, the estate of decedent would have been succeeded to and distributed, and that, in determining whether the paper in question was intended by the decedent as his will, they must take into consideration his mental and physical condition at the time the paper was written; who his relatives were, and the claims which they naturally had upon his bounty; any prior declarations which he may have made, going to show his intentions as to the disposition of his property after death; and the circumstance, if it existed, that before the date of the paper he had formed in his mind a settled purpose to dispose of his property in a manner different from what the paper purports to do; and also all of the testimony admitted in evidence and bearing upon the question, including the contents of the paper itself; and that the bur-

den of proving that the paper was intended by the decedent as his will was upon the proponent. These instructions, with others that followed, presented the contestants' theory as to the case very clearly and fully, and they were therefore, in our opinion, in no way harmed by the action of the court complained of.

"In giving the instructions of its own motion, the court called attention to each of the special issues submitted, and, among other things, said: 'The next question is, was said document executed by said Donohue as and for his last will? The only testimony that the court recalls upon that—although you, gentlemen, have all the testimony before you—the testimony of Mrs. Donohue that he wrote it; he wrote it and signed; and he told her it was his will, and gave it to her. But, of course, you are the sole judges of fact; of the evidence, and the credibility of witnesses. If you believe that evidence, you should answer, "Yes." If you do not, you should answer, "No." It is objected that this portion of the instruction was erroneous because it practically withdrew from the consideration of the jury all of the evidence introduced by contestants for the purpose of showing that the paper was not executed as a will. We do not think the instruction was intended to have the effect charged, and, in view of the other instructions given, it seems impossible that it could have done so. As we read it, it simply calls attention to the only direct evidence as to the making of the paper, and tells the jury, if they believe that evidence to be true, they will answer, "Yes;" otherwise, "No." All the evidence was submitted to them, and, in view of it, they were to determine whether Mrs. Donohue's testimony as to the execution of the paper was true or not. The above disposes of the whole case, and it follows that the judgment and orders appealed from should be affirmed.

"We concur: SEARLS, C.; VANCLIEF, C.

"PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed."

William Shipsey, for appellants. Wilcoxon & Bouldin and J. M. Wilcoxon, for respondent.

PER CURIAM. For the reasons given in the opinion filed by this department June 27, 1893, the judgment and orders appealed from are affirmed.

4 Cal. Unrep. 320

PEOPLE v. VITAL. (No. 20,957.)

(Supreme Court of California. Nov. 2, 1893.)

CRIMINAL LAW—MURDER—ABSENCE OF INSTRUCTIONS FROM RECORD—SETTING ASIDE SUBMISSION OF CAUSE.

Where the record in a murder trial recites that the court read to the jury "instructions asked by the respective parties, and al-

lowed by the court, and those given by the court of its own motion," but does not contain those given by the court of its own motion, or requested by the people, the appellate court will not determine whether or not the trial court erred in refusing to give an instruction asked by defendant, but will set aside a submission of the cause, and restore it to the calendar, to be heard when all the instructions are incorporated into the record.

In bank. Appeal from superior court, Santa Cruz county; W. B. Cope, Judge.

Vital was convicted of murder, and appeals. Submission of cause set aside, and cause restored to the calendar.

A. D. Spilvalo and J. A. Spinetti, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The minutes of the trial of this case, and which constitute a part of the record, state that the court read to the jury "instructions asked by the respective parties, and allowed by the court, and those given by the court on its own motion;" but the record filed here does not contain any of the instructions thus referred to, except those given upon request of the defendant. One of the points made by the appellant is that the court erred in omitting to instruct the jury that they had the discretion, in case they found the defendant guilty of murder in the first degree, to relieve him from the extreme penalty of death, and to say, by their verdict that his punishment should be confinement in the state prison for life. We do not think we should determine this question upon the record now before us; at least, until an opportunity is given to the attorney general to supply the instructions given by the superior court upon its own motion and upon request of the people, if such instructions were actually given. It is the duty of a judge to properly indorse all instructions given on his own motion, and when so indorsed they form a part of the record on appeal. People v. January, 77 Cal. 179, 19 Pac. Rep. 258. The submission of this cause will be set aside, and the case restored to the calendar. The attorney general will be allowed 30 days within which to file a complete record, showing all instructions given and refused by the superior court. So ordered.

4 Cal. Unrep. 265

SISSON, CROCKER & CO. v. JOHNSON et al. (No. 18,102.)

(Supreme Court of California. Oct. 6, 1893.)

INJUNCTION—AGAINST TRESPASS—COMPLAINT.

A complaint by a corporation operating a sawmill, which alleges that plaintiff, the owner in fee of certain land, commenced the construction of a logging road thereon to convey timber to the mill; that defendants entered on the land, and obstructed the men employed by plaintiff in continuing the work, threatening to use violence should they persist, whereby the work was stopped; that such interruption was repeated when an attempt was again made to construct the road, and that defendants threaten such interruption whenever

the work is attempted; that the road is necessary for the operation of the sawmill; and that defendants are insolvent,—warrants the granting of a preliminary injunction.

Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Sisson, Crocker & Co., a corporation, against F. M. Johnson and others, for an injunction. A preliminary injunction was granted, and, from an order denying a motion to dissolve the same, defendant Johnson appeals. Affirmed.

The complaint alleges that plaintiff is a corporation, and that it "was, on and before May 1, 1892, ever since has been, and now is, the owner in fee of" certain described land. It then alleges as follows: "That on or about May 15, 1892, said plaintiff herein commenced the construction of a logging road on the land herein above described, for the purpose of conveying the timber from said land to the sawmill of the said plaintiff, and that for said purpose said plaintiff employed a large number of men, to wit, about seven men, at a great expense, to wit, about twenty-five (\$25) dollars; that on or about May 25, 1892, the said defendant herein entered upon the premises herein above described, and obstructed and prevented the men employed as aforesaid by said plaintiff for the purpose of building said logging road from continuing their work thereon; that said defendants did at said time threaten to use violence toward said men, if they, or any of them, persisted in constructing said logging road on said lands, and that the men so employed by said plaintiff as aforesaid were by said threats of said defendants frightened, and prevented from continuing their work on said logging road, and that the construction of said logging road was thereby wholly stopped; that said plaintiff caused said men to attempt, on several different occasions, to continue their work on said logging road after the first interruption by said defendants, and during said month of May, but that said defendants at each time prevented the continuance of said work, and threatened to do so, by violence, whenever said plaintiff or its employees shall attempt to construct said logging road; * * * that the plaintiff is now, and at all of the times since May 1, 1892, has been, the owner of, and engaged in operating, a sawmill near the town of Sisson, in Siskiyou county, Cal., and that the timber for the transportation of which the aforesaid logging road is being constructed is necessary for the successful operation of said sawmill, and that unless the said defendants are restrained, by the order of the court from preventing the construction of the aforesaid logging road, and the transportation of timber on the same to said mill, the said plaintiff will be compelled to either close said sawmill, or operate the same at a loss; that the continuance of the aforesaid acts of said defendants, as hereinbefore alleged, will cause said plaintiff great

and irreparable damage, and that defendants, as herein above stated, have heretofore and do now threaten to prevent the construction of said logging road by all means within their power; that the said defendants are, and each of them is, insolvent, and unable to respond in damages to plaintiff. Wherefore, said plaintiff prays that the said defendants, and each of them, their agents, employees, attorneys, and all persons claiming by, through, or under them, or either of them, be, by the order of this court, enjoined and restrained from in any way or manner interfering with the said logging road, or the proposed construction thereof on the land herein above described, and from interfering with the employees, and all of them, engaged at this time, or who may hereafter be engaged, in constructing said logging road, or any part thereof; also, from in any manner interfering with the land herein above described, or the timber situated thereon, or the employees of plaintiff operating thereon, for plaintiffs' costs of suit herein, and for such other or further relief as to the court may seem proper."

Warren & Taylor, (T. M. Osmont, of counsel,) for appellant. Gillis & Tapscott and E. J. Emmons, for respondent.

DE HAVEN, J. Appeal from an order refusing to dissolve a preliminary injunction. The complaint states facts sufficient to justify the issuance of the injunction sought to be dissolved, and the court did not err in its ruling upon the motion to dissolve the same. Order affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

102 Cal. 143

STEPHENSON v. SOUTHERN PAC. CO.
(No. 10,186.)

(Supreme Court of California. Oct. 10, 1893.)

RAILROAD COMPANIES—ACCIDENT AT CROSSING—
PERSON JUMPING TO AVOID COLLISION—PLEADING—INSTRUCTIONS.

1. The complaint in an action against a railroad company alleged that the driver of a horse car in which plaintiff was a passenger, on approaching a crossing of defendant's track, observed an engine standing on the track within 25 feet of the crossing, whereupon he stopped the car; that, after ascertaining that the engine was not in motion, he started to cross the track; that when he was very near it the engineer of defendant's engine negligently commenced to back it towards the car, whereupon the passengers, including plaintiff, observing that a collision was imminent, jumped from the car, and that in so doing plaintiff, though using due care, was injured. *Held*, that the complaint stated a cause of action.

2. An instruction that if defendant was guilty of negligence, as charged in the complaint, and plaintiff was injured thereby, the verdict must be for plaintiff, is not erroneous in ignoring the question of contributory negligence, when accompanied by several instructions making the right of recovery dependent on plaintiff's exercise of reasonable care.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Sallie D. Stephenson against the Southern Pacific Company. From a judgment for plaintiff, and order denying a new trial, defendant appeals. Affirmed.

John D. Bricknell, for appellant. Wells, Monroe & Lee, for respondent.

PER CURIAM. This action was brought to recover damages for personal injuries sustained by the plaintiff, who is respondent here, through the alleged negligence of defendant. Plaintiff had a verdict for \$8,000, for which sum judgment was entered. The appeal is from the judgment, and from an order denying a new trial.

The Sixth street car line of the Los Angeles City Railway crosses the track of the Southern Pacific Company on San Fernando street in the city of Los Angeles, near the San Fernando depot, and extends to East Los Angeles. The plaintiff, on the 26th day of December, 1889, was a passenger bound from East Los Angeles on a car of the street-car line, the motive power of which was a horse. Some 60 feet easterly from the railroad crossing is a switch and side track of the street-car line, upon which the car bearing plaintiff was run and stopped to allow an east-bound car of the Olive street line to pass. While so standing, a switch engine of defendant, propelled by steam, was observed on its track at or near the crossing, from which point it moved southerly some 50 feet south of the crossing, (probably to allow the east-bound Olive street car to pass,) where it stopped. The car containing plaintiff moved westerly to a point near the railway crossing, where it came to a full stop. The way being clear, it moved on. About simultaneously the switch engine of defendant rang its bell, and backed towards the crossing, which is diagonal to the course of the street railway. The driver of the street car whipped his horse across the track, and, as plaintiff testified, some one in the car called out, "All who want to save their lives jump," and, observing the approach of the engine, she jumped from the car, which was open at the sides. As she fell, her head struck the rail of the Olive street car line (which runs at this point nearly parallel with the track upon which plaintiff was a passenger) and received the injuries for which this action was brought. The switch engine was stopped some 15 or 20 feet before reaching the crossing. The street car had passed the crossing 5 feet when plaintiff jumped from it, the engine being still in motion. The fireman on the engine saw the street car, notified the engineer, and he stopped the engine. The servants of the defendant in charge of the engine did not wantonly and unnecessarily let the engine take steam and start it with intention thereby and for the purpose of frightening the street-car passengers.

The first point made by appellant relates to the sufficiency of the complaint, which, it is contended, does not state a cause of action. The second paragraph of the complaint, to which the attack is directed, averred that plaintiff was a passenger upon a certain street car, the line of which crossed the railway track, and had a right of way across the same; that the car driver, upon approaching the crossing, observed an engine of defendant standing upon the railway track within a short distance of such crossing, whereupon the street car came to a full stop, and remained standing a short time; that the street-car driver then ascertained that the engine was not in motion, and started his horse to cross the railroad track; that "when very near to defendant's track, to wit, within fifteen feet, and about to cross the same, the engineer of the defendant's engine negligently and carelessly gave his engine steam, and commenced to back the said locomotive upon the track towards and upon the street car aforesaid, whereupon the passengers, including this plaintiff, observing the proximity of said engine, and that the same was rapidly approaching said street car in which they were riding, and that there was imminent danger of a collision with said locomotive, commenced to make their escape from said car by jumping off therefrom, with a view and for the purpose of escaping injury from said engine; and that plaintiff, being in imminent danger of injury by the anticipated collision, jumped from said street car, as did the other passengers." Then follow allegations to the effect that the street car was on the crossing and the engine within 10 feet of it, and moving, when she jumped; that the danger was imminent; that she used due care, etc., but fell and was injured. At common law it was not necessary in a declaration for negligence to set out the facts in detail constituting the basis of the action. The following was a usual form against the owner of a carriage for negligent driving: "For that defendant so negligently drove his horse and carriage that the same struck against the carriage and horse of the defendant, whereby," etc., followed by an allegation of damage. In adopting what is known as the "code system of pleading," courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence; or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting such negligence. This modification of a rule of code pleading is founded in wisdom, and grows out of a fundamental rule in common-law pleading, to the effect that "no greater particularity is required than the nature of the thing pleaded will conveniently admit," (Steph. Pl. *367;) supported by that other rule that "less particularity is required when the facts lie more

in the knowledge of the opposite party," (Id. *370.) In cases of negligence the sufferer may only know the general, the immediate cause of the injury, and may be entirely ignorant as to the specific acts or omissions which lead up to it. Bliss, in his work on Code Pleading, at section 308*, gives the following illustration: "The driver upsets a stage coach, and breaks a passenger's arm. Careful driving will hardly have such a result. The passenger knows there has been negligence, but he may not know in what it consisted. The driver may have been drunk and asleep. He may have so harnessed the horses that they would not obey the rein, or may have made them unmanageable by improper treatment. The plaintiff can only prove that the coach was plumed over. The presumption is that it was the result of negligence; if not, the defendant can show it." The term "negligence," for the purpose of pleading, is a fact to be pleaded,—an ultimate fact, which qualifies an act otherwise not wrongful. Negligence is not the act itself, but the fact which defines the character of the act, and makes it a legal wrong. The absence of care in doing an act which produces injury to another, is actionable. The term "negligence" signifies and stands for the absence of care. "Negligence is the ultimate fact to be pleaded, and it forms part of the act from which an injury arises. * * * It is the absence of care in the performance of an act, and is not usually the result of such absence, but the absence itself, and is not, therefore, a mere conclusion of law, and may be pleaded generally." *Railroad Co. v. Wolfe*, 80 Ky. 84.

As a result of the application of these principles to code pleading in cases of negligence, and to others of kindred character, it is held in this state, and in nearly all of the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done. *Thomp. Neg.* 1246. Tested by these rules, the complaint, which was not demurred to, stated facts sufficient to constitute a cause of action. The case of *Schindler v. Railway Co.*, decided by the supreme court of Michigan November 1, 1889, and reported in 43 N. W. Rep. 911, relied upon by appellant, at first blush seems in point; but an analysis of the complaint by the court shows that the inference drawn therefrom was that the driver of the sleigh was not shown to have relied, or had any reason to rely, on the train remaining still till he could pass, or that it started unexpectedly or improperly when it should have waited, or that it was improperly started. "This," says the court, "if it existed, would have been a very important element in the case." Again, the court says: "All that is averred is simply that defendant negligently struck a sleigh at a road crossing, the driver not being in fault." In the present case the complaint avers that the

defendant's engine was standing on its track within 25 feet of the crossing; that the driver of the street car stopped, and, upon ascertaining that the engine was not in motion, started to cross the track, and when near it "the engineer of the defendant's engine negligently and carelessly gave his engine steam, and commenced to back the said locomotive upon the track towards and upon the street car aforesaid," etc. From this it will be seen the act by which the injury was brought about and the negligent manner of its performance is specified. The statement of other facts auxiliary to this main fact might have tended to a clearer conception of the principal act, but the most there can be said against the pleading is that it states a cause of action, but states it imperfectly, which is the equivalent of saying that it is good except as against a special demurrer. The nonsuit was properly denied.

There was evidence tending to show such negligence on the part of defendant, and contributory negligence on the part of plaintiff, as made it proper to submit the question to the jury. Where the facts are admitted or proven without contradiction the court will determine whether or not they establish negligence or show contributory negligence; but where the conclusion is open to debate it is one for the jury under proper instructions from the court. *Fernandes v. Railway Co.*, 52 Cal. 45; *Orcutt v. Railway Co.*, 85 Cal. 291, 24 Pac. Rep. 661; *Whalen v. Railroad Co.*, 92 Cal. 669, 28 Pac. Rep. 833; *Wilson v. Railroad Co.*, 62 Cal. 164; *Davies v. Steamship Co.*, 89 Cal. 280, 26 Pac. Rep. 827. The following instruction was given at the request of plaintiff: "If the jury believe from the evidence that the defendant was guilty of negligence, as charged in the complaint, and that the plaintiff was injured thereby, your verdict should be for the plaintiff, and that whether such negligence appears or is proved by the testimony on the part of the plaintiff or by defendant's own witnesses." This instruction entirely ignores the question of contributory negligence on the part of plaintiff, and is, therefore, not in itself a complete and correct statement of the law, and the defendant insists that the judgment should be reversed for this reason. In answer to this contention it is sufficient to say that the rule is well settled here that instructions are to be read and considered as a whole, and the fact that, when taken separately, some of them may fail to enunciate in precise terms, and with legal accuracy, propositions of law, does not necessarily render them erroneous. "It is sufficient if all the instructions, taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just notion of the law upon the point discussed." *Davis v. Button*, 78 Cal. 247, 18 Pac. Rep. 133, and 20 Pac. Rep. 545; *People v. Lee Chuck*, 78 Cal. 339, 20 Pac.

Rep. 719; *Monaghan v. Rolling-Mill Co.*, 81 Cal. 190, 22 Pac. Rep. 590; *Murray v. White*, 82 Cal. 119, 23 Pac. Rep. 35; *Doty v. O'Neill*, 95 Cal. 244, 30 Pac. Rep. 526; *People v. Turcott*, 65 Cal. 126, 3 Pac. Rep. 461. Tested by this rule, we do not think the particular instruction complained of could possibly have misled the jury. The second instruction on the part of plaintiff was in part as follows: "The jury are instructed that in determining the question of negligence in this case they should take into consideration the situation and conduct of both parties at the time of the alleged injury as disclosed by the evidence; and if the jury believe from the evidence that the injury complained of was caused by the negligence of the defendant's servants, as charged in the complaint, and the plaintiff acted as was reasonably to be expected of a person of ordinary care and prudence in the situation in which she found herself placed, then the plaintiff is entitled to recover." The fourth, eighth, ninth, tenth, and eleventh instructions asked by plaintiff all contained similar expressions, indicating the right of plaintiff to a recovery, to be subject to the exercise on her part of such reasonable care as a person of ordinary judgment and prudence would exercise under like circumstances. The second instruction, given by the court at the request of defendant, was as follows: "Second. The court instructs the jury that if you believe from the evidence that the plaintiff jumped from the street car after it had passed from a place of danger, or apparent danger, to a place of safety, and that a person of ordinary intelligence under like circumstances would have known that the danger was passed, and would not have jumped from the car at the time plaintiff did, you should find for the defendant." It will thus be seen that the jury were over and over again instructed in clear and explicit language that the plaintiff was not entitled to recover unless she was at the time of the accident herself exercising ordinary care to avoid the injury of which she complained, and it is not reasonable to suppose that the jury was misled to the prejudice of appellant because the first instruction omitted to say anything upon the subject of the effect of contributory negligence upon plaintiff's right of recovery. We find no substantial error in the record. Judgment and order affirmed.

(100 Cal. 91)

MULKEY v. MULKEY. (No. 18,046.)

(Supreme Court of California. Oct. 13, 1893.)

DIVORCE—SETTING ASIDE DECREE.

Code Civil Proc. § 473, provides that the court may, after notice to the adverse party, on such terms as may be just, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. Defendant suffered a default in a suit for divorce for adultery, brought by her husband, who was awarded the custody

of the children and the entire community property. She applied to vacate the judgment under said section, and, by affidavit annexed, swore that her husband told her said suit would be brought for desertion. Held that, in view of the harshness of the judgment, the court should have set it aside, whether defendant had colluded with, or had been deceived by, her husband; her application and affidavit showing sufficiently the grounds of her proposed answer.

Department 2. Appeal from superior court, Modoc county; G. G. Clough, Judge.

Action by David E. Mulkey against Sarah N. Mulkey for a divorce. Judgment for plaintiff. Defendant's motion to set aside judgment denied. Defendant appeals. Reversed.

Spencer & Raker, for appellant. D. W. Jenks and J. D. Goodwin, for respondent.

FITZGERALD, J. The transcript in this case contains two appeals,—one from the judgment decreeing to plaintiff a divorce on the ground of adultery; the other, from an order denying defendant's motion to vacate and set aside the judgment. The complaint was filed April 6, 1891, and the defendant served with process April 8, 1891. On the 21st day of April, 1891, the defendant having failed to appear and answer, default was duly entered against her, and on the 23d day of April, 1891, the court, upon the testimony taken before it, found that all the allegations of the complaint were true, and thereupon judgment was accordingly entered, granting to plaintiff a divorce from the defendant on the ground stated. The judgment awarded to plaintiff the four minor children, three of whom were girls, the eldest being about eight years of age, and assigned to plaintiff all of the community property. The motion was made on all the grounds enumerated in section 473, Code Civil Proc., and upon the further ground of the disqualification of the presiding judge, and was heard on notice and affidavits of the defendant and others, including one of merits, and was resisted by opposing affidavits.

An affidavit of merits on grounds of public policy has no place in a proceeding of this character. *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. Rep. 61. The motion should have been heard and determined alone upon the grounds stated in the notice and affidavits. The facts stated in the affidavit of defendant show either collusion between the parties, or that the defendant was grossly misled and deceived by her husband as to the ground of the proposed action; he having informed her, as she states, that it would be brought on the ground of desertion. In either case the court should have been prompt to set aside the judgment and allow the defendant to answer, so that the case might be heard and determined on its merits. The judgment is a harsh one, and fearful in its consequences. It deprives the defendant, among other things, of children, home, prop-

erty, and character. To justify such a judgment, the evidence should always be clear and convincing; and when obtained in an action of this character, under circumstances such as are disclosed by the record in this case, it should, upon a proper application, made by the defendant for that purpose, be vacated without hesitation, and a much slighter showing than the one here made would be amply sufficient for the purpose. The affidavit of the defendant, in so far as it purports to be an affidavit of merits, was, as we have stated, immaterial; but in this case, although the practice is not to be commended, it serves the purpose of a proposed answer by specifically denying the material allegations of the complaint, thereby showing what the answer would be if permitted to be filed. This is a sufficient reply to respondent's claim that no draft of any proposed answer accompanied the application. Judgment and order reversed, and cause remanded, with directions to the court below to vacate and set aside the judgment, and to allow the defendant to answer within a reasonable time.

We concur: DE HAVEN, J.; McFARLAND, J.

100 Cal. 75

EASTON v. CRESSEY. (No. 18,101.)

(Supreme Court of California. Oct. 13, 1893.)

LIQUIDATED DAMAGES—CONTRACT FOR SALE OF LAND.

Plaintiff agreed with defendant to buy certain land, and pay "\$1,000 cash deposit," and, on or before a certain date, \$2,500, and then to give a mortgage back for \$3,320; if plaintiff should fail to pay the \$2,500 on said date, the contract to be void as to plaintiff, and the \$1,000 to be retained by defendant as liquidated damages. Plaintiff did not pay on said date, but wrote defendant, a week later, explaining why he had not been able to do so, saying that he was now ready, and that a draft on him for \$2,500 would be honored, and the mortgage executed. Defendant did not answer said letter, and refused to fulfill the contract, or return the deposit. *Held* that, having suffered no actual damages by plaintiff's default, he was liable for the whole deposit, in view of Civil Code, §§ 1670, 1671, which forbid contracts for liquidated damages for breach of an obligation unless, from the nature of the case, it would be impracticable to fix the actual damage.

Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge. Action by George Easton against A. L. Cressey for money had and received. Judgment for plaintiff. Defendant appeals. Affirmed.

Stonesifer & Minor, for appellants. Van Ness & Roche and W. H. Hatton, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment against him in favor of plaintiff for \$1,000, and from an or-

der denying a motion for a new trial. The facts found by the court are substantially as follows: On September 7, 1887, the parties made a written agreement by which the appellant, Cressey, agreed to sell to respondent, Easton, a certain piece of land, upon these terms: Easton was to pay "one thousand dollars cash deposit," and on or before November 1, 1887, was to pay \$2,500, and was also, on said last-named day, to execute a mortgage upon the land to Cressey for \$3,320. Then Cressey was to convey the land to Easton. It was provided in the agreement that, if Easton should fail to pay the \$2,500 on November 1st, "then this contract shall be void, so far as said Easton is concerned," and that the \$1,000 cash should be retained by Cressey as "liquidated damages." Easton paid the \$1,000 when the contract was made, but did not pay the \$2,500 on November 1st, because, as he says, Cressey was absent from home. Cressey, however, had left a deed conveying the land to Easton in the Bank of Modesto, at the city of Modesto, of which bank Cressey was president, to be delivered to Easton upon payment that day of the \$2,500. But, on November 8th, Easton, who lived at San Francisco, wrote to Cressey, telling him the reason why he had not paid the money on the 1st; that he was ready to settle according to the terms of the contract; and that a draft on him for the amount would be promptly honored, and the mortgage executed. Cressey received this letter, but made no reply. Easton wrote him again to the same effect on November 28th, but Cressey did not answer the letter. The court finds that on November 1, 1887, Easton was, and ever since has been, "ready, able, willing, and anxious" to make said payment of \$2,500, and execute said mortgage, and that Cressey "has at all times since November 8, 1887, refused to carry out the terms of the contract between the parties, or to perform any" of its covenants or conditions. No part of the \$1,000 has been repaid, and Cressey has not been damaged by any act or omission of Easton in the premises. This action was brought by Easton to recover the said "one thousand dollars' cash deposit."

The foregoing findings are, we think, warranted by the evidence; and, that being so, the judgment is right. The provision in the contract for liquidated damages was void, under sections 1670 and 1671 of the Civil Code, (*Drew v. Pedlar*, 87 Cal. 443, 25 Pac. Rep. 749;) and the rule governing the case at bar is "that, when a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in default, may recover back installments paid of the purchase money, less the actual damage to the vendor, occasioned by his breach of contract," (*Phelps v. Brown*, 95 Cal. 572, 30 Pac. Rep. 774; *Drew v. Pedlar*, supra.) And it was clear that appellant did not suffer any actual damage from the failure of respondent to pay the \$2,500 on the very day named

in the contract. Appellant introduced evidence tending to show a depreciation in the market value of the land, the removal by him of a cloud on the title, etc.; but we cannot see of what importance these matters were, when respondent was willing, able, and anxious to take the land, and pay the contract price. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

100 Cal. 84

PEOPLE v. MORPHY. (No. 20,981.)

(Supreme Court of California. Oct. 13, 1893.)

FALSE PRETENSES—REPRESENTATIONS BY SALESMAN—CHEAPNESS OF PRICES.

A prosecution for obtaining money under false pretenses cannot be maintained by reason of representations by a traveling salesman to a customer as to the importance of the house he represented, and the cheapness of its prices compared with others, where the goods sold are as represented.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

C. Morphy was convicted of obtaining money by false pretenses, and appeals. Reversed.

L. J. Maddux and T. S. O'Donnell, for appellant. Atty. Gen. Hart, for the People.

TEMPLE, C. This is a prosecution for obtaining money by false pretenses, and the defendant, having been convicted, appeals from the judgment.

The indictment was demurred to on the ground that it does not state facts sufficient to constitute a public offense, and, after conviction, a motion in arrest of judgment was made on the same grounds. The indictment charges that defendant, "with intent to defraud one John F. Copeland of his personal property, did unlawfully, knowingly, and designedly falsely pretend and represent to the said John F. Copeland that he, the said C. Morphy, did then and there represent a first-class wholesale grocery firm in the city of San Francisco; that he had no rent to pay and no expenses to pay, and that he could and would then and there sell and deliver groceries to the said John F. Copeland at the town of Hickman, in said Stanislaus county, twenty-five per cent. cheaper than they could be purchased in Modesto, Oakdale, or Stockton, and that all groceries sold by him would be of first-class quality and of full weight and quantity; and the said John F. Copeland, then and there believing said false pretenses and representations so made as aforesaid by the said C. Morphy to be true, was thereby induced to, and did then and there, purchase a bill of groceries from the said C. Morphy, and pay to him therefor the sum of one hundred and eighty-four and 50-100 dollars, the said amount being then and there

fifty dollars and over more than the same bill of groceries could then and there have been purchased for in Modesto, Oakdale, or Stockton." The indictment then proceeds, restating each representation, to charge that it was false, and that the defendant knew it; that said Morphy could not and would not sell or deliver groceries at the town of Hickman cheaper than they could be purchased at Stockton, Oakdale, or Modesto; that all groceries sold by him would not be first-class, or of full weight or quantity; that said Morphy then well knew that all and each of said representations were then and there wholly false and untrue; "and the said C. Morphy did then and there unlawfully, knowingly, and designedly, by reason of said false pretenses and representations aforesaid, deceive the said John F. Copeland, and thereby fraudulently obtain from him, the said John F. Copeland, fifty dollars and over, the personal property of the said Copeland, more than the said Copeland would otherwise have paid the said C. Morphy for the bill of groceries aforesaid."

The demurrer should have been sustained. It is very true that it might amount to false pretenses, within the statute, to falsely and fraudulently represent that one represented a prominent business house in San Francisco for the purpose of obtaining goods or money from another. This, however, is not that case. The representation was made simply by way of an argument to prove that he could sell goods cheaper than they could be bought at Stockton, Oakdale, or Modesto. This representation, and the statement that he had no rent to pay, were designed to induce his intended customer to rely upon his promise that he could and would sell cheaper than the goods could be bought for elsewhere, and it was evidently this promise which induced the prosecutor to deal with him; and the injury was, not that goods or money was obtained without consideration, but that the promise was not kept, and, in fact, the goods could have been obtained cheaper at other places. It does not appear from the indictment that the goods were not all that they were represented to be, as to character, quality, and quantity, or that they were not sold at a fair price. It may be conceded that representations calculated to make intending purchasers believe that a particular merchant can and will sell goods cheaper than others, when it is not so, do not rank very high in the scale of morality; but, if the representations here are criminal false pretenses, a crime is paraded in numerous show windows in every city. Perhaps this is not an argument of a very high order, but it does tend to prove that such "tricks of the trade" were not intended to be included in the statute, where there is no false representation as to the character, quality, or quantity of the merchandise. Customers are presumed to have some knowledge of the value of what they purchase, and can always

inquire, before purchasing, as to market values. I think the judgment should be reversed, and the court directed to sustain the demurrer.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court is directed to sustain the demurrer.

100 Cal. 81

ROSENTHAL et al. v. MATHEWS. (No. 18,048.)

(Supreme Court of California. Oct. 13, 1893.)

JUDGMENT—DESCRIPTION OF LAND—CERTAINTY.

A judgment for the recovery of land entered in September, 1891, described a certain tract, but excepted from its effect such parts "as were sown to grain by the defendant during the fall of 1890 and the winter of 1891." Held, that the term "winter of 1891" referred to the winter of 1890-91, and the description is prima facie sufficient to identify the land excepted.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by Joseph Rosenthal and others against W. P. Mathews. Judgment for plaintiffs. Defendant appeals. Affirmed.

Jackson Hatch, for appellant. P. H. Coffman, for respondents.

VANCLIEF, C. Action to recover possession of a large tract of land situate in the county of Tehama, and the value of the rents and profits thereof, alleged to be \$1,500. The answer of the defendant admits the plaintiffs' ownership of the land, and the withholding of the possession thereof by defendant, but alleges that he was entitled to the possession by a lease from the plaintiffs, and denies that the rents or profits were of any value. The action was tried by the court, and judgment was rendered in favor of the plaintiffs for the possession of the land, except a portion thereof described in the judgment, and for \$500 as the estimated value of the rents and profits of that portion of the land wrongfully withheld. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

1. On the appeal from the judgment the appellant contends that the description of that part of the land excepted from the operation of the judgment is so indefinite and uncertain that neither the land excepted nor that recovered can be identified thereby, and therefore the judgment is void. It is not denied that the demanded premises are definitely and correctly described in the complaint. The judgment describes the land as it is described in the complaint, but excepts from its effect such parts of the land described "as were sown to grain by the de-

fendant during the fall of 1890 and the winter of 1891." As the judgment was entered September 8, 1891, the words "winter of 1891" must be understood to mean the winter expiring in 1891; and the lands excepted are such parts as had been sown to grain by defendant during the fall of 1890 and the winter immediately following,—the winter of 1890 and 1891,—all before the date of the judgment. This is made perfectly plain by the context, and gives appropriate effect to all the words of the exception; for, while no winter is wholly of any one year of our Lord, two-thirds of the winter immediately prior to the judgment was of the year A. D. 1891. It is contended, however, that conceding the exception to be certain as to the winter intended, still, the description is insufficient to identify the land excepted. Prima facie the description appears to be sufficient, and no reason why it cannot be applied so as to identify the excepted land is suggested. The boundary lines of the land sown to grain by defendant during the fall of 1890 and the following winter must have been distinctly apparent on the ground from the time the grain was sown until some time after it was harvested; and if the marks by which such boundary lines were designated were subsequently removed or destroyed, their original location may be proved by extraneous evidence, as in cases of the removal or destruction of stakes or other monuments called for in deeds and patents. *De Sepulveda v. Baugh*, 74 Cal. 468, 16 Pac. Rep. 223. In the case at bar the question is whether or not the description contained in the judgment is sufficient to identify the land. In this it differs from the question involved and discussed in *Crosby v. Dowd*, 61 Cal. 557, and in *De Sepulveda v. Baugh*, supra, in which the objection to the description was that it was not contained in the judgment, but in some other document, map, or record referred to in the judgment, and not appearing even in the judgment roll.

2. The points that the findings do not support the judgment, and that the evidence does not justify the finding that the value of the rents and profits was \$500, rest largely upon the assumption that the description of the land excepted from the operation of the judgment does not distinguish it from the land recovered. The evidence is amply sufficient to justify the finding as to the value of the rents and profits, and the findings support the judgment.

3. It is not made to appear that the court erred in admitting or excluding evidence. As to these points, counsel merely refers to his exceptions. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

100 Cal. 93

CEDERBERG v. ROBISON. (No. 18,100.)
(Supreme Court of California. Oct. 14, 1893.)

DAMAGES—BREACH OF HARVESTING CONTRACT.

In an action for breach of a contract whereby plaintiff was to harvest defendant's grain, it appeared that plaintiff had spent several days in preparing to perform, hauling horse feed and provisions for his men, with two four-horse teams and men in charge; that he was discharged the third day of harvesting; that he was using 24 horses, 6 of them hired, and his own machine, worth \$2,000; that after said discharge his men, teams, and machine lay idle a week before he could obtain other work for them. *Held*, that a verdict for \$400 actual damages was sustained by the evidence.

Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Cederberg against Robison for damages for breach of contract. Judgment for plaintiff. Defendant appeals. Affirmed.

Bradley & Farnsworth, for appellant. Power & Alford and R. Irwin, for respondent.

HARRISON, J. The plaintiff agreed with the defendant to harvest about 1,200 acres of grain, for which the defendant was to pay him at the rate of two dollars per acre. After he had harvested 65 acres a dispute arose between them concerning the terms of the agreement, the defendant claiming that the plaintiff was to take certain mules at an agreed valuation of \$1,000 in part payment on the contract, for which he wished him to give his promissory note, and the defendant claiming that he had not so agreed; and, upon his refusing to execute the note, defendant refused to allow him to complete the harvesting. The plaintiff brought this action to recover damages for the breach of the aforesaid contract. At the trial the jury rendered a verdict in his favor for \$400, and the defendant has appealed.

Whether the agreement between the parties was as claimed by the defendant was sharply contested at the trial, and the verdict of the jury in favor of the plaintiff upon this conflicting evidence shows that they found against his claim, and is conclusive upon the point. We are not called upon to determine whether the rule of damages, as laid down in *Utter v. Chapman*, 38 Cal. 662, 43 Cal. 279, is applicable in the present case. The action was tried in the court below upon the theory that if, after the contract had been wrongfully terminated, the plaintiff had obtained other employment of a similar character, and his earnings during the time he was so employed were equal to those which he would have received had he completed the contract with the defendant, he did not to that extent suffer any damage, and, as the plaintiff has not appealed, the correctness of that rule is not involved herein. The appeal of the defendant is based upon

his proposition that the evidence before the jury did not show that the plaintiff had suffered damage to the extent of \$400. We cannot determine from the record what items the jury took into account in determining this amount of damage, but, as no exception was taken to the instructions of the court, the judgment upon the verdict must stand, if there was evidence before the jury of sufficient damage to justify its finding. It appears that, after making the agreement with the defendant, the plaintiff was engaged for several days in making preparations for the performance of the contract, hauling hay and barley with which to feed his horses while engaged in the harvesting, and provisions for the men in his employ during that time; that in doing this he was compelled to employ two teams of four horses each for several days, with the men necessary to attend them and to care for the hauling; that he began the work of harvesting on the 3d day of June, and was discharged on the 5th, and that his men and horses and harvesting machine remained idle from that date until the 12th of June, when he began similar work upon another field, for which he received a compensation equivalent in amount to that which he would have had for the time he was so engaged had he continued to complete his contract with the defendant; that while he was engaged in the work for the defendant he employed 24 horses, 6 of which he hired for that purpose, and 18 of which were his own; that he was also the owner of the harvester used by him, and for which he had paid \$2,000. The record does not show that there was presented to the jury any evidence of the value of the services rendered by the plaintiff and the teams employed by him in hauling the hay and barley for the purpose of getting ready to do the harvesting, or the expense to which the plaintiff was subjected during the time between his discharge by the defendant and his employment upon the other field; but that in each of these matters he was subjected to some expense required no evidence, and it may be assumed that the jury were familiar with such work, and that from their own knowledge and experience they were capable of estimating the value of these services, and the expenses thus necessarily incurred; and in such a case, unless it should appear that the amount allowed therefor is excessive, the verdict of a jury should not be disturbed. Juries are in many cases permitted to exercise their individual judgments as to values upon subjects presumptively within their own knowledge, which they have acquired through experience or observation, and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdict.

Section 3300 of the Civil Code provides that "for the breach of an obligation aris-

ing from contract the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." When a contract of employment like the present has been wrongfully terminated by the employer, the detriment sustained by the other party includes the necessary expenditures incurred by him in making preparations for performing the contract, sometimes called the "outlay," and the expenses incurred by him while engaged in its performance, up to the time of its termination. If, in addition to the losses thus actually incurred by him, he is subjected to additional expenses after the termination of his employment, that grow out of his preparation for the work, or which result from his enforced idleness, these are necessarily a part of the injury he has sustained by reason of his employer's breach of the contract. If he had completed the contract, the measure of his recovery would be the contract price. This contract price would include his outlay and cost of performance, and also the direct profits which he would realize from its performance. These profits would represent the difference between his actual expenditures and the contract price, and would include compensation for his own labor and the use or rental value of whatever property of his own was employed in performing the contract. If, however, he is prevented by the other party from completing the contract, and seeks to recover damages therefor, his measure of recovery must be determined by the circumstances of each case. He should not be allowed the entire contract price for that portion of the work completed by him, and also his outlay and cost of performance, as that would give him, for the work actually done, the contract price therefor, and also all of his expenses in doing the work and preparing therefor; but, in addition to the expenses incurred by him for outlay and the cost of performance, he should be allowed the reasonable value of his own services and of the use of his property, as a part of the damages sustained by him, and also a portion of the profits which he would have made under the contract, since in each of these elements he has sustained damage. So many elements enter into a calculation of profits that no rule can be formulated for determining what portion of those which are anticipated for the whole contract shall be allowed when the contract is not completed; but this amount must be left to the wise discretion of an intelligent jury, according to the circumstances of each case. If the contract is nearly completed, the difference between the contract price and the original outlay and cost of performance would be more controlling in determining this question than if

the contractor had only entered upon the performance; since in the former case the cost of completing the work could be readily ascertained, whereas, in the other, the uncertainty of this cost and the risk to be encountered would vary with the time required for its completion. "The profits and losses must be determined according to the circumstances of the case and the subject-matter of the contract. The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part and the probable cost of its completion, the whole contract price and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken into consideration,"—citing cases. *Behan v. U. S.*, 18 Ct. Cl. 687, approved by the supreme court on appeal, 110 U. S. 338, 4 Sup. Ct. Rep. 81. The difficulty in any case is not to determine whether the loss of profits upon his contract constitutes a part of his damage, as the cases all admit that this is an element which enters into his damage, but to determine what portion of the profits he has lost by the breach of his contract. If this amount can be accurately ascertained, the plaintiff is entitled thereto, but he is not to be deprived of all profits because they are not susceptible of exact measurement.

In consideration of the foregoing rules, we cannot say that the evidence before the jury was insufficient to justify its verdict. The court before which the case was tried approved the verdict by its action in denying a new trial, and the burden is upon appellant to show that error has been committed. It is not sufficient to say that the jury might have found otherwise, or that a verdict for a less amount would have been consistent with the evidence. It must appear from the evidence itself that the verdict cannot be sustained. "It does not lie in the mouth of the party who has voluntarily and wrongfully put an end to the contract to say that the party injured has not been damaged, at least to the amount of what he has been induced fairly and in good faith to lay out and expend, including his own services, unless he can show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract. * * *

The party who voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay, fairly incurred." *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81. In addition to the actual loss and outlay incurred in making preparations for the contract, the loss necessarily incurred by the plaintiff during the time that he remained idle after the termination of the contract is an element of actual expense; and the delinquent defendant is not entitled to have a

Jury scrutinize too closely the items of expense caused by his own faithlessness, or to receive the advantage of a part performance of his contract without making a reasonable compensation therefor. Certain exceptions were taken to the rulings of the court in admitting evidence during the trial, but none of these rulings were of such a character as to affect the result. The testimony respecting the authority of Niswander to bind the defendant was received, subject to be afterwards struck out on motion of the defendant, but, as no motion of that character was made, he must be deemed to have acquiesced in its remaining before the jury. The judgment and order are affirmed.

We concur: BEATTY, C. J.; GAROUTTE,

100 Cal. 100

HITCHCOCK v. CARUTHERS et al. (No. 18,158.)

(Supreme Court of California. Oct. 14, 1893.)

JUDGMENT—REVIVAL—SURETIES ON STAY BOND.

1. Code Civil Proc. § 708, provides that if the purchaser of property at sheriff's sale fail to recover possession "because the property sold was not subject to execution and sale," the court must, after notice, and on motion of such purchaser, revive the original judgment in his name for the amount paid. A judgment against a party and the sureties on his supersedeas bond was paid partly in cash and partly by execution against the principal debtor, and was satisfied of record. Said debtor's wife then sued, and recovered from the purchaser the property sold, as being hers, and not her husband's, at the time of the levy and sale. Held, that the purchaser was entitled to relief under said statute against both principal and sureties.

2. Though sureties on a supersedeas bond are not actors in the suit, nor entitled to notice of every step in the proceedings, yet, after judgment entered against them, they are as much judgment debtors as the principal, and the judgment, once satisfied of record, cannot be revived against them without notice to them as well as to the principal.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Appeal by William A. Caruthers and others, sureties on his supersedeas bond, from an order reviving the judgment rendered against them in the suit of Ida Hitchcock against said Caruthers in favor of H. H. Welsh, purchaser at the execution sale under said judgment in the sum of \$675. Affirmed as to Caruthers, and reversed as to the others.

J. P. Meux, for appellants. Church & Cory, for respondent.

HARRISON, J. The defendant Caruthers appealed from a judgment rendered against him for the sum of \$7,500, and gave to the plaintiff an undertaking, with the other appellants herein as sureties, to stay the execution of the judgment pending the appeal. The judgment was affirmed in this court,

(23 Pac. Rep. 48,) and after the filing of the remittitur in the court below judgment was entered against the sureties in the undertaking in accordance with the provisions of section 942, Code Civil Proc. Execution was thereupon issued upon the judgment against the defendant, under which the sheriff levied upon certain personal property in the possession of the defendant, and sold the same to the respondent, who had become the assignee of the judgment; and the proceeds were credited upon the judgment. The balance of the judgment was paid in money by the defendant, and thereupon the plaintiff satisfied of record the judgment against the defendant, and also the judgment against the sureties. After these judgments had been thus satisfied, the wife of the defendant brought an action against the respondent for the recovery of the property purchased by him at the sale, and in that action it was adjudged that at the time of the levy and sale the property was not the property of the defendant, but belonged to his wife, and the property was taken from the respondent, and delivered to the owner. Thereupon, upon motion of the respondent, the court made an order under the provisions of section 708, Code Civil Proc., reviving the judgment in his favor for the sum of \$675, the amount in which the judgment had been credited for the property lost by him in the above action, and afterwards ordered that judgment for the same amount be entered against the sureties. This last order was made upon notice thereof to the attorney for the defendant, but no notice thereof was given to the sureties, or either of them.

The defendant has appealed from the judgment so revived against him, and the sureties from the judgment entered against them.

Section 708, Code Civil Proc., provides that, "If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice and on motion of such party in interest or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale," etc. In *Cross v. Zane*, 47 Cal. 602, it was held that, as this section is remedial in its character, it is to be liberally construed, and that, if the property sold was not the property of the defendant in the execution, it amounted to a sale of property not subject to execution and sale within the intent of the statute; and upon the principles of that case it must be held that, if the purchaser lose the possession of the property after its purchase, because it was not the property of the defendant in the execution, he is entitled to the remedies afforded by the act. In *Meredit v. Association*, 60 Cal. 617, it was held that upon a motion to enter judgment against

the sureties on their undertaking to stay execution pending the appeal provided for by section 942, no notice to them is necessary; that by their stipulation in the undertaking they have voluntarily made themselves parties to the action, and that the court has acquired a jurisdiction over them which it retains until the enforcement of any judgment recoverable against them as parties to the action. Although, by entering into the undertaking, they have been brought under the jurisdiction of the court, they have not thereby been made actors in the litigation, or entitled to any part in its conduct. The defendant, for whom they have guaranteed the payment of the judgment, is still entitled to the conduct of his defense, and the party to whom they have given the undertaking is not required to give them notice of any steps in procedure to be taken against the defendant, but they are bound equally with him by any order which may be made between the real parties in the action. They are liable upon their undertaking, even though the appeal is dismissed by his consent. *Chase v. Beraud*, 29 Cal. 138. Their obligation to pay the judgment in case of his default is absolute, and extends until the judgment shall have been actually paid. Any performance by the defendant that will discharge the judgment against him will operate as a discharge against them, and any act of the plaintiff that will release the defendant from the judgment will also release them, but, so long as the plaintiff has the right to enforce the judgment against the defendant, he is entitled to enforce their obligation. It would not be contended that the sureties would be discharged if the defendant had procured a satisfaction of the judgment through some mistake, as by an error in making payment of the amount due upon the judgment, or by a payment in money which proved to be counterfeit, or had knowingly turned over to the plaintiff in satisfaction of the judgment property belonging to another, which the plaintiff had afterwards been compelled to surrender to the real owner. The same grounds which would prevent the defendant from insisting upon such a transaction as a discharge of his obligation would prevent them from insisting that they were discharged, and it would be immaterial that a formal satisfaction of the judgment had been placed on record. Their obligation is that the appellant will pay the amount of the judgment against him, and the terms of this obligation are to be interpreted by the same rules as are the terms of any other contract. Civil Code, § 2837. In the present case the defendant has not paid the judgment, and the court has found that under the provisions of section 708, Code Civil Proc., he is not entitled to the benefit of the satisfaction thereof that had been given. The property which was taken from him for the purpose of satisfying the judgment, and to the taking of which he does not

appear to have objected, was not his property, and consequently neither he nor the sureties have parted with any right or advantage in consideration of the satisfaction, and there is no principle of morals or rule in equity by which the sureties can claim the benefit of the formal satisfaction given in consideration of the receipt of that property.

The judgment against the sureties must, however, be reversed, for the reason that it was entered without any notice to them. When the plaintiff caused the judgment to be entered against them in accordance with their stipulation in the undertaking he assumed the same obligations towards them in reference to this judgment as rest upon any other judgment creditor. After he had satisfied it against them the court was not authorized to set aside this satisfaction or to revive the judgment without giving them an opportunity to be heard. They should have been allowed to present any matter that had occurred subsequent to the entry of the original judgment against them which the court might deem sufficient to authorize a denial of the plaintiff's motion. If the judgment against the defendant had not in fact been paid, their obligation would not have been performed, and the mere fact of its satisfaction under such circumstances as would authorize the court to set it aside as against the defendant would be no defense to a motion by the plaintiff to set it aside as against them. They were, however, entitled to contest this fact, and to contest the insufficiency of the circumstances under which the satisfaction had been made, and the decision of the court in the proceeding between the plaintiff and the defendant would not be conclusive upon them. The court should not order a new judgment to be entered against them without giving them the same opportunity to be heard as by section 708 the judgment debtor is himself entitled to receive. If, however, upon such hearing, the court should be satisfied that the original satisfaction had been entered inadvertently, or under such circumstances as required it to be set aside, it should make an order to that effect; and it might at the same time designate the amount for which the judgment should be permitted to stand. The judgment against the defendant is affirmed, and the judgment against the sureties is reversed, with leave to the petitioner to take such further proceedings against them as he may be advised.

We concur: BEATTY, C. J.; GAROUTTE, J.

4 Cal. Unrep. 297

PACKER et al. v. DORAY et al. (No. 18,105.) (Supreme Court of California. Oct. 14, 1893.)

NEW TRIAL—AMENDMENT OF NOTICE—QUIETING TITLE.

1. Code Civil Proc. § 659, subd. 4, provides that where a motion for a new trial is made

on the minutes of the court; and errors of law are relied on, the notice of motion must specify the errors relied on, and "if the notice do not contain the specifications * * * the motion must be denied." Held that, where the notice does not contain the required specification, it is radically defective, and cannot be amended by adding new specifications after the time for filing it has expired, and if it is so amended, by leave of the trial court, after such time has expired, the specifications will not be considered on appeal.

2. Where defendant in an action to quiet title disclaims as to part of the land, it is not error for the court to dismiss the action as to such part, instead of giving plaintiff judgment therefor, as such judgment would be merely formal, under Code Civil Proc. § 739, which provides that "if the defendant in such action disclaims in his answer any interest or estate in the property * * * the plaintiff cannot recover costs."

Department 1. Appeal from superior court, Sierra county; John Caldwell, Judge.

Action by W. S. Packer and others against Phil Doray and others to quiet title. From a judgment in favor of defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

J. M. Walling, Tiley L. Ford, and Goodwin & Goodwin, for appellants. F. D. Soward and Frank R. Wehe, for respondents.

PER CURIAM. This is an action to quiet the plaintiffs' title to certain tailing mining claims, called the "Alturas Company's Mining Claims," situate in Slate creek, and partly in Sierra county and partly in Plumas county. The claims described extend up and down the creek about 26,000 feet, and contain an area of about 112 acres. The defendants deny that the plaintiffs are, or ever were, the owners or in possession of that portion of the claims described, commencing at the upper end thereof, and extending down the creek about 10,000 feet; and they allege that as to such portion of the claims they are, and were at the time of the commencement of the action, and long prior thereto, the owners, and in possession thereof; and, as to the balance of the claims described in the complaint, they disclaim having or claiming any estate or interest in or to the same. The case was tried by the court and the findings were that neither the plaintiffs, nor either of them, nor their grantors or predecessors, ever owned or possessed, or were entitled to the possession of, the mining ground described in the answers of defendants, and that at the time of the commencement of the action the defendants were the owners of, and in the actual possession of, all the mining ground described in their answers, and claimed by them. Judgment was accordingly entered that the plaintiffs take nothing, that their action be dismissed, and that defendants recover their costs. From this judgment, and an order denying their motion for a new trial, the plaintiffs appeal.

1. The principal contention of appellants is that the findings were not justified by the

evidence, and hence that the judgment should be reversed, and the cause remanded for a new trial. The evidence brought up in the transcript is evidently stated as briefly as possible, and still it covers about 100 printed pages. It relates to sundry attempted locations; to the customs of miners; to work done on different portions of the ground, commencing as early as 1855; and to numerous transfers of interests claimed to have been acquired under such locations. To state the facts in detail would require much space, and subserve no useful purpose. In our opinion, it is enough to say that, while there was some conflict, there was evidence clearly tending to justify and support the findings, and hence that the judgment cannot be reversed on this ground.

2. It is urged that numerous errors of law were committed by the court during the progress of the trial, which call for a reversal of the judgment. The notice of intention to move for a new trial stated that it would be made upon the minutes of the court, and it was so made. The notice specified the particulars in which the evidence was alleged to be insufficient to justify the verdict, but contained no specifications of errors of law. Subsequently, and after the time for giving the notice had elapsed, the plaintiffs, by leave of the court, amended their notice by adding thereto specifications of the errors of law now complained of. The motion was denied, and thereafter a statement of the case was prepared and settled. Section 659, subd. 4, of the Code of Civil Procedure, provides: "When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied." The notice given was radically defective, so far as regards the specifications of error, and after the time for filing it had elapsed the moving parties had no right to amend it by adding the new specifications. *Cooney v. Furlong*, 66 Cal. 520, 6 Pac. Rep. 388; *Little v. Jacks*, 67 Cal. 165, 7 Pac. Rep. 449. This being so, the alleged errors cannot be considered. If, however, it was otherwise, the same result must be reached, since we are unable to see any material error in the rulings complained of.

3. It is further urged that the plaintiffs were entitled to have their title quieted as to all that part of the premises described in their complaint in which the defendants disclaimed having any estate or interest, and that the court, therefore, erred in dismissing

the action. Section 739 of the Code of Civil Procedure provides: "If the defendant in such action [action to quiet title] disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs." If, then, judgment had been entered, quieting the plaintiffs' title to the disclaimed portion of the ground, it would have been merely formal, and without costs. Under these circumstances, we fail to see that plaintiffs were aggrieved by the judgment entered. The judgment and order are affirmed.

(100 Cal. 140)

PEOPLE v. GREENE. (No. 21,022.)

(Supreme Court of California. Oct. 17, 1893.)

CRIMINAL LAW—FORMER JEOPARDY.

On the second trial of a criminal case, the record of the first trial, showing that the jury had been discharged on their statement that they could not agree, after deliberating only six hours, will not support a plea of former jeopardy, as Pen. Code, § 1140, providing that the jury may be discharged "at the expiration of such time as the court may deem proper," if "it satisfactorily appears that there is no probability that the jury can agree," does not require the record to show that it satisfactorily appeared to the judge that there was no such probability.

Department 1. Appeal from superior court, San Francisco county; D. J. Murphy, Judge.

Greene was convicted of embezzlement, and appeals. Affirmed.

Chas. B. Darwin, for appellant. W. S. Barnes, Dist. Atty., and W. H. H. Hart, Atty. Gen., for the People.

PATERSON, J. The defendant was tried upon an information charging him with embezzlement. After deliberating six hours, the jury returned into court, and stated to the judge that they were unable to agree upon a verdict, whereupon they were discharged. When the case came on for trial again, the defendant interposed the pleas of former jeopardy and former acquittal, and in support thereof introduced in evidence the record showing that he had been once before tried on the same information, and that the jury had been discharged on their statement that they could not agree, after deliberating only six hours. The court instructed the jury that the evidence offered was insufficient to sustain either of said pleas. It is now claimed that this instruction was erroneous, as the record must show that it satisfactorily appeared to the judge there was no reasonable probability the jury could agree. The statute upon which the court acted authorizes the discharge of the jury after the cause has been submitted to them "at the expiration of such time as the court may deem proper," if "it satisfactorily appears that there is no probability that the jury can agree." Pen. Code, § 1140. The reasons upon which the court deems it proper to discharge the jury are not required to be placed

on record. It is sufficient that it shows the jury were unable to agree. The judge is not bound to take as final the statement of the jury that they cannot agree upon a verdict, but, when such a statement is made, the court below, familiar with the nature of the evidence, and probably the temperaments of the men who compose the jury, is better qualified to say whether there is a reasonable probability of an agreement than the appellate court. Certainly, the latter ought not to interfere with the ruling, except in cases of clear abuse of discretion. *People v. Smalling*, 94 Cal. 115, 29 Pac. Rep. 421. Judgment and order affirmed.

We concur: **GAROUTTE, J.; HARRISON, J.**

(100 Cal. 121)

JACOBS v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,377.)

(Supreme Court of California. Oct. 14, 1893.)

MUNICIPAL CORPORATIONS—BOARD OF SUPERVISORS—CONSTITUTIONAL CONTROL OF WATER RATES—ORDINANCES—APPROVAL BY MAYOR—MANDAMUS TO MUNICIPAL BOARD—DISCRETIONARY ACTS.

1. Const. art. 14, § 1, providing that water rates "shall be fixed annually by the board of supervisors or other governing body of such city and county, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body," grants to the board of supervisors of the city and county of San Francisco the sole power to fix the water rates in such city and county.

2. The fixing of water rates requires the exercise of discretion and judgment, and, where the board has exercised its discretion by passing an order, it cannot be compelled by mandamus to change its judgment, or to take further action on the order.

3. The consolidation act of 1856, § 68, requiring certain ordinances of the board of supervisors to be presented to the mayor for approval before they take effect, does not make the mayor a member of the board of supervisors, as a "governing body."

4. The constitutional requirement that an ordinance fixing water rates should be passed by the board "in the manner that other ordinances or legislative acts or resolutions are passed by such body" does not render the mayor's approval of the ordinance necessary to its validity, as such ordinance is not included among those required by consolidation act, § 68, to be presented to the mayor for approval.

In bank. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Proceeding in mandamus by Julius Jacobs to compel the board of supervisors of the city and county of San Francisco to act on an order fixing water rates, and which had been vetoed by the mayor. Judgment for petitioner. Defendants appeal. Reversed.

William F. Herrin, John Currey, Garber, Boalt & Bishop, Pillsbury, Blanding & Hayne, and H. S. Foote, for appellants. Pierson & Mitchell and Arthur Rogers, for respondent.

McFARLAND, J. On March 27, 1893, the board of supervisors of the city and county

of San Francisco passed an order—designated as “Order No. 2,622”—fixing the rates of compensation to be collected by any person or corporation furnishing water for family uses, for private persons, and for municipal and public purposes during the year commencing July 1, 1893, pursuant to section 1 of article 14 of the state constitution. The clerk of said board of supervisors presented said order to the mayor of said city and county, who refused to approve the same; and on April 7, 1893, he returned it to the board with a statement in writing of his objections thereto, showing that his views differed widely from those of the board upon the subject of proper water rates. At the first meeting of the board thereafter, viz. April 10th, the said board refused to enter the said objections of the mayor on its journals, and by resolution declared that said order No. 2,622 was not subject to the approval or veto of the mayor, or to the further consideration of the board, and that the jurisdiction and power to fix water rates were vested in the board of supervisors by said section 1 of article 14 of the constitution. Thereafter, Julius Jacobs, alleging himself to be a citizen and taxpayer, brought a proceeding in mandamus in the superior court to compel the said board of supervisors to “act upon the objections of said mayor,” and “to proceed to fix said water rates” for the ensuing year. After a hearing, the superior court entered judgment decreeing that said order No. 2,622 was not a valid order without the approval of the mayor and without the vote of nine members of the board over the veto, and commanding the supervisors, and each of them, “forthwith to act upon the objections of the mayor,” and “to forthwith proceed to fix the rates or compensation to be collected for the year commencing,” etc. From this judgment, the defendants appeal.

We are satisfied that the judgment of the court below is erroneous, and that the facts found do not make a proper case for the exercise of the extraordinary remedy of mandamus. The clause of the constitution—section 1, art. 14—under which it is sought to justify the judgment in the mandamus proceeding is as follows: “The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided that the rates or compensation to be collected by any person, company or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions

are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation, to the city and county, or city or town where the same are collected, for the public use.”

The city and county of San Francisco is a consolidated government, its charter being the consolidation act passed in 1856. Under that act the board of supervisors is the legislative department of the municipal government, although it is provided therein that ordinances upon certain enumerated subjects shall not be effective unless approved by the mayor, (whose office was created by said act,) or unless, after his veto, nine members of the board shall vote therefor. Under the act, however, there are many things which the board may do without the concurrence of the mayor, and there are many powers which the mayor may exercise independently of the board. Under this condition of the law, respondent contends that said section 1 of the constitution should be construed to mean that the mayor has the legal right to veto a water order; and that, under the facts above stated, a court can by mandamus compel the board of supervisors to refix water rates continuously, unless they either yield to the views of the mayor, or are able by a three-fourths vote to override the veto. Constitutional and statutory provisions are subject, substantially, to the same rules of construction; the main object being in all cases to ascertain the meaning of the law maker. A constitution “must be read, interpreted, and expounded in the same manner, by the same means and methods, which are appropriate to all other legislative acts.” Pom. Const. Law, p. 14. Now, it is clear that there should be no such a construction of language as would lead to absurd or impractical results, or compel a court to decree a thing substantially impossible, or which is in plain violation of fundamental principles of law or equity, firmly established and universally recognized, unless such language absolutely requires such construction. The judgment in the case at bar first commands appellants “to act upon the objections of the mayor,” which, we presume, means to vote formally on the question whether the veto shall be sustained, and then, assuming that there may not be nine votes in favor of the order, com-

mands them forthwith to "proceed to fix the rates." If they should vote on the veto, and a majority of the supervisors, but not nine, should vote for the order, of course, under the judgment, they would be compelled to "proceed" and pass another order, and, if that should be vetoed with the same result, then another, and another, and so on indefinitely; so that, if the board should not yield its views to those of the mayor, there could be no legal fixing of water rates at all. But the section of the constitution in question provides that the water rates "shall be fixed annually," to commence on July 1st, and that "any board or body" failing to do so shall be subject to process to compel action, and that any person collecting water rates otherwise than as so fixed annually shall suffer certain penalties and forfeitures. If such a construction does not involve a palpable absurdity or an attempt to accomplish an absolute impossibility, it certainly does lead naturally and probably to what is substantially impracticable, and to a failure to consummate the purpose of the constitutional provision under review. Fixing water rates is an entirely different thing from passing, or refusing to pass, a proposed order or ordinance which merely involves ordinary considerations of public policy, and is not an absolute necessity. The constitution requires that the rates shall be fixed annually in February, and that, if they be not fixed, there shall be no sale of water to the inhabitants of the city after the ensuing 1st of July, by any person, company, or corporation. To do this in a large city like San Francisco, as appears from the order No. 2,622 and the lengthy objections of the mayor thereto contained in the transcript, is a laborious and complicated task, and one about which there is always likely to be great differences of opinion; and the notion that the framers of the constitution meant that this should be accomplished in a short space of time by two independent bodies agreeing upon every detail of the work, and that a court of justice should compel them to thus agree, or rather should compel one to adopt the views of the other, is not to be entertained for a moment, unless it be the necessary and absolute result of the language employed.

Moreover, the construction contended for by respondent violates the well-settled, long-recognized, and fundamental principles which have always limited and governed the jurisdiction of courts in the proceeding of mandamus; and a design to undermine and unsettle those principles is not to be implied by any construction not forced by imperative language. It is, beyond doubt, the universal rule that mandamus will not lie to control the judgment of an officer or tribunal to whom is given discretionary power,—the power to examine, consider, and determine. In such a case the writ can be used only to compel the exercise of discretion; but, when the discretion has been exercised, the writ

cannot be used to compel a party to abandon his own judgment, and to make it conform to the judgment either of the court or of some other person. Every case where a party has been commanded by mandamus to do an act has been a case where the act was definite, certain, and fixed, and where its character and scope, and the result to flow from it, were as well known before the doing of the act as afterwards; as, for instance, when a municipal body has been commanded to provide for the payment of a judgment for a certain and definite amount. But no court in the course of the history of our jurisprudence has ever undertaken to control action by mandamus when the thing to be done was judicial in its nature, when the person or tribunal was "to hear and determine," and to come to a conclusion by the exercise of judgment and discretion, and when the result was not fixed and known beforehand. This principle was declared by this court as early as the fourth volume of Reports, as follows: "Whenever a discretionary power is vested in officers, and they have exercised that discretion, the courts will not interfere, because they cannot control, and ought not to coerce, that discretion, * * *" (McDougall v. Bell, 4 Cal. 177;) and it has been applied here in many subsequent cases. In High, Extr. Rem. § 24, the author, after stating the rule substantially as above, says: "It applies with especial force to cases where the aid of mandamus is sought against inferior courts or judges, public officers, municipal authorities, and corporate officers generally, and in all these cases it is the determining principal in guiding the courts to a correct decision. And whenever such officers or bodies are vested with discretionary power as to the performance of any duty required at their hands, or where, in reaching a given result of official action, they are necessarily obliged to use some degree of judgment and discretion, while mandamus will lie to set them in motion and to compel action upon the matters in controversy, it will in no manner interfere with the exercise of such discretion, nor control or dictate the judgment or decision which shall be reached." And that the supervisors act judicially when fixing water rates—that in performing that duty they should hear the parties interested, fairly weigh the evidence presented, and decide property rights according to their honest convictions and best judgment—is not only clear from the very nature of the thing to be done, but was expressly declared by the supreme court of the United States in *Waterworks v. Schottler*, 110 U. S. 354, 4 Sup. Ct. Rep. 48. In that case the court, speaking of the nature of the power conferred upon the supervisors of San Francisco to fix water rates, says: "Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted to their official

determination." And the same declaration was made by this court in *Spring Valley Waterworks v. City of San Francisco*, 82 Cal. 286, 22 Pac. Rep. 910, 1046; although it was held in that case that according to the averments of the complaint the supervisors had not exercised their judgment.

When we look at the language of said section 1 of article 14 we see not only that it fails to require the construction put upon it by respondent, but that it clearly avoids the consequences above stated. So far we have assumed that the constitutional provision in question is really susceptible of two different constructions,—one as presented by respondent, and the other as contended for by appellants; but it is readily perceived that the former is strained, difficult, and forced, while the latter is apparent and obvious, and rests naturally and easily upon the surface of the language employed. The first and leading words in that part of the section which designates the depository of the power are "the board of supervisors;" the balance of that part of the section merely makes exceptions of those municipalities of which boards of supervisors form no part. At the time the section was adopted there was no city and county, or city or town, other than the city and county of San Francisco, of which a board of supervisors was the legislative department; and it may well be presumed that the constitutional convention at that time had particularly in view the city and county of San Francisco when they expressly granted to the board of supervisors the power to establish water rates. But as there were some, and might in the future be other, cities and towns of whose government boards of supervisors did and might not constitute a part, and as other consolidated city and county governments could be established in the future, whose legislative department might or might not be boards of supervisors, it was necessary, also, to provide for the fixing of water rates in those kinds of municipalities; and so the section, after declaring that water rates "shall be fixed annually by the board of supervisors," (that is, of course, when such board was or should be a part of the government,) proceeded to provide, also, that in municipalities having no boards of supervisors the "other governing body" thereof should fix the rates. It is difficult to conceive how any other construction can be put upon the section without entirely eliminating therefrom the prominent and conspicuous words, "board of supervisors."

We do not deem it necessary to discuss the question whether, if we were to look to the consolidation act alone, the order No. 2,622 would require the approval of the mayor, although it is difficult to see that it would be embraced within any of the enumerated cases in which he is given the veto power by that act; and the veto power is not to be favored by any strained construc-

tion; it is to be recognized only where clearly granted. But the power in question here comes, not from the consolidation act, but from the constitution of the state. It could have been granted in that instrument to the mayor, or to the supervisors, or to any body of municipal officers, or to the judges of the courts. It was, however, expressly granted to the board of supervisors, and in the grant no mention is made of the mayor. Moreover, the "board or body" against whom a mandate will lie is the board or body to whom the power is given; and, if the mayor is part of that "board or body," he is subject to mandamus, which would be absurd. Of course, when a grant of power is made to several persons, or to a board consisting of several persons, the power is to be exercised by a majority of those persons, unless the power is otherwise limited by the grant itself. This is not only a necessary rule, and established by the general authorities, but it is expressly declared in section 12 of the Civil Code, which provides that "words giving a joint authority to three or more public officers, or other persons, are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority."

Our conclusion is that the power to fix water rates in the city and county of San Francisco is granted by the constitution of the state solely to the board of supervisors of said city and county; that the matter of fixing such rates requires the exercise of discretion and judgment; that the board, having exercised its discretion by passing said order No. 2,622, cannot be compelled by mandamus to change its judgment or to take further action thereon; that said order is valid, notwithstanding the attempted veto of the mayor, and legally fixes the rates to be charged for water of said city and county during the year commencing July 1, 1893; and that the judgment of the superior court, commanding said appellants to take further action in the premises, is erroneous. The judgment appealed from is reversed, with directions to the superior court to dismiss the proceedings.

I concur: GAROUTTE, J.

HARRISON, J., (concurring.) Whether the power to fix water rates in the city and county of San Francisco is vested in the board of supervisors alone, or whether the mayor is a constituent part of the governing body of that city and county, and thereby vested with the function of assisting in fixing those rates, is to be determined solely by the construction of the language in which the authority is conferred. The same section of the constitution declares that if any board or body fails to pass the necessary ordinances or resolutions fixing these rates, as therein directed, they shall be subject to peremptory process to compel their action. This is a

mandatory provision, and, if the occasion shall ever be presented, the issuance of such process ought not to be withheld upon the theory that it cannot be enforced. We ought not to assume that any political body will refuse to comply with the law after it has been declared by the highest tribunal in the state, or that there will be any occasion for a court to invoke any force other than the moral strength which its own declarations of the law ought to impress upon every citizen. Article 14, § 1, of the constitution, declares that the rates for the use of water supplied to any city and county shall be fixed annually "by the board of supervisors, * * * or other governing body of such city and county, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body." If the determination of the question above stated is limited to the provisions of the constitution alone, it is clear that this duty is imposed upon the board of supervisors alone. The phrase "or other governing body," inserted in the section after the "board of supervisors" already designated, does not limit or qualify the functions of that board, but is evidently inserted for the purpose of supplying any omission in the previous enumeration of the titles by which the governing bodies of the several towns or cities may be known, and applies to those municipalities whose governing bodies are otherwise entitled, as, for example, the board of trustees in the city of Sacramento.

The respondent contends, in substance, that the term "governing body" is a nomen generalissimum, of which "board of supervisors" is only an enumerated species, and that for the purpose of determining what is the governing body of any municipality it is necessary to resort to the organic act under which the several cities are organized; that, by the provisions of the consolidation act of the city and county of San Francisco, the mayor is a constituent part of the governing body of that municipality, and consequently, in fixing the water rates for that municipality, he is to be consulted. We are not called upon here to determine how the water rates in San Francisco should be fixed in case the governing body of the city and county of San Francisco should be changed, as that city is still governed by the same charter as existed at the adoption of the constitution. The contention of the respondent that the mayor is a part of the governing body of San Francisco rests upon the provisions of section 68 of the consolidation act, which declares that certain ordinances shall be presented to him for approval "before they take effect." This "approval" of the mayor is, however, an act distinct from the passage of the ordinance, and is not called into exercise until after it has been passed by the board of supervisors. The mayor has no vote upon its passage, and the language

of the section requiring it to be presented to him for his approval is that the ordinance, "after the same shall pass the board, shall, before it takes effect, be presented to the president of the board (mayor) for his approval." The act of 1868 (page 702) does not extend the power of the mayor in the passage of any ordinance or resolution by the board of supervisors, but merely provides that, in those cases in which he is authorized to exercise a disapproval of their acts, nine votes shall be necessary to override his action. The same act provides that any ordinance, order, or resolution may be passed by the vote of seven members of the board, and consequently every ordinance which is adopted by seven members is valid immediately upon its passage, unless by virtue of section 68 it requires his approval. See *Chumasero v. Potts*, 2 Mont. 285. The mayor is not a member of the board of supervisors, nor is he necessarily a constituent part of the legislative power of a municipality. His functions are of an executive or administrative character, and in article 11 of the constitution he is in several places styled the "chief executive officer" of a city. Whatever power he may at any time exercise in the legislative functions of a municipal government is never to be implied, but must find its authority in some positive statute; and as the constitution confers upon the board of supervisors the power to fix the water rates by an ordinance, and neither makes any limitation upon their absolute authority in the matter nor refers to any approval of their act by the mayor, we are not justified in holding that his approval is necessary.

It is further contended by the respondent that, inasmuch as the constitution requires the ordinance fixing the water rates to be passed by the board of supervisors "in the manner that other ordinances or legislative acts or resolutions are passed by such body," and as by the provisions of section 68 of the consolidation act the mayor's approval is necessary to the validity of certain ordinances, of which it is claimed this is one, such approval is a part of the "manner" in which the ordinance must be passed. The theory of this contention would require us to hold that this article of the constitution incorporates into its terms the various provisions of the several charters of cities in this state respecting the manner of passing ordinances, and, instead of having an organic act of the state whose provisions are specific and definite, we would have a constitution to be differently construed in different portions of the state. It would place us in the additional dilemma of having a constitution whose provisions may be varied by each legislature, or one with which there might be no means of compliance. If the manner in which the water rates are to be fixed is to be determined by the legislature, and that body should at any time provide that such

an ordinance of a municipality could be passed by only a unanimous vote of the board of supervisors, or city council, or other governing body, the plain provisions of the constitution would be destroyed. If, on the other hand, the manner in which the ordinance is to be passed is such as existed at the date of the constitution, it would follow that a subsequent change in the charter respecting the mode of passing ordinances would render the mode of fixing water rates different from the mode of passing any other ordinance, and might be utterly impracticable. For example, if the city of San Francisco should adopt a charter in which two boards of supervisors were provided, it would be difficult to determine which of the two would have the power to pass the rates, or, if they were to be passed by both how it should be exercised. By construing this provision of the constitution simply according to its terms and irrespective of any statute these questions are avoided. The reference therein to the "manner" in which legislative acts are passed may vary according to the provisions of the statute under which the municipal body is organized. There may be no power to pass any legislative act until after it has been offered at a previous meeting of the board, or until after it has been published for a certain number of days, or the charter may require that the vote upon its passage shall be by having the ayes and noes entered upon its records, or by having the original ordinance signed by the members of the body voting therefor. As a creature of the legislature, the mode in which the municipal body is authorized to act becomes the only mode in which its acts can have validity, and this provision of the constitution only means that the ordinance or resolution by which the water rates shall be passed shall be in that manner which will constitute it a valid ordinance or resolution. This, however, does not include any steps other than those which are necessary for the passage of the ordinance, nor does it include any act of any other character than its passage. It is sometimes provided that an ordinance shall not have effect until it has been entered at length in a book kept for that purpose, or until it shall have been published in some newspaper for a certain length of time. These are steps necessary to give validity to the ordinance, for its enforcement, but are entirely disconnected with its passage. The ordinance provided in this section of the constitution becomes valid immediately upon its passage.

Even under the provisions of section 68 of the consolidation act, the approval of the mayor does not become essential to the validity of an ordinance fixing water rates. His approval is required to only certain classes of ordinances which are enumerated in that section. These are ordinances "providing for any specific improvement, the granting of any privilege, or involving the lease or other

appropriation of public property, or the expenditure of public moneys, (except for sums less than five hundred dollars,) or laying tax or assessment, or imposing a new duty or penalty." It is sufficient to say without further discussion that an ordinance fixing water rates is not included in either of these classes. The direct object and purpose of the ordinance does not involve the expenditure of any public moneys, but is to perform a public duty, imposed by the sovereign people upon a designated tribunal, of determining the compensation which the water company shall receive in the exercise of its franchise. Although this ordinance is the act of a legislative body, and is to that extent a legislative act, as has been sometimes stated, yet the act itself is more of a judicial than a legislative character, and was so determined by the supreme court of the United States in *Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. Rep. 48. In that case it was said, with reference to this provision: "By the constitution and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and the company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination." See, also, *Spring Valley Waterworks v. City of San Francisco*, 82 Cal. 307, 22 Pac. Rep. 910, 1046. The constitution substituted the board of supervisors for the board of commissioners which was authorized by the act of 1858, and it is reasonable to hold that the functions of the two boards are the same.

The proposition that the power to fix the water rates rests with the supervisors alone is not now presented for the first time. In *Spring Valley Waterworks v. City of San Francisco*, 61 Cal. 18, Chief Justice Morrison said that this provision for fixing the water rates "is as broad and comprehensive as the English language could make it, and gives to the board of supervisors of the city plenary power over the subject-matter to which the article relates;" and in another case between the same parties, reported in the same volume, (61 Cal. 3,) Justice McKee, in giving the opinion of the court, said: "Water rates must be fixed by the board of supervisors, pursuant to the provisions of the act of 1881, and not by a board of commissioners appointed under the act of 1858." In another case between the same parties (82 Cal. 305, 22 Pac. Rep. 910, 1046) this court said: "It must be conceded in the outset that the use of water for sale is a public use, and that the price at which it shall be sold is a matter within the power of the board of supervisors to determine." The act of 1881, (page 54,) above referred to, is a legislative provision for carrying into effect this provi-

sion of the constitution, and the first section declares: "The board of supervisors, town council, board of aldermen, or other legislative body of any city and county, city or town, are hereby authorized and empowered, and it is made their official duty to annually fix the rates that shall be charged and collected by any person, company, association or corporation for water furnished to any such city and county, or city or town, or the inhabitants thereof. Such rates shall be fixed at a regular or special session of such board, or other legislative body, held during the month of February of each year, and shall take effect on the first day of July thereafter, and shall continue in full force and effect for the term of one year, and no longer." In this statute the board of supervisors alone is designated as the body whose official duty it is to fix the rates, and there is no reference to any approval of their act by the mayor, or any limitation upon the manner in which they shall act; and for the purpose of determining whether their act is valid we have only to look to their organization and invoke the general rules of construction for determining how an organized board may execute a power conferred upon it.

For the foregoing reasons, as well as those presented by Mr. Justice McFARLAND, the judgment should be reversed, and the court below directed to dismiss the proceedings.

We concur: DE HAVEN, J.; FITZGERALD, J.

PATERSON, J., (concurring.) I concur in the judgment, and in the construction placed upon section 1, art. 14, of the constitution, by Mr. Justice McFARLAND. I think, however, that the judgment is not objectionable on the ground that it seeks to interfere with the exercise of the discretion of the board, or any member thereof, or that, conceding the theory of the petitioner to be correct, the writ must run against the mayor as well as the board. The record shows that, after the mayor refused to approve the ordinance and return the same with his objections thereto, the board of supervisors refused to entertain the objection, and refused to take any action whatever with respect thereto. If the mayor had a right to act in the premises, it was the duty of the board of supervisors to consider his objections, and it is in no way an interference with their discretion to say that they must act in some manner upon them. When they have acted, of course that is the end of the matter; their discretion cannot be controlled by the court. If it be conceded that the mayor is a part of the power which must fix the water rates, he is not necessarily a party to a proceeding of this kind. He acts independently, and upon his own responsibility. This he has done. The board alone refuses to perform its duty, according to the theory of the petitioner, and I see no reason why a writ, in such a case,

should not run against that branch of the law or order making power. As the mayor, however, is not a part of the power which fixes water rates, under the provision of the constitution, the questions as to whether the judgment is directed against the proper parties, or whether it interferes with the exercise of discretion, are unnecessary to the decision in this case.

BEATTY, C. J., (concurring.) I concur in the judgment upon the ground that the true construction of the constitution is that ordinances fixing water rates are to be passed as legislative acts of the particular municipality are generally passed, and not as they are passed in exceptional cases provided by act of the legislature. To hold otherwise would be to admit the power of the legislature and boards of freeholders to adopt charters under which, with respect to all other subjects of legislation, a reasonable discretion and freedom of action would be left to the legislative body, while with respect to water ordinances the legislative body would be so hampered and restricted that the fixing of rates would be practically impossible, thus accomplishing the confiscation of the property of water companies. The board of supervisors of San Francisco is the legislative body as to all subjects of legislation, with a few special exceptions, and its acts do not generally require the approval of the mayor. Water ordinances must be held to fall under the general rule, and not within the exception.

100 Cal. 26

SHANKLIN v. HALL. (No. 19,075.)

(Supreme Court of California. Oct. 10, 1893.)

REVIEW ON APPEAL—REAL-ESTATE AGENT—PAROL CONTRACT—MEMORANDA OF AGREEMENT

1. Though an order for a new trial is made on an erroneous ground, yet, if the order can be justified on grounds of error in law occurring during the progress of the trial, it should be affirmed.

2. Plaintiff cannot recover on an oral agreement to use his knowledge and influence to enable defendant to sell or exchange certain land; such agreement being within Civil Code, § 1624, subd. 6, providing that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission shall be void, if not in writing.

3. Letters written by defendant to plaintiff long after the alleged performance of the contract cannot be relied on as containing sufficient memoranda to satisfy the statute, when they do not state the agreement alleged in the complaint, nor refer to any of its terms.

In bank. Appeal from superior court, Los Angeles county; J. W. Towner, Judge.

Action by W. I. Shanklin against J. H. Hall to recover for services rendered in the exchange of certain land. Judgment was entered for plaintiff, and, from an order granting a new trial, he appeals. Affirmed.

Hervey Bleecker and Ray Billingsley, for appellant. Victor Montgomery, for respondent.

GAROUTTE, J. This is an action to recover for services rendered in the exchange of certain real estate. Judgment went for plaintiff, a motion for new trial was made and granted, and this appeal is prosecuted from the order granting a new trial. The case was tried by the court, and the new trial was granted upon the ground that "the decision was against law." The court made the following findings of fact: "That on the 17th day of April, 1890, the plaintiff and defendant entered into an oral agreement whereby it was agreed between them that plaintiff should use his knowledge and influence on behalf of, and render his services to, defendant, to enable him to sell or exchange the lands mentioned in the amended complaint herein, for which plaintiff was to be paid by the defendant the sum of \$450 as soon as the sale or exchange was effected through his (the plaintiff's) knowledge, influence, or services rendered to him, the defendant." The court further found that the plaintiff rendered his services as agreed, and that a transfer of the land was made by virtue of such services of plaintiff. The findings are directly in line with the allegations of the complaint, and the court concluded therefrom that plaintiff was entitled to recover. We think the conclusion of law arrived at by the court erroneous, and that an appeal from the judgment would have resulted in its reversal for that reason. But a motion for a new trial was granted upon the ground that the decision was against law. It may be conceded, from the authorities in this state, that "the decision is against law" when the conclusions of law are not supported by the findings, and that such an error of the court should be reviewed by a direct appeal from the judgment; yet, if the order granting the new trial can be justified upon the grounds of error in law occurring during the progress of the trial, it should be affirmed. *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. Rep. 481. If such were not the rule, the moving party would be deprived of his rights to a new trial merely because the grounds upon which the order was made were not sound. Such an injustice is not tolerated by the courts.

2. Upon the trial the defendant objected to oral evidence of the express contract alleged in the complaint, on the ground that the sixth division of section 1624 of the Civil Code requires such contract, or some note or memorandum thereof, to be in writing, and subscribed by the party to be charged, or by his agent, and, therefore, that oral testimony was incompetent. The court overruled the objection, and admitted testimony of an oral contract, to which defendant excepted. This matter was material, and as the decision of it, if erroneous, was

prejudicial to the appellant, he is entitled to have the question considered, and the decision of it reviewed on this appeal, although the trial court expressly based the order granting the new trial on the distinctly different ground that "the decision was against law." Among the contracts declared invalid, if not in writing, etc., by section 1624 of the Civil Code is: "6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission." The contract set out in the complaint is embraced in the findings of the court which we have quoted, and it appears to possess all the elements essential to bring it within the purview of the statute. It is not necessary, in the sense of the statute, that he should have been authorized to execute a conveyance of defendant's real property. *Bouv. Law Dict.* "The duty assumed by a broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made." *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. Rep. 642; *Sibbald v. Iron Co.*, 83 N. Y. 382. And this is what plaintiff was employed to do, and precisely what he avers he did in performance of the agreement on his part. As additional authority for the application of the statute to this case, see *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. Rep. 523. The case of *Wilson v. Morton*, 85 Cal. 598, 24 Pac. Rep. 784, is not in point. In that case the plaintiff was not employed to purchase or sell, or to assist in the purchase or sale of real estate. An objection to the evidence should have been sustained, and this ruling of the court in this regard was an error of law which may be reviewed upon this appeal.

Counsel for appellant contend that certain letters written by defendant to plaintiff long after the alleged performance of the contract by plaintiff contain memoranda sufficient to satisfy the statute. But those letters do not state the agreement alleged in the complaint, nor refer to any of the terms thereof. The complaint contains a count upon an implied contract to pay the reasonable value of the same services alleged in the special count, but this count seems to have been abandoned. Nothing is claimed under it here, and the judgment is evidently based upon the special count. Let the order granting the new trial be affirmed.

We concur: HARRISON, J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.

100 Cal. 26

MILLS et al. v. FLETCHER et al. (No. 18, 150.)

(Supreme Court of California. Oct. 18, 1893.)

MINING CLAIMS—EJECTMENT.

1. In ejectment for a mining claim there was evidence that defendants entered on the locus in quo in 1890, and that plaintiffs had

made the requisite annual expenditure on the claim during the preceding year. The cause charged that if the jury found such facts from the evidence, and that defendants unlawfully entered and remained in possession under a hostile claim of title until the action was commenced, then plaintiffs are entitled to recover, regardless of whether defendants made a new location of the claim in 1891 on the ground that plaintiff did not make the required expenditure in 1890. Held that such charge was correct, since plaintiffs were entitled to the whole of the year in which to make the annual expenditure.

2. In ejectment, the verdict of the jury is conclusive as to damages, and the court cannot allow a different sum on finding made by the court.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Ejectment by Mills and others against Fletcher and others. There was a judgment in favor of plaintiffs, and defendants appeal. Modified.

P. F. Simonds and Kitts & Bowman, for appellants. J. M. Walling, for respondents.

VANCLIEF, C. Action of ejectment to recover the possession of two adjoining quartz lode mining claims, situate on the public mineral land of the United States, known as the "Hathaway Claim" and the "Peck Claim," each being particularly described in the complaint by metes and bounds; and also to recover \$3,000 damages for the severance and removal from said claims of gold-bearing rock. The complaint was not verified. By their answer the defendants deny generally each and every allegation in said complaint contained; "aver that the premises described in plaintiffs' complaint are public mineral lands of the United States, and that plaintiffs have not done any work, or performed any labor, or made any improvements thereon, since December 31, 1889;" and also aver that the cost of mining and milling the gold-bearing rock mentioned in the complaint largely exceeded the value of said rock and the gold and other minerals extracted therefrom. Then, "by way of cross complaint," the defendants aver that they own and possess certain premises known as the "Consolidated Quartz Mining Claim," containing 40-37 acres, and describe it by metes and bounds; then further aver that plaintiffs claim an interest therein adversely to defendants without right, and also that their said "Consolidated Quartz Mining Claim" includes within its boundaries a portion of the premises described in plaintiffs' complaint, but that the boundaries and extent of said portion so included cannot be determined by defendants from said complaint, or by any other means. The prayer of the so-called "cross complaint" is that defendants may be adjudged to be the owners of the premises described in their cross complaint, and that their title thereto may be quieted as against the plaintiffs.

The cross complaint not being verified, the plaintiffs answered it by a general denial, and by a repetition of all the affirmative averments of their complaint; and also disclaimed any interest in the premises described in said cross complaint, except such portions thereof as were within the exterior boundary lines of the claims described in their complaint. The cause was tried by a jury on special issues besides the general issue. The jury found for the plaintiffs on all the special issues, and also returned a general verdict for plaintiffs.

The special issue as to damages was submitted to the jury in the following language: "Question No. 16. How many dollars damages are plaintiffs entitled to recover, if entitled to recover damages at all?" The answer to this was: "One dollar." In addition to the special and general verdict of the jury the court made special findings, all in harmony with the verdict of the jury, unless the following is inconsistent therewith: The court found that defendants took from plaintiffs' claim 162½ tons of gold-bearing quartz rock. "After said rock had been severed from the realty, said defendants converted the same to their own use, and received as proceeds from the working thereof the sum of \$1,922.71. That they expended in and about said rock, after the same had been taken from the ledge in plaintiffs' claim, as necessary expenses in reducing said rock and extracting the gold therefrom, the sum of \$807.25. That, in extracting and reducing said rock, defendants expended the sum of \$2,750." As conclusions of law the court found that plaintiffs were entitled to recover the ground in dispute, and also to recover from the defendants, Skewes and Fletcher, damages in the sum of \$1,015.46, and rendered judgment accordingly. The defendants bring this appeal from the judgment on the judgment roll containing their bill of exceptions.

1. About one-third part of plaintiffs' claim is within section 35 of the government survey, and two-thirds thereof are in section 34. For the purpose of showing an outstanding title, the defendants offered in evidence a patent from the government to the Central Pacific Railroad Company for section 35, which was excluded by the court, and this action of the court is assigned as error by appellants. In the first place, it appears that defendants put in evidence "a map of the premises; which map, it was admitted, correctly delineated the Peck, Hathaway, Standard, and Consolidated locations, and the conflict between them." This map shows that no part of the land in dispute is within section 35. In the second place, it is averred in the answer of the defendants that "the premises described in plaintiffs' complaint are public mineral lands of the United States;" and the answer of plaintiffs to the so-called "cross complaint" is to the same effect. It follows, at least, that the

offered patent was irrelevant to any material issue, and that defendants could not have been injured by its exclusion.

2. It is contended that the court erred in giving each of the following instructions to the jury: "If you find from the evidence that defendants or their grantors unlawfully entered upon the claims of plaintiffs in the year 1890, and took possession of plaintiffs' tunnel, posted a notice of location upon said claim, recorded said notice of location, and extracted rock and earth therefrom, against the consent of plaintiffs, and under a claim hostile to plaintiffs' title; that thereafter defendants and their grantors kept exclusive possession of said claims until the commencement of this action,—then plaintiffs are entitled to recover possession of the premises in controversy, regardless of whether defendants or their grantors made a new location of said premises in 1891. Defendants could not go wrongfully, if you find that they did so, upon plaintiffs' claim in 1890, take possession thereof, and, while thus wrongfully holding such possession, make a new location of said claims, under the claim that the plaintiffs had not made the annual expenditure for 1890. Plaintiffs were entitled to the whole of the year 1890 in which to make the annual expenditure for that year, provided plaintiffs had made the annual expenditure for 1889, or had resumed work upon said claims in 1890, and prior to the entry of the defendants or their grantors." "The jury is instructed that on each mining claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed, or improvements made, during each year, unless such labor is excused by reason of some act of the defendants excusing the performance of such work sufficient for that purpose." As applied to the evidence, I think these instructions substantially correct. It is admitted that plaintiffs did the required annual labor on their claims prior to January 1, 1890. If the facts hypothetically stated in these instructions are true, the defendants should not be heard to object that plaintiffs did not do the annual labor required by law during the year 1890, or any subsequent year while they remained in adverse possession, and occupied the only tunnel that was open to the lode, and through which plaintiffs intended to work. Conceding that plaintiffs might have been permitted by defendants to do work on the surface of their claims, there is no evidence that such work, or any work outside of the tunnel occupied by defendants, would have tended to improve or develop their claims, or could have been done to any advantage whatever; and, if not, such work would not have answered the purpose of the law requiring annual labor. But there is no evidence that defendants would have permitted even useless work on the surface.

3. It is contended for appellants that the verdict of the jury as to the amount of the

damages is conclusive, and not merely advisory, except as against the power of the court to grant a new trial; and I think this point should be sustained. The facts stated in the so-called "cross complaint" constitute a mere answer, and not a cross complaint. So far as material, they are that defendants are the owners of, in the possession of, and entitled to the possession of the demanded premises. The averment that plaintiffs claim an interest in the premises adversely to defendants is unnecessary, since that fact is even more explicitly averred in plaintiffs' complaint, and is put in issue by the general denial in the answer; and the averment that plaintiffs' claim is without right is also included in the general denial of all the allegations of the complaint. It is immaterial what the defendants called their pleading. Its character is to be determined by the court. *Holmes v. Richet*, 56 Cal. 307; *Meeker v. Dalton*, 75 Cal. 156, 16 Pac. Rep. 764. The action is an action at law, and the defense is only a legal defense. A verdict and judgment upon the issues raised and tendered by the answer would quiet the title of the prevailing party as effectually as would any form of judgment asked for in the prayer appended to the so-called "cross complaint." It has several times been decided that in actions of ejectment and actions to quiet title, in which the defendant relies upon title in himself, a cross complaint is unnecessary. *Wilson v. Madison*, 55 Cal. 5; *Doyle v. Franklin*, 40 Cal. 107; *Miller v. Luco*, 80 Cal. 261, 22 Pac. Rep. 195; *Meeker v. Dalton*, supra. Matter constituting a complete defense should not be pleaded as a cross complaint. *Hills v. Sherwood*, 48 Cal. 386; *Jones v. Jones*, 38 Cal. 585; *Association v. Wagner*, 61 Cal. 349. The defendants in this action, being in possession, needed no affirmative relief. A general verdict and judgment thereon in their favor would have been conclusive evidence of their title as against the plaintiffs, and of their right to the possession which they already had.

If the foregoing views, as to the legal nature of the action and defense, are correct, it follows that the court erred in giving judgment for damages in a sum exceeding one dollar. The court should not have disregarded the verdict of the jury, except by ordering a new trial upon the conditions and in the mode prescribed by the Code of Civil Procedure. I think the judgment should be affirmed, except in respect to the damages, in which respect it should be modified by reducing the amount of damages to one dollar.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed, except in respect to the damages, in which respect it is modified by reducing the amount of the damages to one dollar; each of the parties to pay their own costs of appeal.

4 Cal. Unrep. 305

WILLIAMS v. BISAGNO et al. (No. 14,271.)
(Supreme Court of California. Oct. 18, 1893.)

STREET ASSESSMENTS—VALIDITY—ACTION TO ENFORCE.

1. A resolution to pave and curb a street required the city engineer to furnish the council with estimates. The estimates, in addition to the items of paving and curbing, stated, under the head of "grading," that 66 cubic yards of excavation and 42 cubic yards of embankment would be required. The grading, if taken from the entire surface of the street, would involve the removal of 1 5-7 inches in depth. *Held*, that it would be assumed, from the small amount of the so-called "grading" required, that the street had been graded, and that the grading mentioned in the estimates was merely the removal of small inequalities in the surface, and therefore an assessment for the paving and curbing was not invalid on the ground that it required grading, which was not mentioned in the resolution.

2. A recital in the record on appeal by defendant, in an action to enforce a street assessment, that plaintiff produced two witnesses who testified that the notice of the improvement "was posted at the time and in the manner required by law, both as to the number of said notices, the place of posting, and the time during which the same remained posted," sufficiently shows that the law as to posting the notice was complied with.

3. A resolution to pave a street, which refers by number to certain ordinances for the manner in which the work is to be done, is sufficient, without reciting the provisions of the ordinance.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. R. Swinnerton, Judge.

Action by C. B. Williams, administrator of J. E. Magary, deceased,—substituted as plaintiff in place of his intestate,—against A. Bisagno and others, to enforce a street assessment. There was a judgment in favor of plaintiff, and defendants appeal. Affirmed.

Craig & Meredith, for appellants. Jas. H. Budd, for respondent.

HAYNES, C. This action was brought by Magary against the appellants to enforce a street assessment. He obtained judgment in the superior court, and defendants appeal from the judgment, and an order denying their motion for a new trial. After the appeal was taken, Magary died, and his administrator, C. B. Williams, was substituted in this court. Upon their motion for a new trial, appellants specified three particulars in which they claimed the evidence was insufficient to justify the decision, namely: (1) It appeared from the evidence that the plans and specifications were not in accordance with the resolution of intention, in that they included grading, which work was not included in said resolution of intention. (2) The contract embraced work not within said resolution of intention, namely, the grading of said street. (3) The notice of said work, as posted, did not comply with the law, in that the letters were not an inch long, and said notice was not posted in two or more places." The only error of law

specified is that "the court should have decided in favor of defendants."

The resolution of intention was to order Washington street paved with basalt blocks of the dimensions required by ordinance No. 239 of the ordinances of the city of Stockton, for the entire width of the roadway from one designated point to another, and to order curbing of granite rock, of the dimensions required by another designated ordinance, along the outside of the sidewalks, on both sides of the same street, between the same terminal points. By a resolution of the council, the city engineer was required to furnish the council with plans and specifications, and careful estimates of the cost and expense, of said paving, and of the curbing. This resolution was complied with. The engineer reported, under the head "grading," the following: "There will be a total of 66 cubic yards of excavation and 42 cubic yards of embankment. The embankment must be made from the excavation, and the entire work must be rolled at least twice with the city roller before placing sand upon it." After fully describing the manner in which the paving and curbing should be done, the "estimate of cost" was given as follows:

13,465 square feet of paving at	
\$.25	\$3,366 25
606 running feet of curbing at \$1.00	606 00
	\$3,972 25

These plans and specifications and estimates were approved by the council, and were incorporated in the contract for the work. No estimate was made for grading, nor was any bid made therefor, except as included in the bid for paving, and the assessment and warrant were for paving and curbing. It is clear from the record that the grading mentioned in the specifications was treated throughout as incidental to, and part of, the paving. The grading involved a removal, if taken from the entire surface, of one and five-sevenths inches in depth, or, as the specifications show, an excess of twenty-four yards over what was required to fill the slight inequalities of the street. Such work is obviously incidental to the paving, as much so as putting on the three inches of sand required as a basis for the basalt blocks, and was within the work specified in the resolution of intention. The ordinance providing for the manner in which the paving shall be done is not set out, either in the transcript or briefs, nor is there anything in the record to show that the street had not been graded. We think it may therefore be assumed, not only from the silence of the record, but from the small amount of the so-called "grading," that the street had been graded; that the work denominated "grading" in the specifications was merely the removal of inequalities resulting from the use of the street after it was graded, and that the ordinance prescribing the mode or manner of paving provided for the removal

of such inequalities as part of the work of paving; that the character of this work did not come within the meaning of the word "graded," as used in the second section of the act, and was used by the engineer only in the sense of being a necessary part of the work of paving, for which a separate estimate was not only unnecessary, but improper. The resolution directed the engineer to make plans, specifications, and estimates "of the cost and expense of paving with basalt blocks," and, the estimate not having included "grading," both the engineer, in making his report, and the council, in approving it, must have understood the grading as part of the paving, and within the ordinance upon the subject of paving. *Dyer v. Chase*, 52 Cal. 440, and *Donnelly v. Howard*, 60 Cal. 291, cited by appellants, are not in point. In *Dyer v. Chase* the resolution of intention was to curb and macadamize a street. The contract and assessment included macadamizing the sidewalk. And in *Donnelly v. Howard* a reference to the record shows that the assessment included "curbing," which was not included or referred to in the resolution of intention. It may be, as appellants contend, that the grading increased the bid for paving, but, as the paving could not be done without the prior preparation of the street, such preparation is properly included.

The contention that the "notice of street work" did not comply with the statute, in that the letters should have been "an inch in length along the line," instead of vertically, requires little notice. The object of the statute is to have the headline of the posted notices, consisting of the words, "Notice of Street Work," so prominent as to attract attention, and so distinct as to be easily read at a reasonable distance. A copy of the headline of the notice, as posted, is inserted in the transcript. The letters are more than an inch in length, vertically, and of reasonable proportion, and are sufficiently distinct. The sole purpose of the statutory provision having been fully accomplished, as well as literally complied with, a discussion of the question is unnecessary.

As to the point that it is not shown that more than one notice of "street work" was posted, the transcript contains the following: "The plaintiff thereupon produced two witnesses, who testified, in substance and effect, that the said notice was posted at the time and in the manner required by law, both as to the number of said notices, the place of posting, and the time during which the same remained posted." This condensed statement of the evidence upon this point, made by appellants in their statement on motion for a new trial, is, we think, conclusive that the law was complied with in that regard. At the least, it does not appear from the record that the requisite number of notices was not posted.

Appellants make the further point in their

brief that the resolution of intention was not sufficient, inasmuch as it referred to ordinances 239 and 334, instead of reciting the provisions of those ordinances, and cite in support of their contention *Crosby v. Dowd*, 61 Cal. 558, to the effect that a decree foreclosing a mortgage must be, in itself, sufficient, without referring to other records. That case was, however, overruled in *De Sepulveda v. Baugh*, 74 Cal. 468; 16 Pac. Rep. 223; In re Madera Irrigation Dist., 92 Cal. 329, 28 Pac. Rep. 272, 675. The question here, however, is different. In *Crosby v. Dowd* the question was whether a decree was not void which purported to enforce a lien upon property not described in the decree itself, and which could only be identified, if at all, by a reference to conveyances on record. Here the reference is to ordinances showing the manner in which the work is to be done, and of which appellants were not only bound to take notice, but were conclusively presumed to have knowledge. Finding no error in the record, we advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be affirmed.

(4 Cal. Unrep. 309)

Ex parte BELL.

(Supreme Court of California. Oct. 18, 1893.)

CRIMINAL LAW—JURISDICTION OF SUPERIOR COURT.

Where a defendant is convicted in the superior court of petit larceny, on an information which charges him with grand larceny, he may be confined in the county jail under such conviction, though the superior court has no jurisdiction of petit larceny, since the charge of grand larceny gave the court jurisdiction, and Pen. Code, § 1159, authorizes a conviction of petit larceny when grand larceny is charged.

In bank.

Application by Charles Bell for a writ of habeas corpus, alleging that he was illegally imprisoned under a conviction of petit larceny. Denied.

P. E. & Robt. A. King, for petitioner.

PER CURIAM. The petitioner was accused by information of the crime of grand larceny, and, after a trial in the superior court, convicted of petit larceny. His imprisonment in the county jail upon that conviction is alleged to be unlawful, because the superior court has no jurisdiction of petit larceny. But the charge of grand larceny gave the superior court jurisdiction, and the statute authorizes a conviction of petit larceny when grand larceny is charged. Pen. Code, § 1159. Writ denied.

100 Cal. 150

PEOPLE v. DEFOOR. (No. 20,963.)

(Supreme Court of California. Oct. 19, 1893.)

CRIMINAL LAW—FORMER JEOPARDY—CONVICTION OF LOWER OFFENSE—MERGER.

1. Pen. Code, § 1159, provides that defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged. Defendant was convicted of an assault under an information charging him with an assault with intent to kill. Held to bar a trial on an indictment for mayhem.

2. The doctrine of merger does not apply in such case, for a conviction of mayhem could not merge a prior conviction and judgment for the same assault; but, if the information for mayhem had been the only one filed, a conviction would have merged the lower included offense, of assault.

Commissioners' decision. Department 1. Appeal from superior court, Calaveras county; C. V. Gottschalk, Judge.

Jackson Defoor was convicted of mayhem, and appeals from the judgment, and from an order denying a new trial. Reversed.

Reddy & Solinsky, for appellant. W. H. H. Hart, Atty. Gen., for the People.

HAYNES, C. The defendant was found guilty by a jury, and sentenced by the court to seven years' imprisonment in the state prison, upon an information for mayhem committed upon one W. R. Jones on the 19th day of December, 1891. The defendant pleaded not guilty, and also pleaded that he had once been in jeopardy for the offense charged, and also a further plea that he had been convicted of the offense charged upon judgment of the superior court of the same county, of Calaveras. The appeal is from the judgment, and from an order denying his motion for a new trial. The bill of exceptions shows that on the 19th day of December, 1891, the complaining witness, Jones, was seated in Raggio's store; that the defendant came in, and, after addressing some abusive language to Jones, struck him upon the head with a whisky glass; that Jones got up, whereupon the two men seized each other, and, in the struggle that followed, fell upon the floor, each striking the other as opportunity offered; and that, during the struggle, Jones was bitten upon the thumb by the defendant. The fight lasted about a minute and a half or two minutes, when the parties were separated by others who were present. The bite caused an abrasion upon the thumb, between the first and second joints, about the size of the head of a lead pencil. The complaining witness, the same day, went to a physician, and had the wound upon his head dressed, but did not call the attention of the physician to the injury to his thumb. The following day he returned to the physician, complaining of pains in his thumb, and received treatment therefor, with a view to prevent blood poisoning. The treatment seems not to have been successful, and a few days later it be-

came necessary to amputate the thumb. Afterwards, on the 4th day of February, 1892, two informations were filed against the defendant,—the first charging him with an assault upon the prosecuting witness, Jones, with a glass tumbler, with intent to kill and murder said Jones; and the second, for mayhem. In June, 1892, the defendant was tried upon the first information, and convicted of an assault, and judgment was duly entered against him that he be imprisoned in the county jail of the county of Calaveras for the term of three months; and the defendant was then remanded to the custody of the sheriff under said judgment. This judgment was entered June 10, 1892, and the trial upon the charge of mayhem was immediately proceeded with. Upon the trial of the information for mayhem, the defendant offered in evidence the information for assault with intent to murder, together with all the proceedings thereunder, including the verdict of the jury in finding him guilty of assault, and the judgment of the court thereon, to which evidence the people, by the district attorney, interposed an objection which was sustained by the court, and the evidence excluded, and the jury were instructed by the court, upon each of these issues, to find for the people; to which rulings the defendant duly excepted.

No question is made as to the form or sufficiency of the pleas, nor as to the fact that there was but one conflict between the prosecuting witness and the defendant. The court erred in excluding the evidence offered by defendant in support of his pleas of former conviction and of once in jeopardy, and in instructing the jury to find those issues for the people. The constitution provides that "no person shall be twice put in jeopardy for the same offense." The question arising under this provision is, what facts shall be held to constitute "the same offense," in any given case? That there are cases where at the same time, and apparently by the same act, different and entirely distinct offenses may be committed, need not be disputed. But this is not one of them. It is assumed on the part of the people that evidence to support the information for mayhem would not prove an assault with intent to murder, and that that is the test by which the question at issue is to be determined. But in this counsel are mistaken. Section 1159, Pen. Code, is as follows: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." It was therefore entirely proper to charge the assault with intent to murder in a single count, and the effect of so pleading, the conviction being for assault only, is an acquittal of the higher offense; and a conviction of the lower gave the conviction precisely the same effect, for the purposes of a plea of former conviction, as though the information had

been for that offense only. The information for mayhem does not, in terms, charge an assault, and it is not necessary under section 1159, Pen. Code, that it should. Nevertheless, an assault by the defendant upon the prosecuting witness is an essential element of the charge of mayhem; and, under the common-law system of pleading, it was always alleged that the defendant, "intending to maim," etc., "with force and arms did make an assault upon," etc., and then alleged facts showing the accomplishment of the higher offense. See Whart. Prec. p. 192. It is clear, therefore, that under section 1159, Pen. Code, above cited, the defendant might have been convicted of an attempt to maim, or of an assault only; and, if of an assault, there would have been two convictions for precisely the same offense. Nor does it make any difference that the conviction was for the higher offense, of mayhem, since that offense could not be proved without proving the assault, for which he had already been convicted. The doctrine of merger, to which great importance is given in many of the cases, cannot aid the respondent. If the information for mayhem had been the only one filed, the conviction would have merged the lower included offense, of an assault, but the conviction of mayhem could not merge a prior conviction and judgment for the same assault.

The circumstances under which courts have been called upon to determine what facts constitute the same offense have been so different and numerous that the authorities upon this subject are seriously conflicting, so far as the general question is concerned. I think, however, the views I have endeavored to express are amply sustained by the great weight of authority. In Bishop's New Criminal Law, (section 1058, subd. 3,) the learned author says: "A man convicted of an assault cannot afterwards be prosecuted for the battery in which it terminated, because, said Totten, J., 'the one is a necessary part of the other; and, if he be now punished for the battery, he will thereby be twice punished for the assault.' State v. Chaffin, 2 Swan, 493. And by the general and better doctrine a conviction or acquittal of a common assault will bar proceedings for an assault with intent to do great bodily harm, and other assaults aggravated in like manner." The only established exception to the foregoing proposition is where death subsequently occurs as a result of the assault, where it has been held that there may be a prosecution for the homicide, notwithstanding the previous conviction for the assault and battery. The same learned author above cited, in section 1051 of his work on Criminal Law, further says: "If the two indictments set out like offenses, and relate to one transaction, yet if one contains more of criminal charge than the other, but upon it there could be conviction for what is embraced in the other, the offenses, though of different

names, are, within our constitutional guaranty, the same." And in the following section the test is declared to be "whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction. When there could, the second cannot be maintained. When there could not, it can be." The case of *People v. Majors*, 65 Cal. 138, 3 Pac. Rep. 597, cited by respondent, is not in point. There two men were murdered at the same time, and by the same act. The defendant, having been convicted of the murder of one, to an indictment for the murder of the other pleaded a former conviction of the same offense. This court properly held that the murder of different persons, though by the same act, constituted different offenses, and that a conviction for one could not be pleaded in bar of the other. In *People v. Stephens*, 79 Cal. 428, 21 Pac. Rep. 856, the prosecution was for libel. The court said: "The only question in this case is whether the second prosecution is for the same offense as the first. If so, it cannot be maintained. The first prosecution was for a libel contained in an article published by the defendant in a newspaper. The second prosecution is for a libel contained in the same article, and published in the same issue of the same newspaper as the first. The words alleged to be defamatory are not the same in both instances. If they were, the case would be a plain one, but the publication, in both cases, was one and the same act. 'The act which is the essential element in the wrong, slander, and libel is a wrongful publication of language.' Townsh. Sland. & L. 121." So, in the case at bar, the assault is the essential element in both the alleged offenses. See, also, cases cited by the court on page 430, 431. And on page 432, 79 Cal., and page 457, 21 Pac. Rep., in the same case, the court, quoting from *State v. Smith*, 43 Vt. 324, said: "There is considerable conflict in the authorities upon this subject, but we think the rule is now well settled that where one offense is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution for the other." In *Wilcox v. State*, 6 Lea, 571, it was held a conviction of robbery is a bar to a subsequent indictment, founded on the same transaction, for assault with intent to murder. The court said: "The assault or violence in the robbery case, being an essential element or ingredient of, and constituting an important and material part of, that offense, as it does in the offense of assault with intent to commit murder, and having been once punished in the robbery case as a material part thereof, it cannot be again punished, as it would be if the judgment below were allowed to stand." In the same case, the court further said: "It was for the assault at the time of the robbery that the conviction was had in

this case. Force and violence were proved in each case, and were alike essential in both to sustain a conviction. It was one continuous transaction, in which defendants perpetrated a robbery by violence, dangerously wounding the prosecutor. Being one transaction, the prosecutor may carve as large an offense out of it as he can, but, it is said, 'he must cut only once.'" In the case of *U. S. v. Wilson*, 7 Pet. 150, the defendant was indicted for robbing the mail of the United States, and putting the life of the driver in jeopardy, the punishment for which was death. He was found guilty as charged. The president of the United States granted a pardon to Wilson; the pardon being expressly restricted to the sentence of death passed upon the defendant, and expressly reserved from its operation the conviction then before the court, of the charge of committing the same robbery, omitting the allegation of putting the life of the driver in jeopardy. The case came before the supreme court upon a certificate of a division of opinion by the judges of the lower court. In the opinion of the court, delivered by Mr. Chief Justice Marshall, (see page 159,) it was said: "Whether the pardon reached the less offense or not, the first indictment comprehended both the robbery and the putting life in jeopardy, and the conviction, and judgment pronounced upon it, extended to both. After the judgment, no subsequent prosecution could be maintained for the same offense, or for any part of it, provided the former conviction was pleaded." The same principle is announced by that court in *Re Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556, and in *Nielsen*, Petitioner, 131 U. S. 176, 9 Sup. Ct. Rep. 672. In the case of *State v. Cooper*, 13 N. J. Law, 361, the prisoner had been indicted, tried, and convicted for arson. While still in custody under this proceeding, he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction in bar, and the supreme court of New Jersey held it a good plea. See, also, *State v. Smith*, 43 Vt. 324; *State v. Shepard*, 7 Conn. 54; *Moore v. State*, 71 Ala. 307.

The vice of respondent's argument is in treating the first information as a charge of assault with intent to murder, without regard to the included offense of an assault, and arguing thereon that, because evidence showing that the defendant was guilty of the crime of mayhem would not convict him on the charge of an assault with intent to murder, therefore the offenses were not the same, within the meaning of the constitutional provision hereinbefore cited. In *People v. Gilmore*, 4 Cal. 380, the court say: "An indictment, by operation of law, for murder, is also an indictment for manslaughter, and every less offense that may be included under the charge of murder, just as much as though it were charged in distinct and separate counts." See, also, *Peo-*

ple v. Apgar, 35 Cal. 391; *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. Rep. 776; Pen. Code, § 1159. The case, therefore, stands precisely as though the first information had been for an assault. The defendant having been convicted for that offense, he could not be prosecuted for mayhem committed during the same assault without violating the constitutional provision which protects him against being twice convicted of the same offense,—a provision as important, and to be as sacredly regarded, as the right of a trial by jury, or any other constitutional provision intended for the protection of the life, liberty, or property of a citizen.

As the decision reached upon the principal question is conclusive of the case, it is not necessary to consider any of the other points urged by appellant. The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed; and, it having been shown to the court that since the submission of the cause the defendant has died, it is ordered that this judgment be entered nunc pro tunc as of May 5, 1893.

(100 Cal. 1729)

TOOMY v. HALE. (No. 15,183.)
(Supreme Court of California. Oct. 20, 1893.)
RES JUDICATA.

In an action to recover \$1,775 commission for renting premises, the court found that, in a former action between the same parties for the same services, it had been decided that defendant was not indebted to plaintiff therefor. Plaintiff claimed that the former action was on an account stated, or on a new contract, by which he was to accept \$1,000 for the services, in consideration of prompt payment. The particulars of the original contract were fully set out in that complaint, the character of the services, the amount to be paid, and the manner of payment; and it was evidently framed so that there could be a recovery either on the original contract, or the new agreement to accept \$1,000. Held, that the finding in the former action that defendant was not liable was conclusive.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by one Toomy against one Hale to recover for alleged services in renting premises belonging to defendant. From a judgment in favor of defendant, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Henry N. Clement, (W. M. Cannon, of counsel,) for appellant. A. H. Loughborough, for respondent.

PATERSON, J. This action was brought to recover the sum of \$1,775, the reasonable value of services alleged to have been ren-

dered at defendant's instance and request. The court found that, in a former action brought by plaintiff against defendant, it was adjudged that plaintiff did not render to defendant, at the latter's instance or request, the services alleged in the complaint in that action, and that defendant was not indebted to plaintiff therefor; that the services mentioned in the complaint herein are the same services alleged in the complaint in the former action. The judgment in the former action was held to be a bar to plaintiff's cause of action set up herein, and judgment was entered for defendant. From this judgment, and an order denying his motion for a new trial, plaintiff has appealed.

Appellant contends that the complaint in the former action was upon an account stated, or upon a new contract, by the terms of which the defendant agreed to pay, and plaintiff agreed to accept, \$1,000, in payment of the services alleged to have been rendered. The allegations of that complaint were substantially as follows: Defendant employed plaintiff to find a party who would take a lease of certain premises for a term of years, and promised to pay him therefor, out of the first rents collected, $2\frac{1}{2}$ per cent. of the amount of rent to be paid during the term; that plaintiff found a party willing to take the premises, and on October 10, 1889, said party and defendant entered into a contract of lease for a term of 10 years at a rental of \$625 per month, payable monthly in advance, from April 10, 1890; that plaintiff's compensation under said agreement amounted to the sum of \$1,875; "that thereafter there was an accounting by and between said plaintiff and defendant for and about the compensation to be paid by said defendant to said plaintiff for said services, and, in consideration of immediate payment by said defendant to said plaintiff of the sum of one thousand dollars, it was then and there agreed by and between said plaintiff and said defendant, on or about the 15th day of October, in lieu of the agreement hereinbefore mentioned, the said defendant should pay, and said plaintiff receive, in full satisfaction for said services, the sum of one thousand dollars cash, and defendant then and there paid to plaintiff the sum of one hundred dollars on account; but, though often requested, said defendant has failed and refused to pay the remainder of said sum, to wit, the sum of nine hundred dollars, which is now due and owing from defendant to plaintiff." The care with which the particulars of the original contract,—the character of services to be performed, the exact amount to be paid therefor, and manner of payment,—and the result of plaintiff's efforts under it, are set forth in the complaint in the former action, indicates that the pleader had in view something more than merely a declaration on an account stated. The complaint was evidently framed for a double purpose, and as there was no demurrer for uncertainty, or on the

ground that two causes of action were improperly united, there is no doubt the plaintiff could have used it as a basis of recovery on either the original contract alleged, and services performed thereunder, or on the new agreement that the plaintiff should accept \$1,000 in consideration of immediate payment. Having gone to trial upon the issues thus tendered by himself, and the court having determined all of them against him, he is now bound by the decision. He cannot litigate the same question twice. In the former action the court decided that the services alleged were performed at the request of, and as the agent of, the party to whom the premises were leased, and not at the request of defendant; and, although in that action an express promise to pay a certain amount was alleged, the finding is conclusive in this action on the same question that was involved, viz. were the services performed at the request or instance of defendant? The judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

100 Cal. 175

BETHELL v. ROGERS. (No. 15,384.)

(Supreme Court of California. Oct. 24, 1893.)

APPEAL—PRACTICE—TIME OF FILING TRANSCRIPT—COURT RULES.

Rule 2 of the supreme court, which requires the transcript to be filed within 40 days after taking an appeal, is not superseded, nor is the time of filing extended for 5 days, by rule 11, which allows the appellee 5 days in which to examine the transcript presented by appellant and to certify to its correctness.

Department 1. Appeal from superior court, Contra Costa county.

Action by F. C. Bethell against C. W. Rogers. Judgment for plaintiff. Defendant appeals from an order denying a new trial. Appeal dismissed.

A. D. Spivalo, for appellant. W. S. Tinning, for respondent.

HARRISON, J. Motion to dismiss the appeal. Judgment was rendered in this case in favor of the plaintiff, June 24, 1890, and an order was afterwards made denying defendant's motion for a new trial. From this order the defendant appealed on the 29th of April, 1892. May 25, 1893, the respondent gave notice to the appellant of this motion to dismiss the appeal upon the ground that the appellant had failed to file the printed transcript of the record within the time prescribed by rule 2 of this court. At the time of giving the notice, the transcript on appeal had not been filed, and was not filed until June, 1893. It appears from the affidavits that in the latter part of June, 1892, Mr. Weller, at the request of the attorney for the appellant, went to the office of the attorney for the respondent in Martinez, and there met W. S. Wells, who

informed him that the attorney for the respondent was absent from the county of Contra Costa; that said attorney for the respondent was in fact absent from said county, and did not return thereto until about the 6th of July; that Weller asked affiant to certify to said transcript for said respondent's attorney, but was informed that he had no authority to act in the matter; that Weller thereupon requested him to forward the transcript to the said attorney by mail, which Wells agreed to do, and which he did; that said attorney was at that time at Cazadero, but did not receive the transcript so forwarded to him; that, after his return to Martinez, respondent's attorney received a letter from the attorney for the appellant requesting him to return said transcript, and that he endeavored to trace the same through the mail, but failed to do so, and never did receive said original transcript, and had no other communication with appellant's attorney until after the present notice to dismiss the appeal was given.

Rule 11 of this court provides that if a party shall present to the attorney of the adverse party a transcript on appeal in a civil cause, and request his certificate that the same is correct, and said attorney, upon such request, shall for a period of 5 days neglect or refuse to join in such certificate, the costs of procuring a proper certificate from the clerk shall be taxed against him. This rule does not supersede the provision of rule 2 which requires the transcript to be filed within 40 days after taking the appeal, nor does it extend the time for filing the transcript until the expiration of the period given to the adverse party to examine the same. At the time the transcript was left with Wells to be forwarded to the respondent's attorney, nearly 60 days had elapsed after the appeal had been taken; and, if it could be assumed that his construction of rule 11 gave him 5 days' additional time, he has presented no excuse for his neglect to file the transcript at the expiration of that period, or at least as soon as he had every reason to believe that the attorney for the respondent did not intend to certify to its correctness. The appeal is dismissed.

We concur: PATERSON, J.; GAROUTTE, J.

100 Cal. 132

MONTGOMERY v. SAYRE. (No. 18,132.)
(Supreme Court of California. Oct. 27, 1893.)

RELEASE OF SURETY.

1. One who gives his note as collateral to a note made by a corporation and indorsed by another person is a surety, as regards both maker and indorser; and, when the owner of the principal note has taken judgment on it against the maker and indorser, by releasing the latter he releases the surety.

2. A creditor who has a judgment lien on land of the principal debtor which is fairly

worth in the market enough to pay the whole debt, if he combine with the owner in selling it at private sale for less than it is worth, releases the surety on the debt.

3. To show that the land was sold for less than its value at a private sale negotiated by the owner and a lienholder, the proof is not confined to the cash price at a forced sale, but it may be shown that such tracts in that region had never been sold for all cash, but always for part cash and part on mortgage.

4. On an issue of the real value of land at the time it was sold, evidence as to the prices realized by the purchaser on sales of small parts of it a few months after his purchase is not necessarily incompetent, but its admission is regulated by the discretion of the court.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by A. Montgomery against Albarnus L. Sayre, executor of A. L. Sayre, deceased, on a promissory note. Judgment for defendant. Plaintiff appeals. Affirmed.

For reports of former appeal, see 25 Pac. Rep. 552; 27 Pac. Rep. 648.

Arthur Rogers and W. F. Goad, for appellant. Geo. A. Nourse, for respondent.

McFARLAND, J. This is an appeal by plaintiff from a judgment in favor of defendant, and from an order denying a motion for a new trial. The main history of the case is stated in the opinion of this court upon a former appeal, (91 Cal. 206, 27 Pac. Rep. 648,) and it need not be repeated here.

The first question in the case is whether or not Sayre, deceased, made the \$10,000 promissory note to appellant, sued on, as surety for W. S. Chapman. Respondent contends that this question was decided affirmatively by this court on the former appeal, and that such decision is the law of the case. This court did say in its opinion on that appeal that "Sayre was, in law, a surety;" but we will not inquire into the somewhat complicated question whether that statement was necessary to the determination of that appeal, and therefore the law of the case, because we think that the correctness of that statement otherwise appears. Indeed, it appears from the complaint itself, which includes the presentation of the claim to the executor. It is not pretended in the complaint that the Sayre note for \$10,000 was not given as security, in some form, or that an action could be maintained upon it, as on any ordinary promissory note, without averring extrinsic facts other than those appearing upon its face. The complaint avers that on April 19, 1884, the Pioneer Mining Company, a corporation, made and delivered to appellant, Montgomery, its promissory note for \$110,000, and "that said note was indorsed by Wm. S. Chapman." (The evidence shows that the indorsement was preceded by the words, "Demand, notice, and protest waived April 19, 1884.") It is then averred "that at the time of said delivery of said note, and to secure the payment of the same, there was delivered to plaintiff,

by way of pledge, all the capital stock of said corporation, except thirty shares thereof, and said corporation did execute to plaintiff its mortgage on the Pioneer mine, in Sierra county in said state, and said A. L. Sayre, now deceased, who was then living, did make, execute, and deliver his promissory note, hereafter designated as the 'Sayre Note,' bearing even date herewith, for the sum of ten thousand dollars, (\$10,000,) the same being the note here sued on. It is then further averred that several payments were made from time to time on said note for \$110,000; that afterwards plaintiff foreclosed said mortgage on the Pioneer mine; that the proceeds of the sale of the mine under said foreclosure were applied to the payment of said note, but were not sufficient to satisfy it; that a deficiency judgment was entered and docketed against said corporation and against said Chapman for \$61,554.13; that thereafter certain payments were made on said note and judgment; and that there remains due and unpaid on said note and judgment the sum of \$34,551.20. It is further averred that said corporation has no other property, and that its capital stock is valueless, and upon these averments plaintiff bases his right to recover the amount of the Sayre note. From the foregoing averments, it seems quite clear to us that Sayre was a surety for Chapman,—for Chapman as well as for the mining company. It appears that on April 19, 1884, there was made and delivered to appellant a promissory note for \$110,000 signed at the bottom by the Pioneer Company, and indorsed by Chapman, and that, "to secure the payment of the same," Sayre, deceased, made the "Sayre note," for \$10,000. It was to secure the \$110,000, just as it stood,—with the names of the responsible parties thereto, the maker and indorser written therein and thereon,—that Sayre made his note. The only liability which he assumed to appellant was that if the persons who signed said \$110,000 note—the one, in form, as maker, and the other as indorser, with demand and notice waived—should fail to pay the same, he (Sayre) would be liable for the same to the extent of his \$10,000 note. He based his contingent liability upon the probable financial ability of both the mining company and Chapman. As to him, they were both principals; and he was exonerated if, by any act of appellant, the latter's rights or remedies against either the mining company or Chapman were impaired, suspended, or destroyed. And this conclusion is made still more apparent by the fact that the \$110,000 note was merged in a deficiency judgment against both the mining company and Chapman.

Sayre, then, being a surety, he was exonerated (1) if appellant, Montgomery, released Chapman from all liability under said judgment, and thus released the surety; or (2) if Montgomery, having a judgment lien upon land of Chapman, which, if sold at its real

value, would have realized a sufficient amount of money to satisfy all indebtedness of the latter to the former, including said judgment, united with Chapman in selling and conveying said land at private sale to one Hughes for a price far less than its real value. The jury returned a general verdict for defendant, no special issues having been submitted to them; and it is quite clear that they were warranted by the evidence in finding the first of the said two propositions in favor of respondent,—that is, that Montgomery released Chapman. And there is no specification of the insufficiency of the evidence to support such a finding, or of any erroneous ruling of the court as to the admissibility of evidence on that point. Respondent contends that the general verdict imports a finding in his favor of all the material issues, and therefore a finding that appellant released Chapman; and that, this being so, it is immaterial whether or not the court committed any errors with respect to the second question as to the value of the land sold to Hughes. Appellant contends, however, that it cannot be known upon what ground the jury based their verdict, and therefore, if the court committed errors about the question of the value of the land, the judgment should be reversed. We will assume, for the purpose of this decision, that appellant's view of the matter is correct, because we do not think that the court committed any reversible error in its rulings concerning the value of the land.

With respect to the question of the value of the land, appellant took a number of exceptions to the rulings of the court in passing upon offered evidence, and instructing the jury on that subject. The various exceptions, however, present, mainly, one point, which may be stated as follows: Appellant contended that the only question proper to be asked witnesses on the subject of value was, what would the land have brought if respondent had taken out an execution, and had it sold by the sheriff at public auction for full cash value? while the court admitted evidence that, in the region of the land in question, large tracts of land had never been sold for all cash, but for from one-fourth to one-third cash, and the balance on reasonable time, and at a reasonable rate of interest, secured by mortgage on the land sold, and allowed witnesses to be asked the general question, "what was the fair market value" of the land at the time of the sale to Hughes? In thus ruling, the court, in our opinion, did not commit error. The respondent declined to pursue his lien against the land, and sold it at private sale; and, having done so, the question before the jury was the difference between the amount for which it was sold, and its fair market value at the time of sale; and, in arriving at the real value of the land, the jury were not confined in this case, any more than they would have been in any other case, to what it would have brought at a forced sale for cash. They

had the right to consider the character and situation of the property, and the usual methods by which sales of such property were effected, where there were parties wanting to sell, and parties wanting to buy. Indeed, it would have been practically impossible to have determined the market value of such land upon the supposition of full cash payment, for there had been no such sales. It was proper, therefore, for the jury to have such information as the said ruling of the court allowed them. The testimony admitted tended to show the fair market value of the land, and furnished proper aid to the jury in determining such value. The case of *Cassin v. Marshall*, 18 Cal. 689, cited by appellant, dealt with facts very different from those in the case at bar. It is to be remarked, also, that the sale from appellant to Hughes was for a very small amount in cash, and the balance on time, secured by mortgage.

It is also contended that the court erred in allowing some testimony of the amounts for which Hughes sold some small parts of the land "a few months" after the sale to him. This, considering the other evidence in the case, would be a matter of too small importance to work a reversal of the judgment, even if be conceded that the ruling was erroneous. But we do not think that the ruling was erroneous. While the thing to be determined is the value on the day in question, still, evidence is not necessarily confined to that very day. Evidence of value for short periods before and after the day in question has been frequently allowed. Its allowance is greatly within the discretion of the court, and, under the circumstances of this case, we do not think that such discretion was abused. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.; GAROUTTE, J.; HARRISON, J.

(4 Cal. Unrep. 310)

WAGNER v. SUPERIOR COURT OF LOS ANGELES COUNTY. (No. 15,506.)¹

(Supreme Court of California. Oct. 27, 1893.)

INSOLVENCY—PROCEEDING TO VACATE DISCHARGE—WHO MAY COMMENCE.

Where a person has been discharged in insolvency, the court has no jurisdiction to hear a petition by his assignee to annul the certificate of discharge, since, under Insolvent Act 1880, § 53, providing that "any creditor" of an insolvent debtor who has obtained such discharge may contest its validity on the ground that it was fraudulently obtained, such a proceeding can only be commenced by a creditor.

In bank.

Petition by L. M. Wagner for a writ of prohibition to restrain the superior court of Los Angeles county from proceeding under an order made by it directing petitioner to appear and show cause why an order made on a petition for insolvency discharging her from her debts should not be vacated. Writ granted.

¹ For opinion on rehearing, see 34 Pac. Rep. 820.

W. H. Pollard, for petitioner. Mr. Graff, for respondent.

PER CURIAM. Application for a writ of prohibition. It appears that on September 28, 1892, the petitioner, L. M. Wagner, was adjudged insolvent by the superior court of Los Angeles, and subsequently the court, in the matter of the insolvency proceeding, made a distribution of all of the estate of the insolvent which had come into the possession of the assignee, and granted to the petitioner here a certificate of discharge from all debts and claims existing against her at the date of the filing of her petition to be adjudged insolvent, and also made an order discharging the assignee. When these orders were made, the insolvency proceedings were ended, and the court had no further jurisdiction over the person of the insolvent, and this jurisdiction could only be restored by an application upon the part of some creditor of the insolvent to set aside and annul the decree or certificate discharging her from her indebtedness, as provided by section 53 of the insolvent act. Certainly, after the insolvency proceeding was thus ended, the court was without authority to proceed under either section 24 or section 47 of the insolvent act, and examine the petitioner here, or other persons, for the purpose of ascertaining whether or not all the property of the insolvent estate had come into the hands of the assignee. It seems, however, that since the making of the orders referred to, two petitions have been filed in the superior court, each praying that the certificate of discharge granted to the petitioner herein be annulled upon the ground of alleged fraud in obtaining it. One of these petitions was filed by the assignee in the insolvency proceeding, and the other by a creditor of the insolvent Wagner. The court thereupon made an order requiring the petitioner herein to appear on October 30, 1893, and show cause why the order discharging her from her indebtedness should not be vacated, and upon the same day, upon application of the assignee, the court made an order requiring the petitioner here to appear before the court upon a day named for examination in relation to her property, and also directed that subpoenas should issue requiring the attendance as witnesses of other persons claiming to own such property. The object of this proceeding is to prohibit the court from proceeding under this latter order. We think the application must be granted. The court is without any jurisdiction to hear the petition of the assignee, asking that the certificate of discharge be annulled. Such a proceeding can only be commenced by a creditor of the insolvent. Section 53, Insolvent Act; *Sanborn v. Doe*, 92 Cal. 152, 28 Pac.

¹ Insolvent Act 1880, § 53, provides that "any creditor" of an insolvent debtor who has obtained a discharge from his debts may contest the validity of the discharge on the ground that it was fraudulently obtained.

Rep. 105. The order under which the court is proceeding seems to be based upon this petition, and is void. In the matter of the petition filed by the creditor, the petitioner and the other persons named in the order may be required to give their depositions under section 2021 of the Code of Civil Procedure, or to appear in open court and give their testimony upon the issues arising upon such petition and the answer thereto. Let the writ of prohibition issue.

100 Cal. 188

PEOPLE v. BAKER. (No. 21,004.)

(Supreme Court of California. Oct. 27, 1893.)

FORGERY—MORTGAGE OF HOMESTEAD—INFORMATION—ALLEGING VENUE—UTTERING FORGED INSTRUMENT—EVIDENCE—VARIANCE.

1. An information is not defective merely because the word "information" does not appear in the body of it.

2. The words "county of Los Angeles, state of California," having been used in the first part of an information, an allegation thereafter that the crime was committed "at the county and state aforesaid" is a sufficient averment of venue.

3. Signing the name of a married man to a mortgage of property on which there is a homestead declaration, if done with intent to defraud him and the man from whom it is proposed to raise money thereon, may be forgery, though the mortgage would not have been good without the execution of it by both the husband and wife.

4. Placing the mortgage on record because the one who was to loan money on the mortgage desired it on record before he examined the title, was a sufficient uttering of the forged instrument.

5. The fact that the mortgage in evidence had attached a certificate of acknowledgment, while the one set forth in the information did not have a certificate, did not constitute a fatal variance.

6. The mortgage, as set forth in the information, having contained a copy of a note which it was given to secure, there was no error in allowing proof of the signing of the note as well as the mortgage, both being parts of the same transaction, one preliminary to the other.

In bank. Appeal from superior court, Los Angeles county.

Edward L. Baker was convicted of forgery, and appeals. Affirmed.

Z. G. Peck and S. M. White, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The defendant was charged with and convicted of the crime of forgery, and appeals from the judgment, and also from an order denying a motion for a new trial. The appellant makes a great many points in his briefs, and elaborately argues them, and we will notice briefly what we consider the most important of such points.

1. Appellant contends that the information is fatally defective because the word "information" is not used in the body of that

pleading. The word "information" appears as a heading of the pleading, and the body of the pleading commences as follows: "The said Edward L. Baker is accused by the district attorney," etc. But, as the pleading alleges all the facts necessary to constitute the crime sought to be charged, it is not defective merely because the word "information" is not used in the body of the instrument. The variation from the usual form was, we presume, the effect of oversight, or perhaps of an unexplainable desire to take a new departure; but this variation is not sufficiently material to make the pleading invalid. We think, also, that the averment of venue is sufficient. The words "county of Los Angeles, state of California," having been used in the first part of the information, it was sufficient afterwards to allege that the crime was committed "at the county and state aforesaid."

2. The alleged forgery was of a certain mortgage, purporting to have been signed by one Morris M. Green; and it is contended by appellant that, because said Green was a married man, and there was a homestead declaration on the property covered by the mortgage, therefore no forgery in law could be committed by signing the name of Green alone to the instrument. But if the instrument was falsely made in the name of Green, with intent, as is alleged in the information, to defraud the said Morris M. Green and one Strassforth, from whom the money was to be borrowed on the mortgage, the act was forgery, whether or not, as a matter of law, the mortgage would have been good without the execution of it by both husband and wife. The mortgage was placed on record in the recorder's office by the appellant, or by one Hoy, who was the principal in the alleged crime, because Strassforth, who was to loan the money on the mortgage, desired it to be placed on record before he examined the title; and we think that, under the circumstances, this was a sufficient uttering of the alleged forged instrument, although it was not in any other way delivered to Strassforth, who about that time began to suspect the fraud.

3. The mortgage introduced in evidence had attached to it a certificate of acknowledgment, while the copy of the mortgage set forth in the information did not have such certificate. We do not think that this was a fatal variance.

4. The mortgage as set forth in the information contained a copy of a promissory note which it was given to secure, and we do not think that the court erred in allowing proof of the signing of the note as well as the mortgage. They were both parts of the same transaction, and one was preliminary to the other.

5. We have examined the instructions given to the jury by the court, and those asked by defendant and refused, and we do not see any errors committed by the court in

the matter of instructing the jury. Of the instructions asked by the defendant and refused, those which were correct were given in other parts of the charge.

6. There are a great many exceptions in the record to the rulings of the court upon the admissibility of evidence, but we see no material error committed by the court in such rulings.

7. The most serious point made by appellant is that during the progress of the trial the court unnecessarily and unjustly censured the attorney of appellant, and applied to his conduct of the case improper adverse criticism, and thus prejudiced the jury against the attorney, and therefore against appellant. This contention has certainly some plausible reasons for its support, but after a full consideration of the whole matter we do not think that what passed from the court to appellant's counsel was of sufficient impropriety or importance to warrant us in setting aside the verdict. The great difficulty with an appellate court in determining such a question is to learn from a dry, printed transcript the true character and quality of the thing complained of. It is not photographed before us, and we cannot know the tone, the emphasis, the expression, or the manner with which the thing was said or done. The language complained of related mainly to what the court considered an unnecessary consumption of time by appellant's counsel in examining and cross-examining witnesses, making objections, etc. The court, no doubt, might have confined counsel within proper limits of time in conducting the defense by the use of less harsh language; but that nice mingling of the fortiter in re and the suaviter in modo which would enable a presiding judge to always keep in hand the orderly conduct of a trial without an occasional jerk is not to be often expected. Counsel for appellant seems to have been entirely respectful in his manner to the court, but his repetition of questions, many of which were pointless, was a useless waste of time. Some of the witnesses for the people had been examined on a previous trial of another person for the same offense, and upon a preliminary examination before a magistrate, and counsel for appellant asked them a great many questions about what they had testified on those former occasions. This was proper, of course, if there had been an apparent intent to show a difference between their former and their present testimony; but most of the questions were whether or not they had said things on the former occasions which were exactly the same things to which they had just then presently testified. All this was no doubt trying to the patience of the court; and, while some of the language used by the court to counsel is not at all to be commended, we do not think that, considering the whole case, the appellant was prejudiced or injured thereby. There are no other points necessary to be

considered. The judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.; HARRISON, J.; FITZGERALD, J.; DE HAVEN, J.

100 Cal. 192

HOVEY v. WALBANK et al. (No. 18,187.)
(Supreme Court of California. Oct. 28, 1893.)

WILLS—CONSTRUCTION—RIGHTS OF LEGATEES.

Under a will giving to testator's wife all his property to expend as she may see fit, with full power to dispose of any or all of it as she may deem proper, and with power to convey all interest which testator might have in his property at his death, a provision directing that, after the death of the wife, certain legacies be paid from any money remaining to testator's estate, gives the legatees named no rights in the property as against grantees of the testator's wife.

Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Frank Hovey, as administrator with the will annexed of the estate of Charles Breton, deceased, against Edward M. Walbank and another, to recover property which had belonged to testator's estate. Judgment for defendants. Plaintiff appeals. Affirmed.

L. F. Coburn, for appellant. Gills & Tapscott, for respondents.

McFARLAND, J. Charles Breton died on the 4th of August, 1890, leaving a will of which the following are the material parts necessary to be here considered: "First. I direct that all my just debts, the expenses of my last sickness, and my funeral expenses be paid from the first money that shall come to the hands of my executrix herein-after named. Secondly. I will, bequeath, and devise to my beloved wife, Bertha Breton, all of the remainder of my property, real, personal, and mixed, and wherever the same may be situated, to have, use, and expend as she may see fit during her lifetime, with full power to sell, transfer, or dispose of the whole or any portion thereof, as she may deem proper, hereby granting, giving, and devising to her full power to convey a fee-simple title to any of the real estate which I may own at the time of my death, and to convey all the right, title, and interest which I may have at the time of my death, of, in, and to all the property which may be hereby willed, bequeathed, and devised to her. After the death of my said wife, I direct that from any money remaining to my estate the following named legacies be paid." Then follow several legacies to different persons; and by the will his said wife, Bertha Breton, was made executrix without bonds. The widow, the said Bertha Breton, qualified as executrix, and such proceedings in the administration of the estate were duly had that on October 31, 1891, a final decree of distribution of the

estate of Charles Breton, deceased, was regularly entered in the superior court in which said administration was pending, distributing said estate in the words of said will; and on November 7, 1891, a further decree was entered discharging the said Bertha Breton from all further liability as executrix, and adjudging that the estate was "fully distributed and the trust settled and closed." The said Bertha Breton took possession of all the property under said decree of distribution; and afterwards, on February 21, 1892, she made, executed, acknowledged, and delivered to the defendants, Edward M. Walbank and William Bisbee, an instrument in writing, by which she conveyed and transferred to said defendants all the property mentioned in said decree of distribution, and in said will remaining undisposed of by her at that time; and the said defendants thereupon immediately took possession of all of said property. This instrument provided that the defendants should execute certain trusts therein expressly declared. Afterwards the said Bertha Breton died, and the plaintiff herein, who was public administrator, procured himself to be appointed administrator with the will annexed of the estate of said Charles Breton, deceased. As such administrator he commenced this action against said defendants, Walbank and Bisbee, to recover possession of all the property in their hands which had belonged to said Charles Breton, deceased, at the time of his death. The defendants answered, claiming ownership of said property under said conveyance from said Bertha Breton. At the trial—the evidence and admissions of the parties having shown substantially the above facts—the court granted a nonsuit, and entered judgment for the defendants. From the judgment, plaintiff appeals.

Respondents contend, in the first place, that the judgment should be affirmed without reference to the construction of the will, because it appears that the estate of Charles Breton was fully and finally distributed, and the administration closed; that there was nothing further to be administered on in said estate, and that, if those who claim to be legatees under the will after the death of Bertha Breton have any rights in the premises, such rights could be asserted only in actions brought directly by said legatees against the defendants. We are disposed to think that respondents are right in this contention, but we do not deem it necessary to definitely determine this point, because, in our opinion, said legatees, under the facts, took no interest in any of said property. It is not necessary to determine accurately and to a nicety into what category of estates the interest which Bertha Breton took under the will should be placed. Under some authorities such an absolute power of disposition of property as this will contains is held to substantially and necessarily create an estate in fee, notwithstanding the

fact that such a phrase as "lifetime" may also have been used. In *Ramsdell v. Ramsdell*, 21 Me. 288, the court say: "If estates be devised to a person with or without words of inheritance, and with an absolute right to sell and appropriate the proceeds at pleasure to his own use, it is not perceived how there can be a vested interest imparted to another in the same estate or property. Such full dominion in the devisee or legatee is inconsistent with and destructive of all other rights." But, however that may be, it is certainly true that where, in such a case, the devisee has actually disposed of all the property, there cannot afterwards be "a vested interest imparted to another" therein. In none of the cases cited by appellant was the language of the will the same as that used in the will here in question. In the present case the devisee was not confined by the words of the will to the mere use of the property during her life. She was not limited merely to such disposition or such change of form of the property as would enable her to better enjoy it. It was given to her to "expend as she may see fit," and "with full power to sell, transfer, or dispose of the whole, or any portion thereof, as she may deem proper;" and she was given "full power to convey a fee-simple title to any of the real estate," and "to convey all the right, title, and interest which I may have at the time of my death, of, in, and to all the property" mentioned in the will. It is admitted that by the said instrument in writing, executed and delivered to the defendants, she did in express terms convey, transfer, and dispose of all of said property to said defendants, and, having done so, there was not "any money remaining" to which the subsequent legacies named in the will could attach. The judgment and orders appealed from are affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

100 Cal. 222

CRAWFORD v. MADDUX et al. (No. 18,140.)

(Supreme Court of California. Nov. 6, 1893.)

INSOLVENCY — INSOLVENT ESTATE — MONEY RECEIVED BY CREDITOR — ACTION BY ASSIGNEE FOR EMBEZZLEMENT — CREDITOR AS TRUSTEE.

1. Money received by a creditor of an insolvent in consideration of not bidding at a judicial sale of insolvent's property cannot be recovered by the assignee in insolvency in an action for its embezzlement as part of the insolvent estate, under Insolvent Act 1880, § 23.

2. The fact that a creditor delayed the appointment of an assignee until the remedy by vacating the sale became inadequate could not give rise to such action, since it could not have been maintained if the assignee had been appointed without delay.

3. The creditor who received money from the purchaser at the sale for not bidding did not become a trustee of the money for insolvent's creditors, as the money did not belong to the insolvent or his estate.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by E. R. Crawford, as assignee in insolvency of W. W. Granger, against L. J. Maddux, the Jacob Unna Company, Reddington & Co., Alfred Greenebaum & Co., Whittier, Fuller & Co., and Yates & Co. for the embezzlement of money of the insolvent debtor. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Reversed.

Chickering, Thomas & Gregory, Joseph Kirk, and L. J. Maddux, (Warren Olney, of counsel,) for appellants. Dennett & Needham, for respondent.

HAYNES, C. On September 26, 1889, one Goldzier obtained a judgment in a justice's court against Granger, the owner of a drug store. An execution was issued thereon, and on October 15, 1889, the goods were sold by the constable under the execution of J. W. Husband and G. S. Turner for \$196, the amount of said judgment and costs. On October 1, 1889, the Jacob Unna Company, Reddington & Co., Alfred Greenebaum & Co., Whittier, Fuller & Co., and Yates & Co., (appellants here,) creditors of Granger, filed a petition in the superior court praying that Granger be adjudged an insolvent debtor. The record does not disclose at what time the order to show cause was made returnable, nor when it was served upon Granger, but on December 7, 1889, he was adjudged an insolvent debtor, and on August 15, 1890, Crawford, the plaintiff in this action, was elected assignee.

It was further alleged in the complaint, and the court found, that one A. C. Bonnell was the agent of the appellants, and as such agent agreed with Husband and Turner, who desired to purchase the store at said execution sale, that he would not bid at such sale in consideration that they, said Husband and Turner, would pay appellants the sum of \$704; that Husband and Turner had represented to Bonnell that they were willing to pay \$900 for the store; "that thereafter the said Husband and Turner did bid in the said store and stock thereof for the sum of \$196, and the said Bonnell did refrain from bidding at said execution sale," and that thereafter Husband and Turner paid to defendant Maddux said sum of \$704; that Maddux transferred the money to the Board of Trade of San Francisco, who paid the same to defendants, the said petitioning creditors, and that they "received the said sum of \$704, belonging to the insolvent estate of said W. W. Granger, before the assignment therein, and, having notice of the commencement of the proceedings in insolvency, converted and appropriated the same to their own use, and refused to deliver the same when demanded by the assignee of the said insolvent estate, the plaintiff herein."

The court further found that the value of the store was \$900; that the constable who made the sale had no knowledge of said agreement; that Husband and Turner had no knowledge that said \$704 was not to be paid to the assignee of Granger, and that Maddux was an innocent agent in the transaction. Judgment was rendered against appellants for the sum of \$1,408, with interest from October 15, 1889, amounting to \$213.54, and costs of suit. This appeal is from said judgment and an order denying defendants' motion for a new trial.

The action is based upon section 23 of the insolvent act of 1880, which is as follows: "If any person, before the assignment is made, having notice of the commencement of proceedings in insolvency, embezzles or disposes of any of the moneys, goods, chattels or effects of the insolvent, he is chargeable therewith, and liable to an action by the assignee for double the value of the property so embezzled or disposed of, to be recovered for the benefit of the estate." By section 61 of the same act the filing of a petition by or against the debtor is declared to be the commencement of proceedings in insolvency under the act.

The judgment against appellants is based upon the theory that the property sold by the constable was of the value of \$900; that Husband and Turner were willing to pay that amount for it; that the agreement between them and Bonnell, as the agent of appellants, prevented competition; that the money paid to appellants after the sale was the money of the insolvent's estate, and that its appropriation by them was an embezzlement of the money of Granger, against whom proceedings in insolvency had been commenced.

It is apparent that, if the money so paid by Husband and Turner was not the money of Granger, the judgment is wrong. Appellants have not at any time had possession or control of the goods under execution. The agreement in question was against public policy, and wholly void. If Husband and Turner had refused to pay the money, Bonnell could not have compelled payment; or if, after payment, the sale had been set aside because of the agreement, Husband and Turner could not have compelled Bonnell or his principals to repay it. *Packard v. Bird*, 40 Cal. 378; *Freem. Ex'ns*, § 297, and cases there cited. The payment was, therefore, voluntary, and the agreement was made by Husband and Turner for their real or supposed personal advantage. The finding of the court that they did not know that the money was not to go to the creditors of Granger does not in any way affect the question. The illegality and wrong of the agreement was the prevention of competition at the sale, and that illegality and wrong would have been equally great and equally capable of redress by setting aside the sale if the

consideration had been but five dollars, or if the absence of competition had been procured by false representations or fraudulent devices, without the payment of any money. The amount paid cannot, therefore, because of the wrong, become the property of the execution debtor, nor create a demand in his favor for the amount so paid, nor even be the measure of damages, if an action of that character would lie.

The action here, however, is not for damages for any fraud practiced by appellants, but for the embezzlement of \$704 of the money, property, and effects of the insolvent debtor; and the material question is whether that money was the money of the insolvent's estate. It will hardly be contended that, if the agreement had been to give appellants a pair of horses, or to convey to them a certain parcel of land, and the horses had been delivered or the land conveyed in fulfillment of the agreement, the plaintiff could have replevied the horses as the property of the estate, or compelled a conveyance of the title to the land, for the plain reason that neither Granger, before the adjudication of insolvency, nor his estate afterwards, was the owner of the property sought to be replevied or recovered; and, if not, an appropriation of the horses or the land to the use of appellants could not be an embezzlement. Counsel for respondent do not cite us to any case where it has been held that money or property received by one in consideration of not bidding at a judicial sale may be recovered in an action by the judgment debtor or his assignee, nor has any such decision fallen under our notice; and, if an action could not be maintained for the recovery of the sum so received, it must be clear that an action for its embezzlement will not lie.

Respondent's argument that the failure of appellants, the petitioning creditors, to pay the costs in the insolvency proceeding, whereby the appointment of the assignee was greatly delayed, and that the remedy by vacating the sale was thereby rendered inadequate, is, therefore, without force, because it could not operate to give a cause of action for embezzlement where that action could not have been maintained if the assignee had been appointed without delay.

Respondent also contends that appellants, who were petitioning creditors, were trustees for the creditors, and that the judgment should be sustained upon that ground. The execution was levied upon the store before the petition was filed, and the sale under that execution could not have been prevented. They were in no way instrumental in procuring the sale. Their only connection with it was through the agreement made by Bonnell, and, as the money paid by the execution purchasers under that agreement was not the money of Granger or his creditors, no trust was created in appellants in relation thereto.

These considerations necessarily dispose of other questions presented by appellants. I think the judgment and order appealed from should be reversed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

(4 Cal. Unrep. 322)

HOGINS v. BOGGS. (No. 18,155.)

(Supreme Court of California. Nov. 7, 1893.)

DEED—DESCRIPTION—DISTANCES.

Under a deed purporting to convey a certain number of feet along a street commencing at a certain point, only that number of feet passed by the deed, and therefore evidence that the grantor, in measuring off the land granted, measured more than that number of feet, is incompetent to show that more than the number of feet stated passed by the deed.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; W. H. Grant, Judge.

Action by Catherine Hogins against J. C. Boggs. Judgment for plaintiff. Defendant appeals. Reversed.

Hale & Craig, John M. Fulweiler, and Ben P. Tabor, for appellant. Wallace & Wallace, for respondent.

TEMPLE, C. Action to quiet title to land in Newcastle, in the county of Placer. The controversy is in regard to the boundaries. The plaintiff had judgment, and the defendant appeals from the judgment and an order refusing a new trial.

The parties own and occupy contiguous places on Depot street, and both derive title from H. F. Albee. It is agreed that A. N. Page formerly owned a larger tract of land, of which the premises now claimed by both parties constituted a portion. September 9, 1875, Page conveyed to Mrs. H. F. Albee a tract fronting on Depot street 100 feet, and extending 150 feet back. The lots of the parties and the strip in dispute extend 200 feet back from Depot street. The tract conveyed to Mrs. Albee extends along Depot street 100 feet northerly from the Good Templars' lot. The strip in dispute is 6 feet wide, and the southerly line of it is just 50 feet 9 inches north from the Good Templars' lot. The deed to Mrs. Albee was a bargain and sale deed, and Mrs. Albee testified that she paid \$50 for the land. There was no evidence tending to show that the money paid was her separate property. The land then was the community property of Albee and wife. November 19, 1877, Page conveyed to H. F. Albee a tract on the north of the lot conveyed to Mrs. Albee, fronting 20 feet on Depot street. This vested in Albee, or in Albee and wife, as community property, a frontage of 120 feet on Depot street.

Another conveyance was made by Page to Albee and Hogins of a tract including the land theretofore conveyed to the Albees and other lands. This conveyance was intended, as Albee testified, to take in odds and ends. The land described in this deed was conveyed to Albee by Hogins. November 17, 1880, Albee conveyed to Hogins a tract of land described as follows: "Commencing at the northwest corner of the Good Templars' Hall Association lot on Depot street, and running along said Depot street, about northwest, about fifty feet; thence nearly westerly about one hundred and fifty feet, more or less, to Page's line; thence fifty feet in a southerly direction; and thence one hundred and fifty feet, more or less, to the place of beginning." February 23, 1883, Albee conveyed to defendant Boggs a tract of land described as follows: "Commencing on Depot street in said town of Newcastle, at the northeast corner of A. N. Page's lot; thence westerly, along the south line of said Page's lot, a distance of 90 feet; thence south, 20 feet; thence west, 60 feet, more or less; thence south, 50 feet; thence east, a distance of 150 feet, more or less, to said Depot street; thence north along said Depot street, 70 feet, to the place of beginning,—together with the dwelling house thereon, heretofore known as the residence of the party of the first part." In none of the deeds from Page, under which Albee claimed, were any landmarks called for except Abbot's lot, Madden's lot, and Depot street. North of Madden's lot, no landmark was called for except Depot street. The distances are therefore controlling. There was nothing to do, then, but to find the starting point, and measure northerly along the line of Depot street. There was no chance, under such circumstances, for surplus land. It does not appear that any landmarks were set after the deeds were made which were agreed upon by the parties. The land was not immediately inclosed. In 1878 a fence was built in front of the property, and according to that, as I understand the testimony, there was a surplus of 7¼ inches only. Still, a witness, Elmer Albee, was allowed to testify, against the objection of defendant, that he assisted Mr. Page in measuring the 100 feet conveyed to Mrs. Albee, and that, "as nigh" as he could guess, it was 5 or 6 feet over. The only purpose of this testimony was to show that more than 100 feet passed by the deed to Mrs. Albee. It was clearly incompetent for that purpose. If they measured 6 feet over the 100 feet, that did not pass title to anything more than was described in the deed. Mrs. Hogins claims as heir to Daniel Hogins, and under a deed from Albee dated June 23, 1890. Apparently, at that time, Albee had no land to convey, and it is likely the conclusion of the court was based upon the testimony of Elmer Albee as to the surplus six feet. Oral evidence would have been competent to apply the description to

the land. For this purpose it might have been shown where H. H. Smith's lot was, that it was the same property afterwards known as the "Madden" or "Good Templars'" lot, and where Depot street was. These facts appearing, there were no others which could have thrown light upon the matter. I think the judgment and order should be reversed, and a new trial had.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial ordered.

(100 Cal. 214)

RAKER v. BUCHER, Sheriff. (No. 18,015.)¹
(Supreme Court of California. Nov. 6, 1893.)

SHERIFFS AND CONSTABLES—DUTIES—FALSE RETURN—SUFFICIENCY OF EVIDENCE—PLEADING—ANSWER—CORRECTION OF CLERICAL ERROR.

1. Plaintiff's motion for judgment because the answer is evasive is properly denied, where plaintiff's objection to the answer may be overcome by the correction of an evident clerical error which the context shows to be the use of "when" for "where."

2. In an action against a sheriff for the penalty for selling property without notice, where the truth of the sheriff's return was in issue, undisputed evidence that the sheriff had admitted its falsity was sufficient to overcome the prima facie effect which the law attached to such return.

Department 2. Appeal from superior court, Modoc county; G. G. Clough, Judge.

Action by Raker against Bucher, as sheriff, for statutory penalty for failure to give the required notice of an execution sale, and for damages. Judgment for defendant. Plaintiff appeals. Reversed.

Spencer & Raker and Clarence A. Raker, for appellant. D. W. Jenks, for respondent.

DE HAVEN, J. The defendant, as sheriff, sold certain real property owned by plaintiff under an execution issued upon a judgment recovered against him. The complaint in this action, which is verified, alleges that this sale was made by defendant without giving the notice required by section 692 of the Code of Civil Procedure, and the plaintiff demands a judgment against the defendant for the statutory penalty of \$500 given by section 693 of the Code of Civil Procedure against an officer for selling property without legal notice, and also for the actual damages alleged to have been sustained by him by reason of such wrongful sale. The defendant answered, and the action was tried without a jury, the court finding, in substance, that the defendant gave the notice required by law before making the sale complained of, and judgment was thereupon entered in favor of defendant. Plaintiff appeals.

¹ Rehearing denied. See 34 Pac. Rep. 849.

1. The court did not err in denying the motion of plaintiff for judgment upon the pleadings. The answer was not evasive, as claimed by plaintiff, it being very evident that the word "when," used in one of the denials relating to the posting of the notices, is a clerical error, the context showing that "where" was the word intended; and with this correction the extremely technical objection to the sufficiency of the answer loses all of its force.

2. The point most strongly urged by the plaintiff for a reversal of the judgment is the insufficiency of the evidence to justify the finding of the court to the effect that notices of sale were duly posted in the township where the property is situated, and in the township where it was sold, for the length of time required by law. The only evidence offered by plaintiff, for the purpose of showing that such notices were not posted, consisted of the testimony of himself and another witness as to verbal admissions made to them by defendant, to the effect that he knew that the notices were not posted, and also the testimony of one Merryfield, to whom defendant sent notices of the sale for posting in the township where the property sold is situated. This witness testified that he thought he received the notices for posting on January 27, 1890, only 13 days before the sale; but he was not questioned in relation to the grounds of his belief, and he testified to no circumstance enabling him to retain any fixed or definite recollection of the exact date when he received the notices, nor did he profess to be certain as to such date. This testimony was given about 17 months after the event, and relating, as it did, to a matter and date which the witness was not shown to have any particular reason to recollect with entire accuracy, was entitled to but little weight in passing upon the question when the notices were posted. The court below evidently did not regard it as satisfactory, and we need not further consider it. The only evidence offered by defendant was the writ of execution and his official return thereon, which upon its face showed a sale of plaintiff's property after notice given in the manner and for the length of time required by section 692 of the Code of Civil Procedure. The precise question thus presented is as to the effect of this return as evidence, and whether the court was justified in finding the facts to be as stated in this return, in the face of the evidence of plaintiff in relation to the contrary admissions made by defendant.

In an action against a sheriff for a false return, the return is *prima facie* evidence in favor of the sheriff. 2 Freem. Ex'ns, § 366. In the section just cited, Mr. Freeman says: "The better rule is that an action for a false return is not the exclusive remedy when an officer has been guilty of a breach of duty. He may be proceeded against in

any other form of action in which such breach of duty is alleged as a ground for damages or for relief; and, while his return may be received as evidence in his favor, the plaintiff is at liberty to controvert it, if he can." See, also, to the same effect, *Whithead v. Keyes*, 3 Allen, 495; *Barrett v. Copeland*, 18 Vt. 67. This is an action against the defendant for a breach of official duty, and his official return, showing the manner in which he performed his duty in the matter complained of, is only *prima facie* evidence in his favor; and, as the truth of the return is the real question in issue in an action like this, only slight evidence aliunde is required to overcome the *prima facie* effect which the law attaches to the return of the officer; and when, as in this case, it is not disputed that the defendant sheriff has himself admitted the falsity of the return, a finding that its recitals are true, based upon no other evidence than the return itself, cannot be sustained. The defendant was called upon, in order to rebut the testimony of plaintiff concerning these admissions, to offer some evidence, either in explanation or denial of the admissions, or some independent proof that the notices were posted in the manner stated in the return. Judgment and order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

100 Cal. 199

AUSTIN v. DICK. (No. 18,184.)

(Supreme Court of California. Oct. 30, 1893.)

ELECTIONS AND VOTERS—CONTEST—WHEN AUTHORIZED.

Code Civil Proc. § 1111, providing that any elector of a county, or political subdivision thereof, may contest the right of any person "declared elected" to an office to be exercised therein, for causes enumerated, only authorizes an examination of the right of a person "declared elected" at an election, the canvass of which is questioned, and does not authorize a canvass of votes where the election has been declared to have resulted in the election of no one, in which case a new election must be held.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; C. L. Chaffin, Judge.

Action by J. T. Austin against Morris Dick to contest defendant's right to an office for which contestant and contestee were candidates. A judgment refusing to declare contestant elected was rendered, and, to obtain a modification of the judgment, he appeals. Modification denied.

D. W. Jenks and G. F. Harris, for appellant. Goodwin & Stewart, Goodwin & Goodwin, J. W. Harrington, and H. L. Spargur, for respondent.

TEMPLE, C. This is an appeal taken to obtain a modification of a judgment in an election contest. It appears from the complaint that at the general election, November-

8, 1892, plaintiff and defendant were candidates, and the only persons voted for, for the office of supervisor of the third supervisorial district in the county of Modoc, and that at such election plaintiff received 87 and defendant 85 votes; that the votes were canvassed November 14, 1892, but the board refused to declare plaintiff elected, and afterwards, on the 8th of December of the same year, declared the defendant elected. The complaint then proceeds to set out certain alleged irregularities at the election, and, among them, that the board of judges at a certain precinct failed to count for plaintiff one vote which had been cast for him, and that the alleged misconduct and irregularity "procured said Morris Dick to be declared elected to said office of supervisor, when he had not received the highest number of legal votes therefor." The answer denies that said defendant, Morris Dick, was, or has ever been, declared elected at said election, but avers that the board of canvassers declared the result of the canvass of said election as follows: "It further appearing from the canvass of said returns that no person has received the highest number of votes for the office of supervisor of the third supervisor district, but that it does appear that, of the persons receiving the highest number of votes, J. T. Austin and Morris Dick each received the same number, and that no person has received a higher number of votes cast for that office, it is ordered that a special election be held in said supervisor district number 3 on the first day of December, 1892, for the purpose of electing one supervisor for said district, and that an election proclamation be issued and published, calling such special election." The court found this allegation in the answer to be true, and yet proceeded to find that at such election one vote was wrongly counted for Dick, which, if deducted from the votes counted for him, "will reduce the number of his legal votes below the number of legal votes given to said contestant, J. T. Austin."

The court, however, refused, by its judgment, to declare contestant elected, and this appeal is taken to obtain a modification and correction of the judgment in that respect. But the finding that no one was declared elected is upon a matter of jurisdiction. The proceeding is entirely statutory, and is to obtain a recanvass of the votes cast at an election in which some person was declared elected, and the contest is simply over the right of the person "declared elected." Section 1111, Code Civil Proc.¹ It is not, and cannot be made, a proceeding to determine the right of claimants to an office where one claims a right not depending upon that election, and the statute has not authorized the recanvass of the votes in the case, where

the election has been declared to have resulted in the election of no one. In such case a new election must be called, although it may be that a candidate may question the correctness of the canvass in a different proceeding. Dick was elected at the special election called after it was determined that there had been no election at the general election. No fault is found with that election in the complaint. It is, in fact, wholly ignored. Perhaps it may be now claimed that the special election was illegal because there was then no vacancy. But this is a question which cannot be tried in this proceeding. There is hardly a section in the title in regard to this contest which does not show that the inquiry is limited to an examination of the right of the person declared elected at the election, the canvass of which is questioned. The finding, therefore, that no one had been declared elected, was a finding to the effect that the court had no jurisdiction of the matter. This present appeal does not affect the rights of said Morris Dick, who, it seems, has also taken an appeal. The relief demanded should be denied.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the relief demanded is denied, and the judgment affirmed.

100 Cal. 43

SAN DIEGO WATER CO. v. SAN DIEGO FLUME CO. (No. 19,196.)

(Supreme Court of California. Oct. 10, 1893.)

WATER COMPANIES—CONTRACTS—RIGHTS OF PARTIES—ACCOUNTING.

1. Plaintiff and defendant, two water companies,—the latter owning a water supply conducted to the limits of a city; the former owning a system of pipes for conducting it through the city,—made a contract by which defendant's water was to be distributed through plaintiff's pipes; the proceeds, after deducting operating expenses, including necessary extensions of the pipes, to be divided between them; the question of what were necessary operating expenses to be determined by the presidents of the companies, who were to be trustees of the properties. *Held* that, under this contract, plaintiff had no right to lease its property, and sell to the lessee a certain amount of defendant's water for a gross sum, with provision that, if extensions of plaintiff's pipes were necessary, the lessee could require plaintiff to put them in,—plaintiff to be allowed for the amount so expended 6 per cent. interest, and 3 per cent. per annum on the cost for deterioration of the extension,—and, plaintiff insisting on its rights under this lease, defendant could refuse to furnish water.

2. Plaintiff, having brought an action to enjoin defendant from shutting off the water, and for a determination of its rights as to a division of the money received under the lease,—proceeding on the theory of the validity of the lease,—is not entitled to have the action retained for an accounting based on the lease.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

¹ Code Civil Proc. § 1111, provides that any elector of a county, or political subdivision thereof, may contest the right of any person "declared elected" to an office to be exercised therein, for causes enumerated.

Action by the San Diego Water Company against the San Diego Flume Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Works & Works, for appellant. Hunsaker, Britt & Goodrich and Shaw & Holland, for respondent.

McFARLAND, J. This action was brought by plaintiff to enjoin the defendant from shutting off, or preventing the flow of water into, certain mains and pipes of plaintiff. The court granted a nonsuit, and entered judgment for defendant, from which judgment, and from an order denying a motion for a new trial, plaintiff appeals.

Each of the parties is a corporation organized under the general laws of the state, for the purpose of distributing, selling, and furnishing water to consumers in the county and city of San Diego. The contracts and the relations of the parties out of which this litigation came are somewhat complicated. The main facts are as follows:

In September, 1890, the respondent, the flume company, was the owner of a supply of water which it brought from a long distance, by means of ditches, flumes, and pipes, to the boundary of the city of San Diego,—or, as counsel put it, “to the gates of the city;” but it had no pipes or other means, within said city, by which it could distribute water to the inhabitants thereof. The appellant, the water company, owned a system or plant of pipes by which it could distribute water through the greater part of the city, which it had been using to partially supply the city with water pumped from sources in the immediate vicinity. The respondent was negotiating with the city to sell or lease water to the latter, and an election had been called for the 14th of October, at which the electors of the city were to vote on the proposition of issuing bonds for that purpose. The respondent was endeavoring to carry the election in favor of the bonds, and the appellant was opposing that proposition. In the latter part of September, the appellant and respondent agreed upon the proposition to unite their interests, and a memorandum of such agreement was made in writing, but was not fully executed. After that the respondent ceased advocating the proposition of issuing the bonds. On November 6, 1890, the appellant and respondent executed a written agreement, which consisted of two parts, called in the pleadings “Exhibit A” and “Exhibit B,” these two instruments being intended as one agreement. By Exhibit A the respondent appointed the appellant “its sole agent for the exclusive sale of water within the corporate limits of the city of San Diego, California;” the appointment to continue during the continuance of the other part of the contract called “Exhibit B.” It was provided, however, that all sales made by the appellant should be subject to

the approval of the respondent, and that no sales should be made without the consent of the latter. Exhibit B is quite a long contract, and its principal features are these: The parties appoint one Babcock and one Sefton, the former being president of the appellant, and the latter of respondent, as trustees, to whom they, in terms, “assign and give the absolute control of their respective properties, as far as the same may be confined to the corporate limits of the city of San Diego.” Said trustees were to hold in trust, and “operate and control, said respective properties, for the benefit and use of the respective parties of the first and second part, in the manner as herein mentioned.” It was stated that the parties were “to combine their joint endeavors for the advancement of their respective interests under this trust, subject to the conditions as hereinafter mentioned.” It was further provided that appellant should furnish “its entire plant, and any extension of the same, for the free use and occupation as the said trustees may determine for the uses and purposes of this contract.” The respondent agreed “to deliver, at a point in their flume or pipe line where the same does now or may hereafter intersect the present or future limits of the city of San Diego, a water supply, of a good quality, for domestic purposes, sufficient for the uses of the city of San Diego.” It was further agreed that, after deducting the operating expenses of the plants within the city, the proceeds of the sales of water should be divided between the parties in the proportion of 65-100 to the appellant, and 35-100 to the respondent, and it was provided that “operating expenses” should include necessary extensions of said plants; but it was also further provided that the said trustees should determine what were necessary and proper operating expenses. It was further provided that “this contract shall extend and be binding upon the parties hereto, their successors and assigns, for the term of twenty years, beginning on the 6th day of November, 1890.” There were other provisions in the said Exhibit B, which we do not deem necessary to be here mentioned. The parties commenced operating under this agreement of November 9th, and continued to so operate until about the 1st of June, 1891.

On the 13th day of April, 1891, the appellant entered into a written contract with Bryant Howard and several other persons, called “Exhibit 1,” by which the appellant, in its own name, leased to said Howard and others, for the term of 20 years from and after the 1st day of June, 1891, all their water plant within said city, including all pipes, pipe lines, etc., and also sold and conveyed to said Howard and others 3,000,000 gallons of water “from what is now known as the ‘San Diego Flume,’” for each and every 24 hours during said period of 20 years. (The said “water from what is now

known as the 'San Diego Flume,' meant the said water supply of respondent, as above referred to.) By said contract, Howard and others agreed to pay to appellant, during said period, the sum of \$9,165.65 per month, and the appellant agreed to accept in payment thereof the obligation of the city of San Diego to pay and satisfy the same. It was further agreed that after the construction of a certain railroad, afterwards in said contract mentioned, Howard and others should have the right to assign the whole lease to the city of San Diego, and that the appellant would look solely to said city for the carrying out of the agreement on the part of Howard and others. It was then stipulated that the lease was made upon the condition that the appellant should cause a railroad to be constructed and operated from the city of San Diego, Cal., to San Quintin, in the republic of Mexico, or to Fort Yuma, Cal., or its immediate vicinity, although it was also stated that "this provision shall not be construed as obligating the party of the first part to construct said road;" it being sufficient, under the contract, if the road should be built by some railroad company. It was further agreed that, should any extensions of the pipe lines or plant of appellant in said city be necessary, Howard and others, or their assigns or sublessees, should have the option to put in such extensions, or they could require appellant to make such extensions, in which case the appellant should be allowed for the amount expended in such extensions the sum of 6 per cent. per annum interest. It was also stipulated that, "for the deterioration of the extensions of the pipe lines." Howard and others should pay to appellant 3 per cent. per annum on the cost of such extensions; also, that Howard and others should have a right to terminate the lease in case any of the conditions, stipulations, or agreements therein mentioned should not be complied with by appellant. The contract, also, had a general provision that Howard and others might sublease to the city of San Diego. The contract last above referred to was made with the express understanding between the parties that Howard & Co. were to sublease to the city of San Diego, or to make a contract with said city by which Howard & Co. were to transfer to the city all the rights which they obtained under said contract with appellant; and in pursuance of said understanding, five days afterwards, to wit, on April 18, 1891, said Howard and others and said city did enter into a contract called "Exhibit 2." This contract referred to the said contract of April 13th, and provided that "this agreement is made upon the express condition that in case the contract above referred to shall be terminated under any of the conditions, stipulations, or agreements in said contract contained, then and in that case this contract shall at once cease and determine." This contract was substan-

tially the same as the one made between appellant and Howard and others. By it Howard and others leased and sublet to the city, for the period of 20 years from and after June 1, 1891, all the said plant or system of water pipes owned by appellant in said city, and 3,000,000 gallons of water every 24 hours from the San Diego flume, and provided that the city should pay appellant for the same, as rental, \$9,165.65 per month, which amounted to about \$110,000 a year. It provided, also, for the 6 per cent. and 3 per cent. mentioned in said former contract, and provided, further, that, if the city desired more than 3,000,000 gallons per day, plaintiff should furnish the desired amount at the rate of 5 cents per 1,000 gallons. It also provided that the city should determine the amount of extensions to be made to said system of pipes. There were other provisions, which we do not deem it necessary to here notice.

There was some evidence tending to show that some of the directors and stockholders of the respondent had knowledge that the contract between Howard and others and appellant was to be made, and also that Howard and others were to make the said contract with the city, and did not object thereto, but rather encouraged the thing. There is no evidence, however, tending to show that the board of directors of the respondent, at any of its meetings, ever approved either of said contracts, or authorized any of its officers to take any action with respect to them. On the other hand, after the execution of said contract with the city, appellant requested the directors of the respondent to approve said contract, which the latter refused to do; and on the 18th of July, 1891, the directors of respondent passed a resolution, which, after reciting the various contracts, expressly repudiated the contracts made by appellant to Howard and others, and the contract between Howard and others and the city. And between the 1st of June, 1891, and the date of said resolution, the respondent did not receive any money from the appellant. After that, respondent continued to furnish water, as before, until the 2d of May, 1892, claiming, however, to be acting under the original contract of November 6, 1890; but there were continuous difficulties, disagreements, and troubles between the appellant and the respondent, and on the said May 2, 1892, respondent disconnected its water with the mains of the appellant, and refused to furnish any more, whereupon appellant brought this action to enjoin the respondent from thus shutting off the flow of water into the mains and pipes of appellant.

Upon the foregoing facts, counsel discussed a number of important questions, which, under our view, need not be here determined; but, in order to fully present the case, we will notice a few of such questions. Respondent contends, among other things,

that the original agreement of November 6, 1890, was void because it was against public policy, in that its purpose was to prevent the city from acquiring its own water supply, and to obtain a monopoly of the business of furnishing water to the city for 20 years; because it undertook to take away from the directors of respondent all power over its business for 20 years, and to vest such power in two persons, one of whom was not even a member of the corporation respondent; because it undertook to form a partnership between the two corporations, and to consolidate said two corporations, which is not authorized, except in cases of railroad and mining corporations; and because the said contract was in other respects ultra vires, in the broadest sense. Respondent also contends that the contract between appellant and Howard and others was void in many respects, and particularly because it was made in contemplation of the city of San Diego taking the place of Howard and others, and that the contract between Howard & Co. and the city was void for many reasons, and particularly because, under the constitution of the state, it was the duty of the city to fix the rates of water furnished by appellant annually, and that the city had no right, by one act, to fix the rate of water for 20 years; also, because the city council could not grant a subsidy. All these propositions are contested by appellant. Some of the foregoing propositions are of very great importance, and their unnecessary determination here might furnish precedents which would foreclose or embarrass the rights of future litigants without a hearing. We will not, therefore, determine those questions, because we think that the judgment should be affirmed for another reason.

Assuming that the contract of November 6, 1890, is a valid one, still we think that the rights of the respondent must be determined upon that contract alone. That contract did not give to the appellant the right to make the contract with Howard and others; and certainly the contract between Howard and others and the city of San Diego is one which cannot bind respondent in any way, and the two last-named contracts are essentially different from the one of November, 1890. And one essential difference, which is important and substantial, so far as the rights of respondent are concerned, is that the latter contract gives to the city of San Diego the right to determine what extensions should be made to appellant's system of pipes,—what the operating expenses shall be,—while the contract of November, 1890, vests that power entirely in the two trustees named therein; and the result of the said provision of the later contracts was one of the principal causes of difference between the two parties. Moreover, the 6 per cent. and 3 per cent. items in the later contracts were essentially different from any-

thing contained in the contract of 1890. And, as the appellant insisted upon its rights under the said contract with the city, the respondent had the right to stop furnishing its water; and appellant has no legal remedy by injunction to compel respondent to continue its supply of water, as provided for in the contract of November, 1890. And we do not think that the evidence shows any valid ratification of said latter contracts by respondent.

Appellant contends that, even if it be not entitled to an injunction, a nonsuit should not have been granted, but that the court should have gone on, and taken an accounting between the parties. The prayer of the complaint, in addition to asking an injunction, prays, also, for judgment against the respondent for \$10,000 damages, and also "that the rights of plaintiff and the defendant as to the division of the money realized from the amount received from the city under said sublease be ascertained and determined." But, certainly, appellant showed no case for damages against the respondent; and, as the complaint proceeds upon the theory of the validity of the sublease to the city, we do not think that plaintiff is entitled to any accounting based upon the contract with the city. If it be true, as contended by appellant, that some of the members of the corporation respondent encouraged the contracts with Howard and others and with the city, appellant may have some cause to complain of a want of fair dealing; but, when corporate bodies are contracting with each other, they should keep in remembrance the old saying of Lord Coke, that corporations have no souls. The judgment and order denying a new trial are affirmed.

We concur: HARRISON, J.; PATERSON, J.; FITZGERALD, J.

100 Cal. 240

HOLLAND v. SOUTHERN PAC. RY. CO.
(No. 18,128.)(Supreme Court of California. Nov. 8, 1893.)
INJURY TO EMPLOYEE—FELLOW SERVANTS—NOTICE OF PRIOR NEGLIGENCE.

The fact that an engineer once ran his train in 40 minutes over a distance scheduled for an hour, though he knew that hand cars and sectionmen might be on the track up to 10 minutes before schedule time, no accident having in fact occurred, does not show that he was unfit for his position, and that the company ought to have discharged him after notice.

Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by one Holland against the Southern Pacific Railway Company for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

S. C. Denson, E. A. Forbes, and Fred Blake, for appellant. W. H. Carlin and Jacob Samuels, for respondent.

DE HAVEN, J. This is an action brought to recover damages for personal injuries sustained by the plaintiff while in the employment of the defendant as a road master. The injuries were the result of a collision between a locomotive engine and a construction train upon which the plaintiff was riding. The engine which came in collision with the train was then being used in the work of defendant, and was driven by an engineer named Mulligan, employed by the defendant for that purpose. The complaint alleges that Mulligan, for some time prior to and up to the time of the collision, "had been and was incompetent, reckless, and grossly negligent in the performance of his duties as an engineer and * * * employe of defendant," and that defendant had notice of such incompetency and negligence. The case was tried by a jury, and a verdict returned in favor of plaintiff for the sum of \$7,500, and judgment was rendered in the superior court in accordance therewith. The defendant appeals.

The plaintiff and Mulligan were fellow servants, and, in order to entitle plaintiff to

the verdict and judgment recovered in the superior court, it was incumbent upon him to show, not only that the injury he received was proximately caused by the negligence of Mulligan, but also that the latter was incompetent, and that there was negligence upon the part of the defendant in employing him in the first instance, or in retaining him in its service after notice of his incompetency and the alleged careless and reckless manner in which he had discharged his duties as an engineer. It is not claimed by the plaintiff that the defendant failed to exercise reasonable and ordinary care to ascertain whether or not Mulligan was a competent engineer at the time of first employing him, but he contends that the defendant was guilty of negligence in retaining him as an engineer after notice that he was careless and reckless in the discharge of the duties incident to that position, and therefore an unfit person to serve in such capacity. The jury so found, and the defendant insists that the verdict is not supported by the evidence, and the question thus presented is the only one necessary to be considered at this time.

It was shown upon the trial that, some three or four months prior to the collision resulting in the injury complained of by the plaintiff, Mulligan was the engineer in charge of one of defendant's trains running between Marysville and Oroville, and upon that occasion ran a train between Marysville and Moore's Station, a distance of 12 or 14 miles, in 40 minutes, while the schedule time between these points was 1 hour. The plaintiff himself testified that in making about 1½ miles of this run, over a portion of the road which was level, the train was driven at a speed of about 40 or 45 miles an hour; and he further testified that this road was not considered safe to run fast upon, because it was laid with light iron rails. There was but one train a day run over this road, but hand cars used by construction men might have been upon the track at this time, and, under the rules of defendant, would have had the right to remain there until within 10 minutes of the schedule time for the arrival of the regular train. This run was made in daylight, and without accident or injury to any one. The plaintiff, although requested by Mulligan not to do so, notified the proper officers of defendant of the manner in which this train was run upon the occasion just referred to. This was all the evidence tending in any degree to show the incompetency of Mulligan as an engineer prior to the collision in which plaintiff received his injuries. Counsel for plaintiff in their very able brief filed in this court argue that this evidence was sufficient to show that Mulligan knew, or ought to have known, that it was dangerous to run a train so fast upon this particular road; and that in so doing he not only endangered the lives of the passengers on the train, but also imperiled the

lives of the section or construction men who were on the road, and who had the right to remain there until within 10 minutes of the time for the regular approach of the train, and that the jury were justified in finding from this single act of Mulligan that he was reckless and careless to such a degree as to render him wholly incompetent as an engineer; and that the defendant could not, with notice of the incompetency thus shown, retain him in its service as an engineer without rendering itself liable to those of its employes who might thereafter be injured through his negligence. But we do not think so. It may be, and doubtless is, true that a single act may be such as to furnish an unerring index of the character of the actor, and, when considered by itself and in connection with the circumstances surrounding it, be sufficient to demonstrate the unfitness of a person to be placed in any position requiring great or even ordinary care in the discharge of its duties. Still, the act relied upon here was not of a character to necessarily stamp Mulligan as unfit or incompetent to discharge the duties of an engineer. It did not of itself show him to be a grossly careless person, or reckless of the lives, either of the passengers committed to his charge, or the lives of the employes of defendant at work upon the track. No accident occurred at that time, nor is there anything in the evidence to show that this result was due more to chance or good fortune than the management of the engine and the actual condition of the road upon which the train was running; and, although men were liable to have been working on the track, it does not appear that they could not have been easily seen, and would not have had ample time to escape all harm after being warned by bell or whistle of the approach of the train. Upon the facts disclosed by the evidence, the jury was not warranted in finding that the defendant failed in its duty to plaintiff or its other employes in not discharging Mulligan from further service as an engineer because of this one act, assuming it to have been a negligent one. The true rule upon this subject is stated with great precision and clearness by Allen, J., in delivering the opinion of the court of appeals of the state of New York in the case of *Baulec v. Railroad Co.*, 59 N. Y. 363, as follows: "An individual who by years of faithful service has shown himself trustworthy, vigilant, and competent is not disqualified for further employment, and proved either incompetent or careless and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show, what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employes of corporations until a race of servants can be

found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust or any particular service, as when such act is intentional and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the man and his inability to perform a particular service. But a single act of casual neglect does not, per se, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act." See, also, *Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. Rep. 338. And in *Wharton on Negligence* (section 238) it is said: "If single exceptional acts of negligence should prove an officer to be incompetent, no officer could be retained in service, for there is no person who is not at some time to some degree negligent. Hence it has been properly held that intelligent men, of good habits, who are engineers or brakemen or switchmen on railroads, are not necessarily to be discharged by their employers for the first error or act of negligence such employes commit; nor will railroad companies necessarily be liable for a second error or negligent act of a servant to all other servants of such companies when the latter sustain damages by reason thereof." It necessarily follows from these views that the judgment and order appealed from must be reversed.

We concur: McFARLAND, J.; FITZGERALD, J.

(100 Cal. 158)

PHELAN et al. v. SMITH. (No. 19,147.)
(Supreme Court of California. Oct. 20, 1893.)

COMMUNITY PROPERTY — CONVEYANCE OF HOMESTEAD RIGHT — EJECTMENT — OUSTER — ADMINISTRATION — INVENTORY — SETTING ASIDE HOMESTEAD.

1. Civil Code, §§ 1384, 1402, provide that on the death of a husband intestate the title to one-half of the community property vests in the surviving wife, subject to the debts and the control of the probate court for purposes of administration. *Held*, that the widow could not by a conveyance of her interest in the land bar a homestead therein for herself and children.

2. The latter clause of Code Civil Proc. § 1485, which defines the rights of successors by purchase to homesteads and to the right to have homesteads set apart to them, relates only to such purchasers as have succeeded to the rights of all the persons entitled to a homestead, but has no application where the succession is to the rights of only one of such persons.

3. In ejectment by a widow, who had sold her interest in community property, and by her daughter, to get possession of their homestead right, defendant cannot contend that he has not contested the right of the daughter to possession as a tenant in common with him,

so that there has been no ouster, when the complaint avers title in plaintiffs and ouster by defendant, and the answer denies every material allegation of the complaint, and pleads the statute of limitations, and when the agreed statement of facts admits that on a given date the widow, on behalf of herself and daughter, demanded of defendant that they be let in possession, but that defendant refused, and has since withheld possession from plaintiffs.

4. Where the affidavit of the administratrix, attached to the inventory and appraisal, was almost in the precise language prescribed by the Code, except that the affidavit reads "and of all just claims of the said deceased against the said decedent," instead of "against the said affiant," such affidavit was sufficient, the error being merely clerical, and it could not in any way vitiate the subsequent proceedings.

5. The clause in Code Civil Proc. § 1443, requiring the administrator to file his inventory and appraisal within three months after his appointment is directory, and does not render them invalid when subsequently filed.

6. The fact that a second inventory was filed did not affect the validity of the proceedings, for, if the first was in proper form, and the second involved no changes, it was mere surplusage; but if, from the destruction of some property or the discovery of more, the court wished a further inventory, it was within its power to order one taken.

7. The petition for a homestead asked that it be set apart for the widow and her two children, but the decree stated that the property described "is hereby set apart for the use of the family of said O., deceased." The family of O. was shown by the record to have consisted of the widow and two minor children. *Held* that, as the term "family" is used throughout the chapter providing for homesteads to denote the surviving husband or wife and children, it must be regarded as used in the decree in that sense, and as sufficiently describing the widow and children.

8. Objections to a decree setting apart a homestead urged on an appeal in an ejectment suit, a collateral proceeding, can only avail by showing such errors as render the decree absolutely void.

9. Even if the probate proceedings were void, the infant plaintiff could still recover, as the heir of her deceased father, (Code Civil Proc. § 1452), her interest in the real property, and possession thereof, except as against the administrator.

10. Evidence was properly excluded that after the death of her husband the widow purchased with her separate funds a lot in another town, and resided there with her children, and declared a homestead thereon, which lot was subsequently sold by her, before the application for a homestead herein, for the right to a homestead herein inured to her and her children as a joint right which she could not individually waive.

11. The possession of defendant under the agreement to purchase, made by the widow in 1883, was in subordination to plaintiffs' title, and did not become adverse to either of them until the date of the deed September 1, 1885, and, as the ejectment action was begun April 11, 1890, less than five years after the execution of the deed, it was not barred by the statute of limitations.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Ejectment by Maggie Phelan and Mary O'Connor against Edward Smith. From a judgment in favor of plaintiffs, and from an

order denying a new trial, defendant appeals. Affirmed.

O'Melveny & Henning, for appellant. W. I. Foley and Chapman & Hendrick, for respondents.

SEARLS, C. This is an action of ejectment to recover a parcel of land situate in the county of Los Angeles. Plaintiffs had judgment, from which, and from an order denying a motion for a new trial, defendant appeals. The parcel of land in question is part of a larger tract, of which John O'Connor died seised July 21, 1882. The entire tract was community property of John O'Connor and Maggie O'Connor, (now Maggie Phelan,) his wife. John O'Connor died intestate, and left him surviving the said Maggie, his widow, and their two minor children, Louis Francis, who died intestate, a minor, without issue, February 22, 1889, and the plaintiff, Mary O'Connor, who is still a minor. Maggie O'Connor was on the 13th day of October, 1882, appointed guardian of the person and estate of her infant daughter, Mary O'Connor, and on the 8th of November, 1882, she was duly appointed administratrix of the estate of her deceased husband, and qualified as such administratrix. On the 14th of April, 1883, Maggie O'Connor entered into an agreement with the defendant, Edward Smith, and his brother, W. D. Smith, whereby she agreed to convey to them a tract of land consisting of $9\frac{3}{4}$ acres, which includes the land involved in this action. The consideration was \$3,000. W. D. Smith assigned his interest in the contract to defendant, and, the consideration therefor having been paid, on the 1st day of September, 1885, Maggie O'Connor conveyed the undivided one-half of the land by deed of grant to the defendant. The land so conveyed was community property, as aforesaid, and belonged to the estate of John O'Connor, deceased. No order or authority of the probate court was had, either authorizing or approving such sale, and it was made by Maggie O'Connor individually, and not in any representative character. Defendant went into possession of the land at the date of the agreement, by consent of Maggie O'Connor, and since the date of the conveyance has remained in possession, claiming title to an undivided one-half thereof under said deed, and not otherwise, adversely to plaintiffs, and has paid all taxes levied thereon. On July 9, 1888, the land was appraised as of the estate of John O'Connor, deceased, in two parcels. The first parcel, being the land in dispute in this action, was appraised at \$4,500, and the second parcel at \$3,500. On the 18th day of August, 1888, said Maggie O'Connor, as administratrix of the estate of John O'Connor, deceased, filed her petition in the superior court asking that parcel one of the land aforesaid, with the dwelling house thereon, be set apart by said court as

a homestead for the use of said Maggie O'Connor, widow, as aforesaid, and her two minor children, aforesaid, and such proceedings were thereafter had that on the 18th day of August, 1888, said first parcel of land, with the dwelling house, etc., thereon, was set apart by the court as a homestead. After the death of Louis Francis O'Connor, and on the 15th day of August, 1889, a decree of distribution in the matter of said estate was given and made, by which decree three-fourths of said estate was awarded and distributed to Maggie O'Connor, the widow, and one-fourth part thereof to Mary O'Connor, the surviving child. Maggie O'Connor, on the 11th day of March, 1889, married E. F. Phelan, and still is the wife of said Phelan.

Appellant contends that as against the plaintiff Maggie Phelan the deed of September 1, 1885, from her to him, divested her of all title she had to the land, and that she had the one-half thereof, under section 1402 of the Civil Code. That if the decree of the court setting aside the homestead out of the estate of John O'Connor vested any new interest or estate in said Maggie, the same inured to her grantee, and that the homestead decree is not sufficient to enable her to maintain ejectment against her grantee. "Upon the death of the husband, one-half of the community property goes to the surviving wife. * * * In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance and the charges and expenses of administration." Civil Code, § 1402. We assume at the outset of the inquiry that whatever title Maggie O'Connor could at the date of her deed convey to defendant in and to the undivided one-half of the property in question passed to the latter by her deed. Her deed being in form and substance one of grant, an after-acquired title, vesting in her as an individual, and which she could convey as such, passed by operation of law to her grantee under such deed. It remains to inquire as to her capacity to convey an interest in the community property of her deceased husband, pending proceedings in administration, and the limitations, if any, attaching to the title conveyed. "The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purposes of administration." Civil Code, § 1384. The title to one-half of the community property, under sections 1384 and 1402 of the Civil Code, upon the death of the husband who dies intestate, at once vests in the surviving wife, subject to the payment of debts, etc., and subject to the exercise by the probate court of the powers over it, vested in that court, and qualified or subject to be qualified by the exercise of those powers. The objects of administration were

discussed at considerable length in *Estate of Moore*, 57 Cal. 437. That case, like the present, was one in which the husband died intestate, leaving community property, and one in which there had been no homestead declared during the lives of the spouses. The widow had there, as here, conveyed her interest in the real property; the only difference being that in that case it was by quitclaim deed while here it is by grant. She subsequently applied to have a homestead for herself and children carved out of the real estate so conveyed. The court below refused her application. On appeal, this court, in reversing the order denying a homestead, said: "The deed of Mrs. Moore is silent upon the subject of homestead. Whatever its effect as a conveyance, it was no more than to convey the interest in the property of the deceased which she received upon his death by succession. A homestead right, or a right to have a homestead, is not a right which vests under the law by succession. It is a right bestowed by the beneficence of the law of this estate for the benefit of the family. Upon the death of an intestate his property goes by succession to his heirs, subject to administration. The objects of administration are: (1) To support the family for a period; (2) to set apart a homestead to the family; (3) to pay the expenses of administration; (4) to pay the debts of the deceased; (5) to distribute the balance of the estate to those who take it by law. If an heir convey his interest in the estate, or any part thereof, he conveys such interest only as will remain to him after satisfying the first four objects above named, unless the deed should in terms expressly cover more. Setting apart a homestead is a part of the probate proceeding, as much as is a family allowance. * * * The homestead, when set apart, is to be set apart for the benefit of the widow and children. * * * It certainly could not be said that her deed, conveying her interest as successor, would interfere with and defeat the purpose of the law in giving the family an abiding place." In *re Lahiff's Estate*, 86 Cal. 151, 24 Pac. Rep. 850; *Estate of Moore*, 57 Cal. 446. The right to have a probate homestead carved out of the estate is in the nature of a charge upon the estate, from which the widow, under her right of succession, could no more discharge than she could free the estate from its liability for the debts of her deceased husband. The right is inherent, not in her alone, but in the children as well; and she can no more foreclose their right thereto than she can their rights as heirs to the estate. It is conferred for the beneficent purpose of affording a home in which the minor children may be sheltered and shielded from want. To hold that the widow, or any less than all the parties in interest, can by a conveyance defeat the object of the law, would be a fraud upon the rights of those not joining in such conveyance. To say that

the widow may convey her right to such a homestead, and that the grantee takes as a tenant in common with the children, is in effect to say there shall be no homestead. The law consecrates the homestead to a specific purpose, and that purpose can only be accomplished by making it a home for the family. It must be held that the latter clause of section 1485 of the Code of Civil Procedure, which defines the rights of successors by purchase to homesteads, and to the right to have homesteads set apart to them, relates only to such purchasers as have succeeded to the rights of all the persons entitled to a homestead, and has no application to a case like the present, where defendant has succeeded to the right of one only of such persons. It follows that the widow's conveyance was subject to the homestead right which it was the duty of the court to set apart, and, when so consummated, the title which she had conveyed, if not defeated, was, as to the rights of defendant, at least suspended during the period of the occupancy of the property as a homestead. Whether establishing the status of the property as a homestead had the effect of defeating the title conveyed to defendant in toto, or only to hold it in abeyance, involves considerations of deep importance which are not necessary to the decision of this case, and upon which no opinion is expressed. The contention of appellant that he has not contested the right of plaintiff Mary O'Connor to possession as a tenant in common with him, cannot be, on the face of the record, maintained.

The complaint avers title in plaintiffs and ouster by defendant. The answer denies each and every material allegation of the complaint, and pleads the bar of the statute of limitations. The denial of title of a cotenant in an answer is equivalent to an ouster. *Greer v. Tripp*, 56 Cal. 209; *Spect v. Gregg*, 51 Cal. 198; *Packard v. Johnson*, Id. 545; *Miller v. Myles*, 46 Cal. 535. Furthermore, the agreed statement of facts admits as follows: "On the 15th day of March, 1890, the plaintiff, the said Maggie Phelan, on behalf of herself and said Mary O'Connor, demanded of the said defendant that they be let into possession of the said property first herein specifically described, and so set apart as a homestead; and the said defendant refused, and has ever since withheld the possession of said property from the plaintiff." This was abundantly sufficient evidence of ouster and refusal to deliver possession on demand. Demand and refusal of possession are not ouster, but they are such evidence as will authorize a court to find an ouster.

To the introduction of the probate proceedings in the matter of the estate of John O'Connor, deceased, purporting to show the appraisal and inventory of the estate, the order setting apart the homestead, and the decree of distribution, the defendant

objected, and the action of the court in admitting the evidence is assigned as error as follows: (1) That the appraisements (there were two) are invalid, because not verified by the administratrix as required by section 1449, Code Civil Proc. (2) The appraisal was not returned within three months, as required by section 1443, Id. (3) There is no authority for appraising one parcel of land in two parcels "for the purpose of homestead" or for any other purpose. (4) There was no authority for appointment of the last set of appraisers, unless the first appraisal was invalid. If the first appraisal is invalid, it was because of the insufficient affidavit of the administratrix, and, if this is so, the second is equally invalid, because not showing by affidavit of administratrix that all the estate was appraised, or what debts were owing by the affiant to deceased. (5) Error in admitting in evidence the decree of distribution, which is invalid for the reason that no valid appraisal or valid inventory was ever made or had, and because such decree does not affect the title of defendant or his right to possession. So far as the infant plaintiff, Mary O'Connor, is concerned, none of these proceedings can affect her right to recover. If the probate proceedings are void, she may still, as the heir of her deceased father, recover her interest in the real property, and possession thereof, except as against the administrator. Code Civil Proc. § 1452. The affidavit of the administratrix, indorsed upon or attached to the second inventory and appraisal, is almost in the precise language of section 1449 of the Code of Civil Procedure, except that in the final sentence the last word is "decedent" instead of "affiant," thus making the affidavit read "and of all just claims of the said deceased against the said decedent" instead of "against the said affiant." This is a mere clerical error, which could not in any wise vitiate the subsequent proceedings. The object of requiring an affidavit by the administrator or executor to accompany the inventory and appraisal is, apparently, not to give any validity to the inventory as such, but to furnish evidence that it contains all the property within the knowledge and possession of the affiant; thus serving as a check upon the administrator. We have no doubt that, as a basis for action by the court in setting apart a homestead, an inventory and appraisal without any affidavit by the administrator, as provided for in section 1449, Code Civil Proc., would be quite sufficient. The clause in the Code under which the administrator is required to file an inventory and appraisal within three months after his appointment is directory, and does not render them invalid when subsequently filed. So, too, the filing of a second inventory is of no moment. If the first is in proper form, and the second involves no additions or changes, it is mere surplusage; but it may often occur from the discovery of other property, the destruction

or loss of a portion of the property, and from various other causes, that a second or further inventory and appraisal is desirable. In all such cases the court, under the powers conferred upon it, may, we have no doubt, inform itself by means of a new or further inventory and appraisal of the true condition of the estate.

In the present instance we may well conclude the court desired a segregation of the property for homestead purposes. This was proper. The Code does not point out the steps to be pursued in setting apart a homestead where none has been declared by the husband and wife, or one of them, during the lives of the parties; and in such cases the court may adopt any suitable method of procedure conformable to the spirit of the Code. Code Civil Proc., § 187.

It was important for the court to be informed as to the value of the homestead which it was its duty under the law to set apart. It is objected that the decree setting apart the homestead is invalid, on account of the appraisal and inventory not being regular, and for the further reason that "it does not set the property apart to the widow and minor children, but to the family; and it does not purport to set apart for a limited period, but purports to set it apart absolutely," etc. It is only where a homestead is set apart from the separate property of the deceased that it is required to be for a limited period. Code Civil Proc. § 1468. The petition for a homestead asked that it be set apart for the widow and her two children. In the decree the language used is that the property (describing it) "is hereby set apart for the use of the family of said John O'Connor, deceased." The family of John O'Connor, deceased, is shown by the record to have consisted of the widow and two children. The term "family" is used in the chapter providing for homesteads in the sense of denoting the surviving wife and children. It relates to "the provision for the support of the family and of the homestead." Section 1464 provides that the widow or children may remain in possession of the homestead, "of all the wearing apparel of the family," etc. Section 1466 requires the court to make allowance for the maintenance of the family. Section 1468 provides that when property "is set apart to the use of the family," etc. If the estate is of less value than \$1,500, and there be a widow or minor children, the court shall require parties interested to show cause why it should not be set apart for the use of the family. Section 1469. The term "family" throughout the chapter is used as synonymous with and as representing the surviving wife or husband and children, if any. When the court used the term "family" in its decree we must hold that it expresses the meaning and is used in the sense of the statute, and is therefore sufficiently explicit to describe the widow and children.

We have referred to these several objections as if they were presented on an appeal from the decree setting apart the homestead, but it must be borne in mind that this is a collateral attack upon those proceedings, and can only avail by showing such errors as render the decree not voidable, but absolutely void. *Kearney v. Kearney*, 72 Cal. 592, 15 Pac. Rep. 769; *Gruwell v. Seybolt*, 82 Cal. 10, 22 Pac. Rep. 938; *Leach v. Pierce*, 93 Cal. 618, 29 Pac. Rep. 235; *Estate of Maxwell*, 74 Cal. 385, 16 Pac. Rep. 206; Code Civil Proc. § 1908, subd. 1; 1 Freem. Judgm. § 319b. The court did not err in ruling out as immaterial and irrelevant the evidence that, after the death of her husband, Maggie O'Connor purchased with her separate funds a lot of land in the town of Pomona, and resided upon the same with her children, and declared a homestead thereon, which lot was sold under a foreclosure sale, and subsequently redeemed and sold by her before the application for a homestead herein. If, as before stated, the right to a homestead herein was one which inured to her and her children jointly, which she could not individually convey or waive, because of such joint right, then this evidence was not admissible, as the only effect of it would be to show a waiver on her part. For like reasons there is nothing in the decree of distribution, entered long after the homestead was set aside, which could have a bearing upon the action of the court in the homestead matter, or affect the rights of the plaintiffs thereunder. The possession of defendant under the agreement of April 14, 1883, was in subordination to the title of plaintiffs, and did not become adverse to plaintiffs, or either of them, until the date of the deed of September 1, 1885. This action was commenced April 11, 1890, less than five years after the execution of the deed; hence the cause of action was not barred by the statute of limitations. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

100 Cal. 20

STORY & ISHAM COMMERCIAL CO. v.
STORY et al. (No. 19,015.)

(Supreme Court of California. Oct. 10, 1893.)

COUNTERCLAIM — CONVERSION — DAMAGES — JOINT DEFENDANTS — DEFENSE AS TO ONE.

1. Defendant agreed to pay the debts of plaintiff corporation, and, as security, plaintiff conveyed to her all its notes and accounts, merchandise on hand, and all its property, with certain exceptions. It was agreed that plaintiff should endeavor to sell the merchandise, and apply the receipts to the payment of defendant, and that the property conveyed to

defendant should not be sold at less than its cost to plaintiff, without the consent of plaintiff's directors. Subsequently, defendant, without plaintiff's knowledge, sold a portion of the goods, and plaintiff sued for conversion. Defendant, for answer, set up the whole agreement; alleged performance on her part, and that there was due her, above the value of the property sold, a large sum; and prayed an accounting. *Held*, that such answer was a proper counterclaim, within Code Civil Proc. § 438, providing that "a cause of action arising out of the same transaction" may be so set up, and the fact that plaintiff alleged no facts to show that the counterclaim arose out of the same transaction did not prevent defendant from setting out the entire transaction, and thus showing the relation of her claim thereto.

2. The action being to recover the value of the goods, and not the goods themselves, the right of defendant to assert a lien thereon was not involved, so that Civil Code, § 2910, providing that the wrongful conversion of personal property by a person holding a lien thereon extinguishes the lien, had no application, for, by its choice in its form of action, plaintiff adopted the sale, and affirmed the title thereby conveyed.

3. The trial court found that, at all times after making the agreement, defendant claimed to be the owner of the property mentioned therein, so that her making the sale was in pursuance of her construction of its terms. The court also found that she made the sale on an agreement by her vendee that he would pay the price on the debts of plaintiff for which she had become liable. *Held*, that the agreement itself not being free from ambiguity, and defendant having acted according to her construction of it, while, if her construction was wrong, and plaintiff suffered thereby, it had a cause of action against her, yet it could not recover damages independent of an adjustment of their respective rights under the entire agreement.

4. Where the liability of a number of defendants for conversion, if any exists, is several as well as joint, a defense set up by one that will defeat plaintiff's recovery is available for the other defendants.

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by the Story & Isham Commercial Company, a corporation, against Adella B. Story and others, for the alleged conversion of certain goods. Judgment was entered in favor of plaintiff, and both parties appeal. Reversed.

Mr. Works and M. S. Babcock, for plaintiff. Luce & McDonald and Sprigg & Barber, for defendant.

HARRISON, J. In February, 1891, the plaintiff, being largely indebted to Mrs. Adella B. Story, defendant, and also to other creditors, made an agreement with her as follows: "Whereas, Mrs. A. B. Story has agreed to pay all the debts existing against the Story & Isham Commercial Company on the 1st day of February, 1891, including those payable to herself; and whereas, said Story & Isham Commercial Company desires to secure said Mrs. Story for the payments made and to be made by her on account of the said debts; Now, therefore, in consideration of said agreement and the payment of said debts, the said Story & Isham Commercial

Company, pursuant to a resolution of its board of directors at a meeting thereof duly called and had, hereby agrees to pay to said Mrs. A. B. Story all sums paid or agreed to be paid by her on account of said debts, including costs and expenses, notes, attorneys' fees, and judgments, and such things as she may pay on account of said debts, and in procuring the money with which to meet the same. And, as security for the payment of said sums, the Story & Isham Commercial Company agrees to and does sell, assign, convey, and transfer to said Mrs. A. B. Story all notes, accounts, and other demands due or payable to said company, and all goods and merchandise on hand, in store or in transit, owned by it, and all other property owned by it, at law or in equity, excepting, however, that said company reserves the right to use in its business the first sums collected by it, either on sales made or demands due, not exceeding \$2,000, and also reserves the real estate owned by it; but all sums realized from a sale, pledge, or mortgage thereof, not exceeding \$2,000, shall be applied as a payment on the sums payable to said Mrs. A. B. Story, as above specified. Said Commercial Company shall use its best efforts to realize as soon as practicable on said demands and merchandise, and apply the sums received therefor on the sums payable to said Mrs. A. B. Story, as herein provided. The expense of running the said company shall be divided between the old business and the new in proportion to the sales made on account of the goods hereby sold to Mrs. Story and those sold on account of transactions subsequent to February 1, 1891. The property hereby conveyed to Mrs. A. B. Story shall not be sold at less than it cost the Commercial Company, without a direction of the board of directors of said company. Executed and delivered this 5th day of February, 1891. The Story & Isham Commercial Co. Per A. H. Isham, Vice Pres. and Mgr. Adella B. Story." At that time the plaintiff was engaged in the business of merchandising, and was owner of certain personal property, which it had in its custody, and which was included in the aforesaid agreement. On the 26th of February, 1891, Mrs. Story, without the knowledge and consent of the plaintiff, sold to the defendant Bates a portion of said personal property, who took possession thereof without the consent of the plaintiff, and afterwards sold and disposed of the same. On the 2d of March, 1891, the plaintiff brought this action against the defendants for the conversion of the personal property so conveyed by Mrs. Story to the defendant Bates. The defendants, in their answer, set up the foregoing agreement, and the circumstances under which it was made, alleging performance by Mrs. Story of her part of the agreement, and that she had paid out on account of the debts of the plaintiff the sum of about \$115,000, and that there was

due to her, above the value of the property which she had sold to Bates, upwards of \$50,000, and prayed for an accounting, and judgment in her favor against the plaintiff. The court finds that the cost price of the property sold by Mrs. Story to Bates was \$38,550; that that was also the value of the same; that at the time when she sold the goods the plaintiff was indebted to her in the sum of \$24,206; and that she had also caused debts of the plaintiff, to the amount of \$5,523, to be satisfied by having its creditors accept in satisfaction of said debts certificates of deposit issued therefor by the California National Bank of San Diego. The court also found "that by an arrangement between the defendant Adella B. Story and the California National Bank the said bank, on the 26th day of February, 1891, canceled, and marked 'Paid,' notes of the plaintiff held by said bank in the sum of \$15,200, and the same were thereby paid;" and also that, after the sale and taking of said property, she had paid the balance of the debts of the plaintiff, amounting, with the sum paid and amounts due her, to \$113,000, a portion of which was paid out of the proceeds of the property sold by her to Bates. Upon these findings the court made its conclusions of law that the plaintiff was entitled to recover from the defendants the value of the property converted by them, with interest thereon, amounting to \$40,678.79, less \$29,717.54, the amount, with interest thereon, due from the plaintiff to Mrs. Story, and the amount for which she had caused its debts to be satisfied by the certificates of deposit issued by the bank, and that the plaintiff was entitled to judgment in the sum of \$10,961.25, and rendered judgment accordingly. From this judgment, both parties have appealed,—the plaintiff, upon the ground that the court erred in allowing any deductions from the value of the goods sold by Mrs. Story to Bates; and the defendants, on the ground that Mrs. Story should have been allowed the entire amount of her payments for the plaintiff, and should have had a judgment in her favor for the difference between that amount and the value of the goods.

It is contended by the plaintiff, in the first place, that the matters set forth in the answer do not constitute a counterclaim to the cause of action set forth in the complaint, and were not available as a defense thereto. Section 438, Code Civil Proc., provides that the counterclaim which the defendant is permitted to plead "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." One of the definitions given by the Century Dictionary to the

term "transaction," is "a matter or affair, either completed or in course of completion." Mr. Pomeroy, in his treatise on Remedies and Remedial Rights, (section 774,) defines the term, as used in this section, to be "that combination of acts and events, circumstances and defaults which, viewed in one aspect, results in the plaintiff's right of action, and, viewed in another aspect, results in the defendant's right of action," and says, further: 'As these two opposing rights cannot be exactly the same, it follows that there may be, and generally must be, acts, facts, events, and defaults, in the transaction as a whole, which do not enter into each cause of action, but are confined to one of them alone.' See also, *Bank v. Lee*, 7 Abb. Fr. 372; *Ritchie v. Hayward*, 71 Mo. 560; *Judah v. Trustees*, 16 Ind. 60. Every transaction is more or less complex, consisting of various facts and acts done by the respective parties; and it frequently happens that one or more of these acts would, if viewed by itself, be such a violation of duty as to give to the other a right of action, but the obligation thus created may be so counterbalanced by other matters growing out of the same transaction that no compensation ought to be made therefor. While the parties are carrying their agreement into execution, and mutual rights and obligations accrue by reason of the failure of either or both of them to comply strictly with its terms, neither party should have the right, so long as the agreement is in force, and is in process of execution, to recover the damage sustained by him from any breach of duty by the other, without at the same time satisfying any obligation against himself growing out of the same affair. In such a case the rights of the one are so dependent upon the rights of the other, that simple equity requires that the respective causes of action in behalf of each should be adjusted in a single suit. From an early day the tendency of judicial decisions has been to avoid circuitry of action and multiplicity of suits, by permitting matters growing out of the same transaction, which might constitute an independent cause of action, to be given in evidence by way of defense; and the foregoing section of the Code of Civil Procedure is an additional legislative step in the direction of this judicial tendency. As a corollary therefrom, it follows that the form in which the plaintiff may set out his cause of action ought not to be conclusive upon the right of the defendant to set forth his counterclaim in his answer. The plaintiff is to set forth the facts which constitute his cause of action; but, if the other facts in the transaction are so connected with those set forth as to defeat their legal effect, the defendant is not precluded from setting them up by reason of the form which the plaintiff may have chosen for presenting his own side of the case. *Pom. Rem. & Rem. Rights*, § 772; *Gordon v. Bruner*, 49 Mo. 570; *Brady v. Brennan*, 25

Minn. 210; *Bitting v. Thaxton*, 72 N. C. 549; *Thompson v. Kessel*, 30 N. Y. 383; *Chandler v. Childs*, 42 Mich. 128, 3 N. W. Rep. 297. It is for the purpose of enabling the court to render a judgment by which the rights of the parties may be finally determined in the same action, rather than to compel another action, that the Code permits a defendant to set up in his answer any new matter arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim; and, if the plaintiff omits or fails to set forth in his complaint the entire transaction out of which his claim arose, the defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court. The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on this fact alone, if the fact is so connected with others that it forms only a portion of the transaction. The transaction which was the foundation of the cause of action set forth in the complaint herein is not limited to the facts therein set forth, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of their written agreement. If the plaintiff had set out in its complaint the entire transaction between it and Mrs. Story, beginning with the agreement, and the circumstances under which it was made, and giving in detail her sale of the property to Bates, that its value was \$38,550, and that the proceeds thereof had been applied by her in payment of its debts, and also showing that in pursuance of said agreement she had paid the entire debts of the plaintiff, amounting to \$113,000, it would then have appeared, upon the face of the complaint, that the plaintiff was not entitled to recover from her the value of the property sold by her, without at the same time recompensing her for the payments that she had made for its account. If, on the other hand, Mrs. Story had brought an action against the plaintiff for the amount of money paid by her under the agreement, the plaintiff would have had the right to deduct from that amount the value of the property sold by her, and it would not have lain in her mouth to say that she was a trespasser, and therefore not liable to have her tort set off against the contract of the plaintiff. But the rights of the several parties to plead a counterclaim in defense to an action by one against the other for a breach of their respective obligations arising out of the facts in controversy between them must be reciprocal. The entire transaction between them, and the rights resulting therefrom, are to be determined by the court; and it is incumbent upon the court, after hearing all the proof relative to that transaction, to render such judg-

ment as may be consistent with the case, as presented by both parties.

Much of the argument of the plaintiff has been directed to the terms of section 2910, Civil Code, which provide that the wrongful conversion of personal property by a person holding a lien thereon extinguishes the lien. But, as this action is brought to recover the value of the goods, and not for the goods themselves, the right of the defendant to assert a lien thereon is not involved. If the plaintiff had brought its action against Mrs. Story to recover possession of the goods, the effect of this section would have properly arisen; but, by bringing it for the value of the goods, he adopts her sale, and affirms the title conveyed thereby. It is a well-established principle that when one has converted to his own use, or sold, the goods of another, the latter may waive the tort, and sue in assumpsit. It is immaterial in which mode he seeks redress for the wrong. In either case, he can claim only a pecuniary compensation; and whether he claim this in assumpsit, as upon a sale, or for the value of the goods, as by conversion, he establishes only a pecuniary obligation, which the defendant may controvert by any facts connected with the transaction out of which the plaintiff's claim arose. The form in which the plaintiff brought the present action is immaterial, as it might have treated the defendant as having received the proceeds of the goods sold by her, and sued her therefor. But, whatever form of action it might select, it was only entitled to compensation for the goods, and, in a suit for the taking, it could only receive the amount in which it had been damaged. By its agreement with Mrs. Story, it had appropriated this property to the payment of its obligation to her; and in the absence of any finding or any claim by it that it has suffered diminution of estate or damage beyond the value of the property, if that value was appropriated by her to the purpose to which the parties had agreed it should be appropriated, it cannot claim any further compensation from her. By its agreement with her, it placed itself under an obligation to her for the payment of all the moneys which she should advance for its debts; and, as the court finds that she has paid therefor the sum of \$113,000, it can only claim that the value of the property sold by her be deducted from that amount. By treating the goods as the property of the defendant, and suing merely for their value, the plaintiff has elected to treat the obligation as of a fixed value, and it is immaterial in what form it stated its cause of action. In either case, it would be competent for Mrs. Story to show that by virtue of the agreement between them the property had been subjected to the payment of the plaintiff's obligation to her, and that she had made such applica-

tion, and to ask that the remainder of the unperformed part of the contract should be enforced.

The court finds that, at all times after making the said agreement, Mrs. Story claimed that by virtue thereof she had become the owner of the property mentioned therein, and it follows that her making a sale of it to Bates was in pursuance of her construction of its terms. The further finding of the court that her sale was made to Bates with the agreement on his part that he would pay the cost price of said property on the debts of the plaintiff for which she had become liable also supports the position that she made the sale in purported compliance with the terms of the agreement. The agreement itself is not free from ambiguity, and it is not an unnatural construction that it was the intention of the parties that after its execution the goods should remain in the custody of the plaintiff, and that either party should have the right to sell and dispose of the same, and that all sales made by either party should be applied in reduction of the debts of the plaintiff that had been assumed by Mrs. Story. Her claim to have become the owner of the property by virtue of the agreement must be assumed to have been made by her in good faith, and there is no finding of force or oppression, or of any willful wrong, out of which a right to any punitive damages could accrue to the plaintiff. It is clear from the findings that Mrs. Story was not acting in any repudiation of the agreement by which the property was conveyed to her, but in accordance with her own construction of its effect. If that construction was erroneous, so that the plaintiff suffered loss thereby, the result of such construction may have given the plaintiff a cause of action against Mrs. Story; but it does not follow that it is entitled to recover damages from her independent of an adjustment of their respective rights under the entire agreement. Mrs. Story had a cause of action against the plaintiff for the money paid by her in releasing it from its debts, and this cause of action "arose out of"—that is, it resulted from—the same transaction or negotiation as did the plaintiff's right to compensation for the goods which were sold by her to Bates. Both had their origin in the agreement between them for the payment by her of the debts, and the appropriation by the plaintiff of its property as a mode of reimbursing her, and the sale of the goods by her, as well as her payment of the debts, were only separate acts in carrying out the terms of their agreement, and completing this transaction. The act of Mrs. Story in making a sale to Bates of the property described in the complaint was so connected with the business referred to in the agreement between her and the plaintiff, that the entire transaction must be consid-

ered, in order to determine whether her act was wrongful or right; and, even if it should be held that the sale to Bates was not specifically authorized by the terms of the agreement, it is clear from the findings of the court that it was not done in any repudiation of the agreement. She purported to act under, and not in antagonism to, the agreement, so that the plaintiff's right of action would be for damages resulting from a breach of a portion of the agreement, rather than for an invasion by her of its rights, independent of and disconnected with the obligation created by the agreement.

The contention of the plaintiff that, inasmuch as this action is brought against the three defendants, a cause of action existing in favor of Mrs. Story alone is not available as a defense, cannot be maintained. The liability of the defendants, if any existed, is several, as well as joint; and, if Mrs. Story could set up any defense that would defeat the plaintiff's right of recovery, it was available for the other defendants. Whatever shows that the plaintiff had no right of recovery, as against Mrs. Story, protects the other defendants, who were acting under her and by her authority.

The sum of \$15,200, which the court finds is the amount of the debts of the plaintiff which Mrs. Story caused to be paid on the same day that she sold the goods to Bates by an arrangement between her and the California National Bank, added to the \$29,717.54, which the court also finds was due her from the plaintiff at that time, shows that she had then paid more than the entire value of the goods, and consequently she should not be charged with any interest upon that value. As the court finds that Mrs. Story had fully complied with her part of the agreement, it follows that judgment should have been rendered in her favor for the difference between the amount paid by her for the account of the plaintiff, and the value of the goods sold by her to Bates; and the judgment of the court below is reversed, with directions to enter judgment against the plaintiff, and in favor of Mrs. Story, for the sum of \$74,450, with her costs of suit, as of the 10th day of December, 1891.

We concur: DE HAVEN, J.; McFARLAND, J.; FITZGERALD, J.

100 Cal. 41

STORY v. STORY & ISHAM COMMERCIAL CO. et al. (No. 19,077.)

(Supreme Court of California. Oct. 10, 1893.)
RES JUDICATA—PENDING ACTION—EFFECT AS BAR.

Under Code Civil Proc. § 1049, declaring that "an action is to be deemed pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied," the judgment cannot, during such time, be pleaded in bar of another action.

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Adella B. Story against the Story & Isham Commercial Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

Luce & McDonald and Sprigg & Barber, for appellant. Mr. Works and M. S. Babcock, for respondents.

PER CURIAM. This action is closely connected with the action of Story & Isham Commercial Co. v. Story, (No. 19,015,) 34 Pac. Rep. 671, (this day decided,) and was argued and submitted to the court at the same time. After the former action had been brought against the present plaintiff she commenced the present action for the purpose, among others, of restraining the defendants from interfering with the property conveyed to her by the agreement, of which a copy is set forth in the opinion in that case, and to have the demands and choses in action that had been assigned to her thereby sold or collected under the direction of the court, and applied in payment of the indebtedness of the corporation to herself. The two actions were pending in different departments of the superior court in the county of San Diego, and the action in which the present appellant was defendant was tried first, and judgment therein rendered against her December 10, 1891. Thereafter, the corporation defendant filed a supplemental answer herein, pleading the judgment in the other action as a bar to the plaintiff's right of recovery; and upon the submission of the cause, December 23, 1891, the court made its finding to that effect, and rendered judgment in favor of the defendants. From that judgment the plaintiff has appealed.

The court erred in holding that the judgment rendered in the other action was a bar to the plaintiff's right of recovery for the moneys paid by her under the agreement. At the time that the court made its decision in the present case, the other action was still pending, (section 1049, Code Civil Proc.,) and while that action was so pending the judgment rendered therein could not be a bar to the prosecution of the present action, (*Naftzger v. Gregg*, [Cal.] 33 Pac. Rep. 757; *Estate of Blythe*, [Cal.] 34 Pac. Rep. 108.) The justice of this rule is apparent, in view of the fact that the judgment pleaded by the respondent, and determined by the court below to constitute a bar to the plaintiff's cause of action, has been reversed in this court. The judgment is reversed.

(100 Cal. 234)

POWELL v. PATISON et ux. (No. 18,002.) (Supreme Court of California. Nov. 8, 1893.)

MORTGAGE—FORECLOSURE—IMPERFECT RECORD ON APPEAL—REVIEW.

Where, on appeal, the only question is whether an instrument sought to be fore-

closed was given as a mortgage, and the question was treated as an issue of fact below, but no finding was made, and the instrument is not brought up by the record, and is only pleaded according to its legal effect, there is nothing by which the appellate court can determine the nature of the instrument, and a decree refusing a foreclosure must be reversed.

Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by Henry Powell against Henry Patison and wife to foreclose an instrument given to secure the payment of money. From a decree denying a foreclosure, plaintiff appeals. Reversed.

P. J. Hazen, for appellant. Stonesifer & Minor, for respondents.

FITZGERALD, J. The complaint substantially alleges that on June 22, 1881, the defendants Henry Patison and his wife, Emma J. Patison, executed to plaintiff's assignor their promissory note for \$2,000, payable on the 22d day of June, 1885, with interest as therein specified; that at the same time they executed to the defendants Hamilton and Coleman, as trustees, a conveyance of the real property therein described to secure the payment of the principal and interest mentioned in said note according to the terms thereof, and that said deed of trust was intended and given to said trustees as a mortgage for that purpose. The answer admits the execution of the deed of trust, but specifically denies that it was intended and given as a mortgage. Plaintiff had judgment for the full amount of the note, but the court refused to decree a foreclosure, and it is from that part of the judgment that plaintiff appeals.

The only question arising on this appeal is whether the instrument sought to be foreclosed was given and intended as a mortgage. Upon this issue raised by the pleadings, and which is treated and discussed as an issue of fact, the court below made no finding, and, as the instrument itself is not brought up by the record, and is pleaded only by its legal effect, there is nothing before us by which we can determine whether it is an absolute deed of trust or a deed of trust in the nature of a mortgage. There is a well-recognized distinction between these instruments. The former is a conveyance of the property to a trustee for the purpose of selling it to pay debts. The effect of such an instrument is to pass the title absolutely to the trustee, and it vests in him unconditionally and indefeasibly for the purposes of the trust. In the latter the property is conveyed to a trustee merely as collateral security for the payment of a debt, upon an express condition of defeasance, and with power to sell and pay the debt in case of default by the trustor. As we are unable to determine from the record to which class the instrument in question belongs, that

part of the judgment appealed from must, for this reason, be reversed. So ordered.

We concur: McFARLAND, J.; DE HAVEN, J.

100 Cal. 236

POWELL v. PATISON et ux. (No. 18,073.) (Supreme Court of California. Nov. 8, 1893.)

HOMESTEAD — MORTGAGE BY HUSBAND — SUBSEQUENT ACQUIREMENT OF TITLE BY HUSBAND — EFFECT — SECURED DEBT — PERSONAL JUDGMENT

1. Under Civil Code, § 1242, providing that a married person's homestead cannot be incumbered except by the joint act of husband and wife, a mortgage by the husband alone is void, and is not validated by the husband's subsequent acquirement of the homestead by a decree of divorce which assigns it to him, since a subsequently acquired title does not relate back so as to give effect to a void instrument.

2. A personal judgment on a note secured by a valid trust deed is erroneous, since the security must first be exhausted. *Barbieri v. Ramelli*, 23 Pac. Rep. 1086, 84 Cal. 154, followed.

Department 2. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by Henry Powell against Henry Patison and wife. From a judgment for plaintiff, defendants appeal. Affirmed in part and reversed in part.

P. J. Hazen, for appellants. Stonesifer & Minor, for respondent.

FITZGERALD, J. It appears that on the 2d day of October, 1877, the defendant Henry Patison was the owner and resided with his family on the premises in question; that on that day his wife, the defendant Emma J. Patison, declared a homestead thereon, and that they continued to actually occupy the same up to the 29th day of August, 1887, and that the homestead so declared has never been abandoned; that on September 26, 1884, the defendant Henry Patison made his promissory note to plaintiff for \$1,000, and to secure the payment thereof he mortgaged to plaintiff the homestead premises; that on the 29th of August, 1887, the defendant Henry Patison obtained a divorce from his wife, the said Emma J. Patison, and the homestead premises were by the judgment assigned to him. It is claimed by appellants that the court erred in decreeing a foreclosure of the mortgage, for the reason that when the mortgage was executed by the husband there was a valid and subsisting homestead on the premises sought to be mortgaged. Section 1242 of the Civil Code provides that "the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Under these provisions it is clear that the homestead cannot be conveyed or incumbered except by the joint act of the husband

and wife. Hence a conveyance or mortgage thereof by the husband alone is inoperative and void, (*Gleason v. Spray*, 81 Cal. 220, 22 Pac. Rep. 551; *Gagliardo v. Dumont*, 54 Cal. 496,) and does not become valid by the premises subsequently losing their character as a homestead, if in this case it can be said that by the decree assigning to the husband the homestead premises they, by reason of that fact, lost their character as such; nor does a subsequently-acquired title relate back so as to give effect to a void instrument. It therefore follows that, as the mortgage herein was void in its inception, the defendant is not estopped from denying its validity, as would be the case if the mortgage itself was a valid instrument.

The claim that the court erred in rendering a judgment against the defendants on their promissory note secured by a valid deed of trust, and which was also sought to be foreclosed as a mortgage in this action, (see case No. 18,002, just decided by this court,—34 Pac. Rep. 676,) must be sustained, for the reason that it is well settled on authority in this state that a "personal judgment on a secured debt before the security has been legally exhausted is erroneous." *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. Rep. 1086; *Crim v. Kessing*, 89 Cal. 487, 26 Pac. Rep. 1074; *Biddel v. Brizzolara*, 64 Cal. 362, 30 Pac. Rep. 609.

The motion to dismiss on the ground that plaintiff neglected to demand and have judgment entered for more than six months after final submission of the cause was properly denied. The personal judgment against the defendants Patison on their note secured by a valid deed of trust, and that part of the judgment decreeing a foreclosure of the mortgage, is reversed, but the judgment on the \$1,000 note attempted to be secured by the mortgage sought to be foreclosed in this action, the same being void and of no effect, is affirmed. So ordered.

We concur: McFARLAND, J.; DE HAVEN, J.

100 Cal. 256

CLARK v. COLLIER. (No. 13,565.)

(Supreme Court of California. Nov. 8, 1893.)

BUILDING CONTRACT — CONSTRUCTION — PARTIAL PAYMENTS — SUBSTANTIAL COMPLETION — DESTRUCTION BY FIRE.

1. A contract to repair an old building and build an addition, the old part to be turned round, stipulated a certain sum for the whole work, to be paid as follows: "Old part placed in position \$200; foundation in and frame up, \$300; inclosed, and roof on, chimneys up, and the building completed according to agreement and specifications, \$300." *Held* that, the work on the new part not being in condition to entitle the contractor to the third installment, when the building was destroyed by fire, no recovery on such installment could be had for work on the old part, though that was substantially completed, the contract being an entirety.

2. The second coat of paint not having been

put on the new part, two doors not having been hung, and no lock or fastening put on the front door or windows, and the house not having been delivered to the owner, it was not substantially completed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Action by William P. Clark against R. H. Collier. Judgment for defendant. Plaintiff appeals. Affirmed.

Moses G. Cobb and E. K. Taylor, for appellant. Taylor & Haight, for respondent.

VANCLIEF, C. Action to recover a balance of \$825, alleged to be due and owing from defendant to plaintiff on a written building contract; and also \$50 for extra work. The cause was tried by the court. The judgment was in favor of the defendant. The plaintiff has appealed from the judgment and from an order denying his motion for a new trial.

By the contract the plaintiff agreed to repair an old house, and to build a new addition thereto, to be attached to it. The old house was to be turned partly round, removed from its old foundation and placed on a new brick foundation, to be laid by plaintiff under both the old house and the new addition. The plans and specifications of the work to be done upon both the old and the new parts, to which the contract referred, are ordinarily minute. The defendant agreed to pay for the whole work \$1,325, by installments as follows: "Old part placed in position, \$200; foundation in and frame up, \$300; inclosed, and roof on, chimneys up, and the building completed according to agreement and specifications, \$300. Balance to be paid on completion of work, if not otherwise agreed upon by both parties hereto." As the work progressed the first two installments were paid, but before further payment was made the whole house (old and new parts) was consumed by fire, without apparent fault of either party.

1. It is not contended that the plaintiff is entitled to recover either the third or last installment unless the conditions stated in the agreement upon which the third installment was to be paid had been performed by plaintiff before the fire. But counsel for appellant contend that these conditions refer only to the new building. They say, "The old house was not to be inclosed, nor any roof put on, nor any chimneys put up." Conceding this, it is not perceived that the effect would be as claimed by counsel, even if, as they contend, the old house was substantially completed before the fire; since no reason appears why the payment of installments may not have been conditioned upon work on the new part. But counsel are mistaken in regard to chimneys. A chimney was to be built in the old part. The contract specifies: "Old house to be moved and turned side to Taylor avenue; chimneys to

be taken down and new one built, with wood fireplace where shown on plan." Besides, plaintiff testified that he understood "the terms, 'building completed according to agreement and specifications,' to refer to the old house." The contract is an entirety. There is nothing in it by which the price to be paid for any of the work or materials can be distinguished from that to be paid for any other part. The word "building," in the condition upon which the third installment was to be paid, comprehends the new part, as clearly indicated by the condition of the first payment,—“old part placed in position,” not old building placed in position. I think the trial court correctly construed the contract in this respect.

2. It is contended, however, that both parts of the building were substantially completed before the fire; but without conflict the evidence shows that no part of the second coat of paint upon the new part, required by the contract, had been put on; that the workbench of the carpenters and the paint for the second coat were in the new part at the time of the fire; that two of the doors were not hung, no lock nor fastenings on the front door, and no fastenings on the windows; and that the house had not been delivered to defendant. The plaintiff testified, however, that two days before the fire he had told defendant's wife that the old part of the house was finished, and that she might move into it; but this was contradicted by Mrs. Collier. The court found that plaintiff had never finished, completed, nor delivered the house, and that defendant had never accepted it; and I think the evidence sufficient to justify this finding.

3. Upon the count for extra work the court found for the defendant. As to all the items of this count the evidence was substantially conflicting, except as to one door lock, of the value of 50 cents, which, as compared with the sum in contest, may be considered as *de minimis*. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

100 Cal. 260

HIGGINS v. COLE et al. (No. 18,089.)
(Supreme Court of California. Nov. 8, 1893.)
CITIES OF THE FIFTH CLASS—CHIEF OF FIRE DEPARTMENT—ELECTION AND APPOINTMENT—ORDINANCES.

1. One elected chief of the fire department of a city of the fifth class under an ordinance providing that he shall be elected annually by members of the department, is not entitled to hold the position for the year, an ordinance having in the mean time been passed, to take effect immediately, providing for the appointment of the chief of the fire department by the board of trustees.

2. Under an ordinance providing that the chief of the fire department shall be appointed annually by the board of trustees, to hold office for a year, or until his successor is appointed and qualified, the trustees may remove him and appoint a successor within the year.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by E. R. Higgins against S. H. Cole and others for injunction. From an order dissolving a temporary injunction, plaintiff appeals. Affirmed.

Frank H. Short, George A. Nourse, C. C. Merriam, and Austin & Drew, for appellant. Reed B. Ferry, for respondents.

BELCHER, C. The city of Fresno is a municipal corporation, organized in 1885, under the provisions of an act of the legislature approved March 13, 1883, entitled "An act to provide for the organization, incorporation, and government of municipal corporations." It is of the fifth class named in the act, and has a board of trustees vested with power, among other things, "to provide fire engines and all other necessary or proper apparatus for the prevention and extinguishment of fires;" "to appoint and remove such policemen and other subordinate officers as they may deem proper, and to fix their duties and compensation;" "to establish fire limits, with proper regulations;" and "to do and perform any and all other acts and things necessary to carry out the provisions of this chapter," etc. Section 764, subs. 6, 15, 18, 19. The city now owns, and ever since its incorporation has owned, three fire engines and other apparatus for the prevention and extinguishment of fires, and it also has, and has had, a volunteer fire department. In 1891 there was a city ordinance, No. 224, providing: "Section 1. The fire department of this city shall consist of volunteer companies of firemen, organized into engine, hose and hook and ladder companies, who shall elect their officers. Sec. 2. The chief of the fire department, and his assistants, shall be elected annually by members of the department, with the approval of the board of trustees, and shall give such bond as the board of trustees may require." On the 18th of January, 1892, an ordinance (No. 248) was passed, amending the foregoing ordinance, and reading as follows: "Section 1. The fire department of the city shall consist of volunteer companies of firemen, organized into engine, hose and hook and ladder companies, who shall elect their own officers, to wit: the foreman, who is the presiding officer, a secretary and a treasurer. Sec. 2. The chief of the fire department, and his associates, shall be appointed annually by the board of trustees, to hold office each for one year, or until his or their successors are appointed and qualified. And the chief of the fire department shall give a bond," etc. "Sec. 3.

This ordinance shall take effect and be in force immediately from and after its passage and approval."

In December, 1891, the plaintiff, E. R. Higgins, was elected chief of the fire department by the members thereof, and on the 21st of that month notice of such election was given to the board of trustees. It being suggested that the trustees must make the appointment themselves, in order to make it legal, the matter was continued from time to time until February 1, 1892, when the plaintiff was elected chief by the trustees. Thereafter, on March 7, 1892, the board of trustees passed a resolution declaring the position of chief of the fire department vacant, and then appointed the defendant, Timothy Walton, to fill the vacancy. The trustees also by resolution directed the city marshal to put the said Walton in possession of all the fire apparatus owned by the city. The plaintiff, when notified of this action of the trustees, denied their right to remove him from his position as chief, or to take from his possession and control the fire apparatus of the city; and thereupon, on March 8th, he commenced this action against the trustees, the city marshal, and the said Walton, alleging, among other things, that he was then the chief of the volunteer fire department of the city, and as such was in possession and entitled to the possession of all the fire apparatus of the city; that all the acts of the trustees in declaring his position vacant and electing Walton to fill his place, and in directing the city marshal to take from his possession the fire apparatus and to deliver possession of the same to Walton, were done without right or authority of law; that the marshal and Walton had demanded that plaintiff deliver to them the possession of the said apparatus, and had threatened to take immediate and unlawful possession of the same, and unless restrained would proceed forcibly, unlawfully, and wrongfully to execute their threats; wherefore, he prayed that the court make an order enjoining the defendants, and each of them, from taking forcible or other possession of said fire apparatus, or interfering with the same, or molesting the plaintiff's possession thereof. Upon this complaint the court granted a temporary injunction, but subsequently, on motion of defendants, dissolved it; and from that order the plaintiff appeals.

In support of the appeal it is contended: (1) That the members of the fire department were authorized and empowered to elect a chief of the department, without the approval of the board of trustees; and that the appellant, having been so elected, was clothed with authority to hold possession of, manage and control the fire apparatus of the city; and that the trustees had no right to interfere with or disturb his possession, management, and control thereof. (2) That if the

trustees had the right to appoint a chief, their action in removing appellant, after he had been appointed by them and before the expiration of his term of office of one year, was without authority of law, and was null and void. That part of the act of 1883 relating to municipal corporations of the fifth class, and under which Fresno was organized as a corporation, contains no special provisions in regard to a volunteer or paid fire department, and we are cited to no general statute providing that any fire department shall have authority to elect its own chief. Section 3335 of the Political Code provides how fire companies may be formed and organized in incorporated and unincorporated cities, towns, or villages. Section 3336 provides that "every such fire company must choose or elect a foreman, who is the presiding officer, and a secretary and treasurer," etc. And sections 3342 and 3343 prescribe the duties of the chief of the fire department. In none of these provisions, however, is anything found which can be construed as giving the chief a right to the possession or control of the fire apparatus, or prescribing the manner of his election or appointment. This being so, appellant had no rights or authority, as chief of the fire department, except such as he acquired under the ordinances of the city. His first contention cannot, therefore, be sustained.

The solution of the second question presented must depend upon the validity and effect of Ordinance No. 248. Appellant contends that that ordinance was ultra vires and void, but no constitutional provision or statute is cited, and we know of none with which it is in conflict. By the statute under which the city was organized the board of trustees was given power "to pass ordinances not in conflict with the constitution and laws of this state or of the United States," (section 764, subd. 1,) and the ordinance in question must therefore be held valid. The ordinance, in effect, provided that the chief should be appointed to hold office for one year, or until his successor should be appointed and qualified. This, as we understand it, must be construed as declaring only that the term of office shall continue until a successor is elected and qualified, and not necessarily for a full year. And under the statute providing that the trustees may "appoint and remove such policemen and other subordinate officers as they may deem proper," it would seem that it had no power to limit their right of removal. The constitution declares: "When the term of any officer or commissioner is not provided for in this constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making such appointment." Section 16, art. 20. As the term of office of

the chief of the fire department was not fixed by the constitution nor declared by law, it must be held that appellant's term continued only during the pleasure of the appointing power, and that he was rightly removed. In making the order appealed from the court below held that injunction was not in any event the proper remedy to determine the plaintiff's rights; but, in view of the fact that counsel earnestly ask for a decision on the merits, that question may be passed without further notice. We advise that the order be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(100 Cal. 250)

WENZEL v. SCHULTZ et al. (No. 18,125.)

(Supreme Court of California. Nov. 8, 1893.)

VENDOR AND PURCHASER — LIEN — MORTGAGE —
RIGHT OF MORTGAGOR TO COMPEL FORECLOSURE.

1. S. conveyed land, subject to a mortgage, to plaintiff, by absolute deed, as security for a debt. Plaintiff renewed the mortgage, and afterwards, without having his debt paid, reconveyed it to S., who was to sell it, and pay plaintiff. S. conveyed it to his wife, and she conveyed it to D., who had no notice of any vendor's lien on the land. All the conveyances were subject to the mortgage given by plaintiff. *Held*, that plaintiff was not entitled to a vendor's lien on such land.

2. D. is not estopped, in such case, from denying that plaintiff ever had title to the land.

3. Though the note secured by the mortgage given by plaintiff is payable on or before a date specified, he cannot compel a foreclosure of the mortgage before the note is due, especially where D. simply bought the land subject to the mortgage, and did not obligate herself to pay it.

Commissioners' decision. Department 2. Appeal from superior court, Calaveras county; C. V. Gottschalk, Judge.

Action by Frederick Wenzel against Lavantia Schultz, Elizabeth A. Davis, Hattie Stoerling, and Ed. D. Taylor, administrator of the estate of Charles F. Schultz, deceased, to establish and foreclose a vendor's lien on land, and to compel the foreclosure of a mortgage on such land executed by plaintiff to defendant Stoerling. From a judg-

ment of nonsuit, and from an order denying a motion for a new trial, plaintiff appeals. **Affirmed.**

Eagon & Rust, John W. Armstrong, and Armstrong & Platnauer, for appellant. Daniel Titus, for respondents.

SEARLS, C. According to the averments of the amended and supplementary complaint, plaintiff was on the 8th day of December, 1888, the owner of, and in the possession of, certain land described therein. That plaintiff sold and conveyed the land to Charles F. Schultz. The consideration of the sale was \$5,000, as follows: Schultz agreed to pay off a debt of plaintiff to Hattie Stoerling, amounting to \$1,500, evidenced by a promissory note bearing interest at 10½ per cent. per annum, and secured by a mortgage on the land conveyed. The residue of the purchase money, amounting to \$3,500, was to be paid in gold coin. No part of the purchase price was paid. On the 1st of May, 1889, on an accounting between plaintiff and Schultz, there was found to be due to plaintiff on account of the \$3,500, part of the purchase price of the land, the sum of \$2,700, for which sum Charles F. Schultz and Lavantia Schultz, his wife, made to plaintiff their promissory note, payable one day after date, with interest at 9 per cent. per annum. On the 28th day of May, 1889, Charles F. Schultz, being at the point of death, and desirous of avoiding the necessity of administration on his estate, conveyed said land to Lavantia Schultz, his wife, subject to the vendor's lien of plaintiff, and subject to the payment to plaintiff of the purchase money, as aforesaid, of all of which she had notice, and then and there agreed to pay said purchase money to plaintiff. Lavantia Schultz is insolvent. The interest of the defendant Elizabeth A. Davis in said land is vested under a deed from the defendant Lavantia Schultz, dated February 6, 1891, and as a part of the consideration thereof the former assumed and agreed to pay the debt of the plaintiff to Hattie Stoerling, secured by said mortgage; and the deed to her recites that the conveyance is subject to the mortgage which is described therein. Charles F. Schultz died on or about June 30, 1889, and defendant Ed. D. Taylor is administrator of his estate. Defendant Davis has not paid off or discharged the Stoerling mortgage upon the land, and the sum secured thereby was not due when the action was commenced; the note being payable "on or before October 1, 1892." The claim of plaintiff, and the alleged vendor's lien, as well as the agreement to pay the mortgage by Schultz, deceased, was presented to the administrator, and by him allowed as against the estate, but without prejudice to the rights of third persons in the land, and his action was approved by the judge. On the

23d day of November, 1891, plaintiff requested the administrator to institute proceedings for the sale of the land to satisfy his claim, which was refused, whereupon this action was brought. Defendant Elizabeth A. Davis answered, denying, among other things, that the plaintiff was ever the owner of the land in question, or that he sold it to Schultz. She admits her purchase thereof, and avers it was for a valuable consideration, and without notice of plaintiff's alleged vendor's lien, and avers the Stoerling note and mortgage are not due and payable. The case was tried by the court without a jury, commencing June 15, 1892, and a judgment of nonsuit was entered, from which, and from an order denying a new trial, plaintiff appeals.

The motion for a nonsuit was based upon "the ground that said plaintiff has failed to show that he has a lien on the property described in the complaint, or that he was entitled to any relief against said defendants." The nonsuit seems to have been properly granted. The evidence tended to show that Charles F. Schultz was the owner of the property, and, being indebted to plaintiff, he conveyed the land to the latter by an absolute deed of conveyance, but simply as security for the sum of money due said plaintiff. There was an understanding that plaintiff would sell the land, pay off a mortgage held by defendant Stoerling, which Schultz had created, for \$1,400, retain the sum of money due him, and pay to Schultz the residue, if any, received from the sale. Failing to make a sale of the property, by reason of being absent much of the time from the locality, plaintiff reconveyed to Schultz upon an understanding that he (Schultz) would sell the land, pay off the Stoerling mortgage, which plaintiff had renewed in his own name for \$1,500, and pay plaintiff the sum due him from the proceeds. Schultz was sick, nigh unto death, and, at the request of plaintiff, conveyed the land in question to his wife by deed of gift, with a like understanding. The latter conveyed to the defendant Elizabeth A. Davis, subject to the Stoerling mortgage, but, so far as appears, without notice of any vendor's lien on the part of plaintiff. Under such circumstances, the deed from Schultz to plaintiff was a mortgage, and conveyed no title to the latter. Civil Code, § 2924; Code Civil Proc. § 744. Upon its face, the deed from Charles F. Schultz to the plaintiff, under date of April 30, 1885, was an absolute conveyance; and while, between the parties, it only amounted to a mortgage, yet it was sufficient to pass the title as between plaintiff and a purchaser from him, had he sold and conveyed the property in good faith, and for a valuable consideration, to an innocent purchaser without notice. He did not do so, however, but reconveyed the property to his mortgagor, relying, apparently, upon the good faith of the parties, who were

his friends, to make the sale which he had failed to accomplish, and to pay him from the proceeds what was justly due him.

The doctrine of estoppel, invoked by appellant, has no application, as against defendant Elizabeth A. Davis, so far as the vendor's lien is concerned. She is not, in other words, estopped from saying that plaintiff never had title to the land. Her predecessor in interest, Charles F. Schultz, was not estopped from showing that his deed to plaintiff was in fact a mortgage, and neither is she estopped from making the same claim. Were the rule as contended for by appellant, no absolute deed could ever be shown by parol to be intended as a mortgage. We may add that a grantee in fee, who owes no duty to his grantor, is not estopped from disputing the title of such grantor. As was said in *San Francisco v. Lawton*, 18 Cal. 476: "A grantee in fee may deny that his grantor had any title. With the execution of the conveyance, the transaction between the parties is closed. Thenceforth, the grantee holds the property for himself, and is neither bound to surrender possession to his grantor, nor to maintain the validity of his title." In *Osterhout v. Shoemaker*, 3 Hill, 518, it was said: "There is no estoppel where the occupant is under no obligation, express or implied, that he will at some time, or in some event, surrender the possession. The grantee in fee is under no obligation. He does not receive the possession under any contract, express or implied, that he will give it up. He takes the land to hold for himself, and to dispose of it at his pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an entire stranger to the title." *Sparrow v. Kingman*, 1 N. Y. 253; *Blight's Lessee v. Rochester*, 7 Wheat. 548; *Society v. Town of Pawlet*, 4 Pet. 506; *Watkins v. Holman*, 16 Pet. 54; *Barker v. Salmon*, 2 Metc. (Mass.) 32.

The question as to the character of the deed from Schultz to plaintiff was properly in issue. The answer of defendant Davis denied that plaintiff ever owned the land, and under such a denial it was proper to show that the deed to plaintiff was a mortgage, and hence did not convey the title. *Smith v. Smith*, 80 Cal. 323, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549; *Grewell v. Walden*, 23 Cal. 165. It is conceded that the defendant Davis took the land subject to the lien of the mortgage executed by the plaintiff to Hattie Stoerling, but the mortgage was not yet due when this action was commenced. The note which it was given to secure was, it is true, payable on or before October 1, 1892. This gave plaintiff an option to pay it prior to that time, but did not give to the payee a right to enforce it until the date mentioned, and the obligation devolving upon defendant Davis is no greater than that of the plaintiff. Indeed, there

is nothing in the record showing that the defendant Davis ever obligated herself to pay the note. She bought the land subject to the mortgage, and if she does not discharge it the land becomes liable for its payment, not because of any personal obligation on her part to pay the note, but because it is secured by a lien on such land. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

100 Cal. 323

PEOPLE v. MITCHELL. (No. 21,003.)

(Supreme Court of California. Nov. 11, 1893.)

CRIMINAL LAW—MISCONDUCT OF JURY—EVIDENCE.

1. On a murder trial, one of defendant's principal witnesses was a woman who kept a disreputable place, and with whom he lived. During the trial, four of the jurors visited her place repeatedly, and their conduct became so notorious that the judge reprimanded them, and placed them in the custody of the sheriff, and his comments were published in the newspapers. The sheriff also told the jury that if a disagreement was brought about by those of their number guilty of the misconduct, "there will be hell to pay." Held, that a conviction would be set aside, since the freedom of action of the jury had been foreclosed by the notoriety attending their misconduct, and the only way they could free themselves from suspicion was by a conviction.

2. On a trial for the murder of a militiaman, the fact that defendant had been ordered out of the way by an officer, not the deceased, when the company was engaged in skirmish drill, several hours before the murder, is not admissible in evidence, since any inference of ill feeling by defendant against deceased on this ground is too strained.

3. Evidence that a third person is guilty of the murder is admissible, though he had been previously acquitted of the offense.

Commissioners' decision. Department 1. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Rube Mitchell was convicted of murder, and appeals. Reversed.

Clay W. Taylor and Johnson & Chase, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. The defendant was informed against for the crime of murder, and convicted for killing Oscar Crandall in the county of Tehama on the 24th day of April, 1891. The appeal is from a final judgment and from an order denying a motion for a new trial. On a former trial defendant was convicted of murder, and on appeal to this court a new trial was ordered. *People v. Mitchell*, 94 Cal. 550, 29 Pac. Rep. 1106. C. A. Boyden and Frank Hughes were charged in the same information with defendant. Boyden had been tried and acquitted, and Hughes had been discharged without a trial.

It appears, also, that one Long had been indicted or informed against by a separate proceeding for the same offense, and upon a trial had been acquitted. Oscar Crandall was a member of a military company, and on the evening of April 23, 1891, which was a bright, moonlight night, had been out with his company drilling. The defendant was on the ground where the drill was carried on. About 11 o'clock P. M., Crandall, with four comrades, repaired to the Arcade saloon, at the corner of Main and Hickory streets, Red Bluff, kept by Henry Rathja, passed into a back room, and engaged in a game of cards. Crandall did not participate in the game, but witnessed it. Some time later, and, according to a preponderance of testimony, after 12 o'clock, the defendant entered the saloon, passed to the back room, remained a brief period, returned to the front room, met C. A. Boyden, who had come in, engaged in conversation with him, and the two went out together. About the same time, according to the testimony of Rathja, Crandall arose, and walked out the back door upon a high porch which overlooked a back yard, with a gate at the side near the steps leading down from the porch opening into Hickory street, and commenced talking in imitation of a Chinaman. While so talking, some one in Hickory street replied to him, whereupon a conversation involving threats and much vulgarity and obscenity was heard. Crandall evidently went down the steps and to the gate, which was open. A pistol shot was heard, and Crandall was found near the gate, insensible, shot through the head, and with a contused wound on the head near where the bullet entered, from which wounds he died a few hours later. The theory of the defendant at the trial was that he was at a saloon until the south-bound Oregon express arrived, due 11:50 P. M.; that he rode back on the bus of the Tremont hotel to the Cone and Kimball's corner, where he jumped off, went to Rathja's saloon, talked with Boyden, who wanted some opium; that they went to his, defendant's, house, 1½ blocks away, and, while in the act of administering a "shot of opium" to himself and Boyden, they heard the shot, and a few moments after Hughes rushed in, and said a man was shot, whereupon the three men ran to the spot, found the body, and carried it around to the front of the saloon. The testimony on the part of the prosecution was mainly circumstantial. One witness, who heard the conversation between Crandall and his supposed slayer, identified one of the voices as that of defendant. Numerous witnesses testified to the fact that at the time the supposed fatal shot was fired defendant was in his house on High street. Upon the whole case as made by the testimony, it may be said the result very properly depended upon the degree of credit which properly attached to the statements of many of the witnesses. Under

such circumstances, the office of the jury was one calling for the exercise of careful discrimination and sound judgment.

The trial of the cause commenced October 14, 1892. Mary Howard, a woman who lived with the defendant on High street, in Red Bluff, and who was an important witness on his behalf, and who, it is apparent, kept a disreputable place, files an affidavit, and is supported by other and reputable witnesses, showing that four of the jurors at 10 o'clock at night visited her place, drank intoxicating liquor, and that two of the jurors talked with her about the case; that the four jurors were at her house on another night during the trial, and that one of them visited her a number of times during the trial, and while the testimony was being taken. This conduct became so notorious that on the 28th day of October the judge of the court took occasion to deliver to the jury a somewhat lengthy and most sensible admonition, in which he dwelt upon the duty of jurors to refrain from intercourse and association with parties and witnesses intimately connected with the case, and closed his remarks by stating that, unless his suggestions were literally followed, the jury would be placed in the custody of the sheriff. The admonition of the court was published at length in the Daily Sentinel, a newspaper published in Red Bluff, under the heading of "What Does it Mean?" Subsequently, and while some of the jurors were discussing the conduct of the jurors in visiting the Howard place on High street, the sheriff of the county, who was an important witness on behalf of the prosecution, approached them, and declared to them: "If those fellows who were down on High street hang this jury, there will be hell to pay, and you'll all be in it." The sheriff and one other witness admit the language charged to have been used by him to the jurors, except that they deny that he said "you'll all be in it." The jurors implicated file affidavits, admitting the visits to Mary Howard as charged, say they only took one small glass of beer each, and those shown to have been there at other times, and to have conversed with the Howard woman, deny that it had any effect on their verdict. On Monday, October 31st, the jury was ordered into the custody of the sheriff, and remained in his charge until November 3, 1892, when a verdict was rendered. While thus in custody of an officer, John Tait, one of the jurors, on, to wit, the evening of November 2d, separated from his fellows, and went to the town of Tehama, 12 miles distant, where he remained over night with his family, returning the next morning. In justice to him it must be stated that his wife was dangerously ill, and his conduct was doubtless prompted by natural affection, and no suspicion attaches to him. That he should have applied to the court for leave to thus separate from his fel-

low jurors is true beyond cavil. The purity of the motive, however, takes away the sting of the offense. Another juror separated from the jury while in custody of the officer, and visited the postoffice to post a letter. It incidentally appears that the residence of Mary Howard was the resort of lewd women and profligate men. A number of these women were witnesses in the case. That four of the jurors should have visited this place indicates a lack of that high appreciation of the duties and responsibilities of jurors, essential to the purity of the jury system, is quite apparent. That one, at least, if not two of them, should have repeatedly visited such a place under such circumstances, and there conversed in reference to the case on trial, a case which involved the life and liberty of a man whose home was there, the place around which clustered many of the prominent actors and acts in the case, furnishes indubitable proof either of a willingness to do wrong, or, what is more probable, an entire lack of any adequate conception of the position which as jurors they occupied.

It may appear at first blush that the friend and witness of defendant, having been largely instrumental in bringing about the condition of which he complains, it cannot be presumed that he was injured thereby, and that to yield to his plaint will result in encouraging other men charged with crime to resort to like practices. This is but a surface view of the case, and when we go deeper we find that the jurors in question had compromised themselves; that their position had been exposed; that the public was watching them with a suspicious eye; and that henceforth they could only allay that suspicion, and vindicate themselves from it, by convicting the defendant. Their freedom of action was foreclosed. Amid all the notoriety given to their conduct, there can be no reasonable doubt but that the jurors understood fully the unfortunate position in which they were placed, and the temptation to escape by the most practicable mode, viz. by convicting the defendant, was too strong a one to be reasonably resisted by such men under such circumstances. It is plain that all this tended to the injury of the defendant, and a verdict rendered under such circumstances should not be upheld. It is unfortunate for the jury system and for the cause of justice that such episodes should occur in the trial of causes, but the evil will be soonest suppressed by wiping out verdicts rendered under such circumstances.

The other errors assigned need not be noticed at length. The evidence in relation to defendant having been ordered out of the way when the military company was engaged in skirmish drill seems to us as too remote. The order was by an officer of the company, and not by deceased, and any inference of ill feeling by defendant to the deceased by reason thereof would seem

strained. It is not regarded as of sufficient importance to call for a reversal, but it is recommended that upon another trial the evidence be excluded.

The testimony tending to show that one Long was the guilty party was admissible. It is always proper to show that some other person, and not the defendant, committed the crime with which he is charged, and the fact that Long had been tried and acquitted did not alter the case. The argument of respondent that if defendant could try to prove Long's guilt the people could show the judgment of acquittal is not sound, for the simple reason that a judgment as between the people and Long is not evidence in a case of *People v. Mitchell*.

The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial ordered.

4 Cal. Unrep. 324

PORTER v. FISHER. (No. 18,108.)

(Supreme Court of California. Nov. 8, 1893.)
FACTORS AND BROKERS—COMMISSIONS—STATUTE OF FRAUDS—DIVISIBLE CONTRACT.

1. Though, under Civil Code, § 1624, a parol contract employing a broker to sell land is invalid, a broker employed to sell or exchange land, and the personality thereon, under an agreement for a commission of 5 per cent. on the price, may, on bringing about an exchange, recover 5 per cent. on a separate valuation placed on the personality by the principal, though in the exchange, as between the parties thereto, there may have been no division of the consideration, as the contract, in such case, is divisible, and that part as to the land is not unlawful, but merely incapable of enforcement.

2. It is immaterial whether the separate valuation was placed on the personal property by the principal before or after the exchange, or to whom he made the statement as to the valuation, since it is an admission that the personal property was exchanged at such valuation, so that its price can be separated from the gross sum involved in the exchange.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by G. L. Porter against S. C. Fisher. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Goucher, Jacobs & Jones, (Oregon Sanders, of counsel,) for appellant. Nourse & Short, for respondent.

HAYNES, C. Porter, as assignee of one Abbott, brought suit against appellant on several causes of action, among which was one for the sum of \$2,500, as commissions claimed to have been earned by Abbott in effecting a transfer of property between appellant, Fisher, and one J. A. Baxter. The prop-

erty Fisher conveyed and transferred to Baxter consisted of 280 acres of land in Tulare county, together with stock and personal property of a large amount; and the property conveyed and transferred by Baxter to Fisher was 107 acres of land at Byron, Contra Costa county, together with all the personal property thereon. Abbott claimed that he was employed by Fisher as a broker to sell or exchange his said property, real and personal, and for which he was to receive a commission of 5 per cent. His employment, however, as such broker, was not in writing. The cause was tried before the court and a jury, and plaintiff, as assignee of Abbott, recovered on account of the said commissions the sum of \$1,000. The gross recovery by the plaintiff was for a larger sum, but no controversy is made here, except as to the recovery of said \$1,000. The appeal is from the judgment and order denying a new trial. Respondent concedes that no recovery can be had for commissions upon the sale or exchange of the real estate, but contends that the contract for commissions is divisible; that the price of Fisher's real estate was estimated in the exchange at \$30,000, and the price of the personal property at \$20,000; and that he is entitled to recover commissions upon the price of the personal property at the agreed percentage, notwithstanding his contract, so far as the real estate is concerned, was void. The complaint alleges that the commissions were earned by Abbott as agent and broker for the defendant "in the sale, exchange, and transfer of certain real and personal property to one J. A. Baxter, which said real and personal property was sold, exchanged, and transferred to said Baxter for the agreed price and consideration of \$50,000, being \$30,000 for real property so exchanged and transferred, and \$20,000 for the personal property so exchanged and transferred; that the defendant agreed to pay to G. Frank Abbott, for his services as his agent and broker in selling and disposing of said property, five per cent. commission on the price thereof, to wit, \$2,500." As between Fisher and Baxter, the parties to the trade, there appears to have been no separation of prices between the real and personal property of the defendant alleged in the complaint. It is also evident from the statements of the complaint that the undertaking of Abbott was to sell or exchange the real and personal property of Fisher. Appellant contends that the contract was entire, and is not divisible; that as the agreement to pay commissions upon the real estate was void,—not being in writing,—there can be no recovery of any part or portion of the commissions.

As between Baxter and Fisher, the parties to the exchange, the testimony does not show such division of the consideration as to clearly make the contract apportionable, as between them. The question, however, arises between one of the parties to the

exchange, and the broker or agent who made the exchange; and we see no reason why a recovery should not be had for commissions upon the sale of the personal property, if the amount or price thereof can be ascertained with reasonable certainty. The contract set out in the complaint alleges the broker's compensation to be a percentage of the price of the property sold or exchanged; that is, 5 per cent.,—5 cents on each dollar of such price. If, therefore, the price of the personal property can be separated from the price of the real estate, the illegality attaching to the contract, so far as the real estate is concerned, does not, we think, necessarily attach to the remainder of the consideration. Section 1624 of the Civil Code merely declares that a contract or agreement authorizing or employing an agent or broker to purchase or sell real estate for a compensation or a commission is "invalid" unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent. It is not a contract which is *malum in se*, nor is it *malum prohibitum*. It is merely an invalid contract, or one incapable of enforcement.

In the case of *Jackson v. Shawl*, 29 Cal. 272, a pawnbroker charged upon a loan, secured by a pledge, interest at the rate of 7 per cent. per month. A statute then in force provided, in effect, that a pawnbroker shall not charge a greater rate of interest on loans exceeding \$20 than 4 per cent. a month in advance. The plaintiff tendered the \$500 loaned, and interest at the rate of 4 per cent. The court said: "Here the contract between the parties was legal as to the principal sum, but illegal as to the interest. The two things were not inseparable,"—and, quoting from authorities, further said: "When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the courts will make the distinction, for the common law doth divide according to common reason, and, having made that void that is against law, lets the rest stand. The general and more liberal principle now is that when any matter, void even by statute, be mixed up with good matter, which is entirely independent of it, the good part shall stand, and the rest be void." In *Treadwell v. Davis*, 34 Cal. 601, it was held, (syllabus:) "Where a contract consists of two distinct parts, which are readily severable, and not in any material sense dependent on each other,—one part being valid, and the other void,—the rule is to enforce that part of the contract which is valid." See, also, *Granger v. Mining Co.*, 59 Cal. 678. In *More v. Bonnet*, 40 Cal. 254, it was said: "No precise rule can be laid down for the solution of the question whether a contract is entire or separable, but it must be solved by considering both the language and the subject-matter of the contract." The cases above cited go further than is required in this case,

because the contracts there considered were, as to some part, at least, unlawful; but it is not unlawful for a broker or agent to act upon a verbal authority or request, in making a purchase or sale of real estate for another. He may lawfully do so, and incurs no penalty for the doing of it. He simply relies upon the willingness of his principal for the payment of his commissions, and cannot compel payment. Section 1599 of the Civil Code provides: "Where a contract has several distinct objects, of which one at least is lawful and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

Appellant, in his brief, in referring to the testimony of Mr. Abbott, says that he testified that: "Mr. Fisher placed a value upon the real estate and personal property separately. He placed a value on the stallion at \$8,000; on the rest of the personal property, \$12,000; making \$20,000 for the personal property, and \$30,000 for the real property,"—but insists that it does not appear when Mr. Fisher placed this value upon the real and personal property separately, whether it was before or after the trade, nor whether he made the statement to Abbott, or to some one else, nor that the witness contracted with reference to any such estimate, or with reference to the personal property separately. We think it makes no difference when the defendant placed the separate values on the real and personal property, nor to whom he stated such values. It was an admission upon his part that the personal property was exchanged at the price or value of \$20,000, and that, therefore, the price of the personal property was capable of separation from the gross sum involved in the exchange. Mr. Baxter, a witness for plaintiff, testified: "I gave Mr. Fisher a deed for my 107 acres of land at Byron, Contra Costa county, together with all the personal property on my place, in return for which Mr. Fisher gave me a deed of his 280 acres of land in Tulare county, together with stock and personal property, which personal property he estimated to be worth about \$20,000. The full valuation of land and personal property I took on a basis of \$50,000, which was the valuation set upon it by Mr. Fisher." This testimony corroborates that of Mr. Abbott,—that the price of the personal property was capable of being ascertained, and was estimated in the exchange; and while the defendant claimed upon the trial that the value of both properties was very much less than the price put upon them at the time of the exchange, it was competent for the jury to determine whether such price of the personal property was ascertainable from the evidence, and to fix the price thereof. If the contract had been for a commission upon what Fisher received for his property, a different question would have been presented, and the actual value of the Baxter property would have been involved. But even in that case the separate estimates

placed by Fisher upon his real and personal property would have been competent to show the proportion of the entire value of the Baxter property, which was given in exchange for defendant's personal property. The jury must have found the contract to have been as alleged in the complaint, and the estimate of value placed upon his personal property by the defendant could properly be taken as the price referred to in the contract for commissions.

Other questions are made in the record upon exceptions to evidence, and to the instructions given to the jury, the more important of which relate to the question above considered, and our conclusion thereon is conclusive of these exceptions. We think the judgment and order appealed from should be affirmed, and so advise.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

102 Cal. 134

WILLIAMS et al. v. MOUNTAINEER
GOLD MIN. CO. et al. (No. 18,123.)

(Supreme Court of California. Nov. 8, 1893.)

MECHANICS' LIENS—MINING CLAIMS—LIEN ON
STRUCTURES—TITLE.

1. Under Code Civil Proc. § 1183, providing that mechanics, material men, etc., performing labor or furnishing material in the construction of any building or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, and that any person who performs labor on any mining claim has a lien upon the same, a lien for material furnished for structures on a mining claim, to be used in operating the same, filed against the structures, is invalid, as it must be filed against the whole claim.

2. A person who has furnished material for a reduction mill on a mining claim, and filed a claim of lien, which is invalid because against the mill instead of the whole claim, cannot contend that his lien attached when the mill was commenced, and before it was used in connection with the mine, and therefore before it became appurtenant to the mine, as the mill is a part of the mine, and not a mere appurtenance.

3. Conceding the mill to be appurtenant to the mine, such contention cannot be sustained, for the further reason that one who has furnished material for a structure must be held to have anticipated its future use.

4. A person who has furnished material for a structure on a mining claim for a corporation which he found in possession of the mine, claiming it all, cannot enforce a lien filed against the structure instead of the whole claim, and therefore invalid, on the ground that, when he furnished the materials, the corporation had not yet acquired title to that portion of the claim on which the structure was erected, as title cannot be tried in such an action.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county; Stanley A. Smith, Judge.

Consolidated actions by T. Williams, John Hayes, and others against the Mountaineer Gold Mining Company and others to enforce

liens. From a judgment against Hayes, and from an order denying a new trial, he appeals. Affirmed.

Frank R. Wehe, for appellant. F. D. Soward, Tiley L. Ford, and Haven & Haven, for respondents.

TEMPLE, C. The general nature of this case is well stated in the first finding of facts, which is as follows: "The defendant the Mountaineer Gold Mining Company, a corporation, at all the times referred to in the pleadings in the cause, was the owner and in the possession of and working a certain mine known as the Berger or Mountaineer quartz mine, situate in said Sierra county, and consisting of some seven contiguous mining locations, four of which are quartz mining locations, and three placer mining locations, with their respective appurtenances. The plaintiff T. Williams and twenty-four others commenced a joint action July 28, 1891, to foreclose certain miners' liens respectively, which had heretofore been filed against said property for labor performed thereon at various periods, dating from the 9th of October, 1890, to the 11th of July, 1891. T. Berger was also a party plaintiff to this action, but the suit as to him was subsequently dismissed. Prior to the commencement of last-named action, to wit, on April 28, 1891, John Hayes had brought an action against said defendant corporation to foreclose a mechanic's lien filed against the 'Mountaineer Reduction Works, Tramway and Flume,' situate on the 'Lake Placer Claim,' one of the locations above referred to. The Hayes lien was filed for record February 2, 1891, and was for lumber and materials furnished by said Hayes between July 20 and December 31, 1890, to be used in the construction of the said reduction works, etc. The action of T. Williams et als. and that of Hayes were by order of court consolidated August 24, 1891. On September 26, 1891, Stephen Tippet and four others brought suit against defendant corporation similar to the Williams suit, and to foreclose liens against the same property. Three of these liens were for labor performed on said property from May 25 to July 11, 1891, and one of them for materials claimed to have been furnished between January 1 and July 11, 1891, to be used on said mining property. This last action was by order of the court made October 5, 1891, consolidated with the two actions previously consolidated as aforesaid. The reduction works or quartz mill on and connected with said mining property were completed January 4, 1891. Robt. Forbes is made a party to the action, as one claiming ownership to a certain rock breaker and amalgamating pan attached to said mill by means of bolts, etc. William Johns is made a party to the action as one claiming ownership to certain mining ma-

chinery attached to said quartz mill. The Johns claim is based on a chattel mortgage, covering said mining machinery, duly executed on behalf of the then owners of said Mountaineer quartz mine on the 15th day of October, 1890. The property claimed to be covered by the mortgage is described therein as 'certain machinery' for quartz milling, consisting of ten battery stems, ten tappets, ten sockets, ten cams, one cam shaft, two mortars, two challenge feeders, one Knight water wheel, shafting and pulleys belonging to wheel, all to be put into and made a part of the mill of the mortgagors at the Mountaineer mine, in Butte township, Sierra county, California. H. Scammon is made a party to the suit as one claiming an interest in all the property in suit, by reason of an attachment levied thereon as the property of defendant corporation, which attachment was duly levied on the 11th day of July, 1891." Judgment was entered in favor of plaintiffs and sustaining the lien of Johns, but against the claim of the appellant, who appeals from the judgment and an order refusing him a new trial.

It will be seen that there are some 30 claimants of liens upon the mine for labor performed, mostly in the tunnel, but also in a variety of other employments about the mine, and that the work was done at different periods. Appellant commenced to furnish materials for the construction of the mill, tramway, boarding house, and other buildings July 21, 1890, and filed his claim of lien on February 2, 1891. Two of the plaintiffs commenced work before he filed his claim of lien, but all the others commenced work after his claim of lien was filed, and many after he had commenced his action to foreclose his lien. The plaintiffs in the third action on behalf of lien claimants commenced their work after the plaintiffs in the second suit had filed their notice of lien. It is obvious at once that this state of things could not exist in a case for the foreclosure of liens for labor and material used in the construction of a building under contract.

The most important question in the case arises from the fact that appellant only claims a lien upon the reduction works, and filed his notice and claim of lien accordingly, while the plaintiffs in the two suits seek to establish liens upon the whole mining claim, including the reduction works, and described it all in their notice and claim of lien. They contend that the mill, tramway, boarding house, and other structures described in appellant's notice and claim of lien constitute a part only of the property for the improvement of which Hayes furnished lumber, and that he cannot have a lien upon a part only of the structures or property constructed, altered, or improved. The trial court sustained this view. Section 1183, Code Civil Proc., so far as

material here, is as follows: "Mechanics, material men, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class, performing labor upon or furnishing materials to be used in the construction, alteration, or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery railroad, wagonroad, or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished; * * * and any person who performs labor in any mining claim or claims has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done, or materials furnished," etc. The use of the phrase "other structure" in the above extract shows that the word "structure" comprehends all the properties specifically enumerated, and is broad enough to include any similar things constructed, should the enumeration prove incomplete. Following this with the language "and any person who," it would seem to show that a mining claim was not included in the structures upon which liens were allowed; and the procedure provided for acquiring liens upon structures are not in all respects applicable to those claiming liens upon mining claims. They cannot all date back to the commencement of the work. On a mine the work is always going on; may have commenced before the laborers were born; and may continue indefinitely. There is no special 30 days, therefore, within which lienors must record their notices and claim of lien. The labor cannot generally be said to have contributed to the creation of the property, or added to its value. On the contrary, it may diminish its value,—perhaps render it valueless. The Code does not seem to have provided for all the cases which may arise in regard to liens upon mining claims. We can only follow the procedure so far as applicable. For that purpose the mining claim must stand in the place of the structure as the property to be charged with the lien. It is the property which should be described in the notice and claim of lien under section 1187. There can be no harm in so speaking of it if we do not lose sight of essential differences, when it is necessary to discriminate.

Appellant contends that he furnished materials for the structures he has described in his notice of lien, and under section 1183 he is entitled to a lien upon the property for which he has furnished materials. He therefore insists that, although a lien might have been had upon the whole mine,—which, however, he does not concede,—he is entitled to charge the very structures he has contributed to make for the value of his materials. The same sort of argument might have been made for those who worked in the tunnel

had they sought to acquire a lien upon the tunnel only, and those who worked on the ditch and flume had they sought a lien upon those structures only. In such case had each of the supposed liens been foreclosed, and the structures sold to different purchasers, and the mine to another, each purchaser might have found himself the owner of property utterly valueless without the other parts. They were all parts of one entire property, and we cannot suppose, unless the language of the statute compels such conclusion, that such a result was contemplated. One who has a built a chimney in a house, or a porch, or a doorstep, has helped to build a structure, to wit, a chimney, a porch, or doorstep; but he cannot acquire a lien upon these specific structures, and by detached sales destroy the value of the claims depending upon liens upon the whole house. A structure may be a part of another larger structure, and in reference to it constitute but a part of a structure. In such cases it is well settled the lien must cover the entire structure. It was so held in *Cox v. Railroad Co.*, 44 Cal. 28. See, also, *Trust Co. v. Candler*, 87 Ga. 241, 13 S. E. Rep. 560, in which the following language is quoted with approbation: "A railroad, with its depots, bridges, and other appurtenances, is no less an entirety than a dwelling house with its kitchen, its chimneys, and its doorsteps; and yet, no one has ever supposed that a mechanic's lien could be enforced against the doorsteps or chimneys of a dwelling house, or that they could be sold and removed, to the utter destruction of the whole property." In that case it was also said: "A verdict and judgment attempting to set up and enforce a lien upon a specified portion of a railroad are void upon their face." See, also, *Railway Co. v. Wilcox*, 122 Ind. 84, 23 N. E. Rep. 506. In the case at bar the tramway extends to the mouth of the tunnel. To sell it, with a convenient space around it, would be to deprive the owners of the tunnel, and yet not give the tunnel to the purchaser. What would be a convenient space around a structure which can never be of use as a structure? All these structures, severed from the mine, would be valueless as structures. The question has, I think, been decided by this court. In *Dickenson v. Bolger*, 55 Cal. 285, work had been done upon a dwelling house situate upon a mining claim, and also upon a tunnel and other portions of the mining claim. Objection was made that the claim of lien filed did not designate the amount and value of the work done on the dwelling house, and the amount and value of the work done on the tunnel, as required by section 1188, Code Civil Proc. The court said: "It [the section] plainly applies only to cases in which one claim is filed against two or more separate and distinct buildings, mining claims, or other improvements owned by the same person, and not to a case where, as here, all the work

was performed upon one and the same piece of property, although upon different portions of it." In *Helm v. Chapman*, 66 Cal. 291, 5 Pac. Rep. 352, it was said a mine or pit may be called a "structure;" and "section 1183 does not, it is true, provide for a lien upon mines, but upon 'mining claims.' The lien, if it exists at all, extends to the whole claim. Strictly speaking, of course, a mining claim cannot be constructed, altered, or repaired. The intention of the lawmakers seems to have been to give a lien upon the whole claim for labor performed on and for materials furnished for and used in any structure or on or in the mining claim." In *Silvester v. Mine Co.*, 80 Cal. 510, 22 Pac. Rep. 217, a contractor had been employed "to erect hydraulic power hoisting-works and pumping-works building, gallows frame, and track, lay down a water pipe to supply water to the mine, and to pump out the mine to the third level." It was contended that the statute did not give the contractor a lien on the mining claim, but only on the structure he had contracted to construct, alter, and repair, and that his notice and claim of lien, being against the mine, and not against the specific structures, were invalid. It is said: "The lien given by the statute is upon the mining claim as a whole, and not upon the separate pieces of work done in its repair. Code Civil Proc. § 1183. The mine is a 'structure' within the meaning of the statute. *Helm v. Chapman*, 66 Cal. 291, 5 Pac. Rep. 352. The work done in this case became and was a part of the mining claim, and the whole claim, including the added improvements, was subject to the lien. Civil Code, § 661. Therefore the notice of lien, as against the mining claim, was valid." This is a distinct ruling to the effect that a claim of lien for materials furnished, to be used in a building upon a mining claim, should be against the mining claim, and not against the specific structure upon the mine.

Appellant further contends that his lien attached before the mill was used in connection with the mine, and before, therefore, it became an appurtenance, under section 1183, Code Civil Proc., or section 661, Civil Code. As his lien attached at the time the mill was commenced, it, of course, antedates its use. But I think in this case the mill is not a mere appurtenance for the mine. It is upon the mining claim, and, like the tunnels, tramways, and roads, is a part of the mine. But, conceding it to be an appurtenance, I think this reading of the Code too literal. This is to stick in the bark. One contributing labor or materials to a structure must be held to have anticipated its future use. It is necessary to do this in many cases in order to determine what the structure is upon which he is entitled to a lien. A drain to a house may be an appurtenance before either is used. I think the statute would cover a thing as an incident which was exclusively

adapted to the use of the principal before actually used.

It is further objected that the title to that portion of the mining claim upon which the mill was located was not acquired until after his lien attached. Appellant found the corporate defendant in possession of the premises, claiming it all as its mining claim, and furnished materials to improve its claim. In this action he cannot dispute its title. Title cannot be tried in this form of action. If these views are correct, appellant has no lien and is not interested in the other points made. I advise that the judgment and order be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(100 Cal. 231)

WEST v. CONANT. (No. 18,111.)

(Supreme Court of California. Nov. 8, 1893.)

MORTGAGES—FORECLOSURE—REDEMPTION—RIGHTS OF MORTGAGOR—RECEIVER.

Although, under the statute, the purchaser of mortgaged premises on foreclosure sale is entitled to rents of the premises or the value of the use and occupation from the time of the sale until redemption, a receiver will not be appointed for the premises before the expiration of the period allowed for redemption, even though the judgment debtor is insolvent, as the latter, until then, is entitled to the possession.

Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by one West against one Conant for the appointment of a receiver. The action was dismissed, and plaintiff appeals. Affirmed.

John Gall, for appellant. H. V. Reardan, for respondent.

PATERSON, J. The complaint shows that the plaintiff, to whom the defendant had given a note and mortgage, purchased the property therein described at foreclosure sale on March 12, 1892, for the sum of \$21,414.30, being the full amount of the judgment, costs, and expenses, and received the sheriff's certificate; that the premises had never been redeemed from the sale, and the time allowed by law for the redemption thereof would not expire until several months after the commencement of the action; that the mortgaged premises were of less value than the amount due plaintiff, and afforded an insufficient security for the payment thereof; that ever since the sale the defendant has been in possession of the land, has collected and received all the rents, issues, and profits thereof, and refused to pay over to the plaintiff any portion of the same; that there were large crops of wheat, barley, and hay growing on the premises, which the defendant threatened to harvest and sell, and convert the proceeds thereof to his own use,

to the loss of plaintiff in the sum of \$4,000; that defendant is insolvent, and has no property subject to execution out of which the value of the rents and profits of the premises, or the value of the use and occupation thereof during the time allowed for the redemption, could be made; and that unless a receiver be appointed to protect the rights and interests of the plaintiff, he will be wholly deprived of the rents and profits and the value of the use and occupation. Upon the filing of this complaint an order was made appointing a receiver as prayed for. Thereafter, on motion of the defendant, said order was revoked, the receiver discharged, the demurrer sustained, and the plaintiff's action dismissed.

We think that the judgment should be affirmed. Under our statutes the judgment debtor is entitled to remain in possession of the land until the expiration of the time allowed for redemption. During that period the court may restrain the commission of waste on the property on the application of the purchaser; but we know of no provision of the Codes, of any decision, or of any principle, upon which the purchaser is entitled to place a receiver in charge of the property during the period of redemption. The defendant had six months within which to determine whether or not he would redeem the property, and was entitled to use the property and take the proceeds thereof. It is true the statute provides that the purchaser, from the time of the sale until redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof; but this is no warrant for the appointment of a receiver to oust the judgment debtor from his possession, and take from him the crops which have been produced through his labor, and that is what was sought in this action. The plaintiff was no more entitled to have a receiver put in charge of the defendant's property than he would have been if he had brought an ordinary action of assumpsit; and this is true, even if it be conceded that plaintiff was entitled to sue for "the rents of the property sold, or the value of the use and occupation thereof," before the expiration of the period allowed for the redemption. *White v. Griggs*, 54 Iowa, 650, 7 N. W. Rep. 125.

In determining the question involved in this appeal, we have again to say that we have received no assistance from the respondent. No brief has been filed, no suggestion made in any form. The vice of such a practice, and the injustice to the court, is especially noticeable in this case, where we have to go outside of the theory discussed by appellant, and upon which it is asserted the court below proceeded, in order to affirm the judgment. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(100 Cal. 246)

STEWART v. HALL et al. (No. 18,146.)
(Supreme Court of California. Nov. 8, 1893.)

WILLS—PROBATE AND CONTEST.

1. Under Code Civil Proc. § 1312, requiring a copy of the opposition to probate of a will to be served on petitioner and others interested in the estate, where a written opposition to the probate of a will is filed at the time set for hearing a petition by the executor for probate, and shows personal service thereof on him, it is error to strike it from the files, on his motion, on the ground that there is no proof of service on the other persons interested, and to refuse to hear proof of such service, on the ground that it comes too late.

2. Such an order will not be affirmed on the ground that afterwards, on motion of contestant, the court vacated the order, and gave her time to serve the opposition, where it refused to set aside an order admitting the will to probate and granting letters to the executor.

Department 2. Appeal from superior court, Lassen county; W. F. Masten, Judge.

Petition by W. P. Hall to probate the will of William Stewart, deceased. Mary E. Stewart filed an opposition, which was stricken from the files, and an order was made admitting the will to probate, and issuing letters to petitioner. From these orders, and from an order refusing to set aside the order admitting the will to probate, contestant appeals. Reversed.

Spencer & Raker, Clay W. Taylor, J. Chadbourne, and C. McClaskey, for appellant. Goodwin & Dodge, for respondents.

McFARLAND, J. William Stewart died in Lassen county on May 13, 1892, leaving what purported to be his last will, in which the respondent W. P. Hall was named as executor, and in which the daughters of the deceased, May M. Atteberry, aged 24 years, and Nellie Stewart, aged 11 months, both residents of said Lassen county, and his daughter Lena M. Stewart, aged 20 years, resident of Butte county, were made devisees of all his property. Hall filed a petition for the probate of the will, and the hearing of the petition was fixed for the 11th day of June, 1892, at 10 o'clock A. M. At the appointed time the appellant, Mary E. Stewart, who is the widow of the deceased, filed her written opposition to the probate of said will, with a written indorsement thereon of admission of service thereof by the attorneys of record of said petitioner Hall, and also the indorsement of what purported to be the signature of said devisee Mrs. Atteberry, admitting service of said contest; but there was no other proof of such service. Counsel for petitioner Hall, in the absence of counsel for contestant, moved orally—no notice thereof having been given—to strike the said written opposition of Mary E. Stewart from the files, on the ground that the same had not been filed or served as required by law. This motion was taken under advisement until 2 o'clock P. M. of said day. In the mean time the contestant furnished proof

that the written opposition had been personally served on said Hall and on said Mrs. Atteberry; and proof was also made that said infant devisee, Nellie Stewart, was in the care and custody of her mother, said Mary E. Stewart, and that a copy of said opposition had been served on said Mary, and also on said infant, Nellie; and contestant also had filed a petition for the appointment of a guardian ad litem of said infant Nellie, to take charge of her interests in said litigation. The court, however, refused to consider said proofs, upon the ground that they "came too late, and should have been filed at 10 o'clock A. M. of said day." The court then, on motion of petitioner, struck said opposition from the files, and proceeded to hear the petition for the probate of the will, entirely disregarding said opposition, and made an order admitting said will to probate, and appointing said Hall executor, to all of which rulings contestant objected and excepted. From said order the contestant, Mary E. Stewart, appeals.

The written opposition of contestant was in proper form, and set forth many alleged facts which, if true, established the invalidity of the asserted will; and the court erred in denying said opposition, and proceeding to probate the will, and to issue letters testamentary to Hall, without any hearing of the matters alleged in said opposition. This course, it seems, was based upon the provision of section 1312, Code Civil Proc., that the contestant must file a written opposition, "and serve a copy on the petitioner and other residents of the county interested in the estate." But it had been served on the attorneys of Hall; and, this being so, the court should not have refused to give the appellant an opportunity to prove the averments of her written opposition, although there was not at 10 o'clock A. M. sufficient proof of service on the other persons mentioned in said section of the Code. As against Hall, at least, there was a full showing by the pleading on file that the will was invalid, and that he had no rights in the premises. The court should have ordered that contestant furnish proper proof of service on the other parties, and that the latter should have proper time in which to demur or answer the opposition, as provided by the Code. However, on the return day, and before the hour to which the matter had been continued, the contestant did furnish proper proof of service upon all the persons mentioned in the Code, except, perhaps, the infant, Nellie, and, as to said infant, had furnished proof of all the service that could possibly have been made upon her, and had asked for the appointment of a guardian ad litem. Under these circumstances, we see no ground upon which the order appealed from can be affirmed. It is true that afterwards, on July 5th, the court on motion of

appellant, made an order vacating the order striking out said opposition, and giving contestant certain time to serve the same; but that order is no answer to this appeal, for the court refused to set aside the order admitting the will to probate, and granting letters to Hall. Appellant had a right to be heard before the will was probated and Hall appointed executor. "Contesting a will after probate," under sections 1327-1333, is a different thing.

Appellant also appeals from the order of June 11th, striking out her written opposition, and from the order of July 5th, refusing to set aside the order admitting the will to probate. Respondent does not raise the question that these orders are not appealable, and the question would not be important here. The orders appealed from are reversed, with directions to the court below to hear and determine the original question whether or not the said will should be admitted to probate, and letters testamentary issued to said Hall, upon the issues made by said written opposition, after proper service thereof and such pleadings as respondents may choose to make thereto.

We concur: DE HAVEN, J.; FITZGERALD, J.

100 Cal. 265

BOYNE v. RYAN, District Attorney. (No. 14,760.)

(Supreme Court of California. Nov. 8, 1893.)
MANDAMUS—WHEN LIES — TO CONTROL DISTRICT ATTORNEY.

1. Section 8 of the county government act, (Laws 1891, p. 296,) authorizing the district attorney of any county, and making it his duty, to institute suit for money paid out by the board of supervisors without authority of law, vests the attorney with a discretion in determining whether to bring suit which a court cannot control by mandamus.

2. Mandamus will not lie to compel the district attorney to institute a suit to recover money unlawfully paid out by the board of supervisors, as the court could not compel him to prosecute it, and it will not undertake by mandamus what cannot be accomplished.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Petition by William Boyne against F. D. Ryan, district attorney, for a writ of mandamus. From a judgment for respondent, petitioner appeals. Affirmed.

Johnson, Johnson & Johnson, for appellant. H. L. Buckley and A. J. & Elwood Bruner, for respondent.

McFARLAND, J. This is an appeal by petitioner from a judgment for respondent in a proceeding to obtain a writ of mandate. The petition avers that petitioner is a citizen, taxpayer, and resident of Sacramento county; that respondent is district attorney of said county; that McClatchy & Co., pro-

prietors of the Bee newspaper, presented a claim of \$1,567 to the board of supervisors of said county for advertising the delinquent list, which the board considered and allowed for the sum of \$1,317, and the same was paid to said McClatchy & Co.; and that the same was allowed and ordered paid by said board without authority of law. It is averred that the allowance was without authority of law, because the said claim was not properly itemized; because it was not properly verified; because there was no contract made with McClatchy & Co. for the advertising, after a publication inviting bids therefor; and because the amount allowed was too large. It is then averred that the respondent knew of these facts; that he was requested by petitioner and other taxpayers to institute a suit against McClatchy & Co. to recover said money paid to them as aforesaid; and that he refuses to do so. The prayer is that respondent be commanded by mandate to institute such suit. The court below sustained a general demurrer to the petition, and, petitioner declining to amend, judgment went for respondent.

We think that the judgment of the superior court was right. The proceeding is founded on section 8 of the county government act, (Laws 1891, p. 296,) which, so far as material here, is as follows: "Hereafter, when any board of supervisors shall without authority of law order any money paid as a salary, fees, or any other purposes, and such money shall have been actually paid, * * * the district attorney of such county is hereby empowered, and it is hereby made his duty, to institute suit, in the name of the county, against such person or persons, to recover the money so paid, and twenty per cent. damages for the use thereof." As the expense of the publication of the delinquent list is a charge against the county, and as the board of supervisors are given the power to examine, settle, and allow accounts chargeable against the county, it is perhaps questionable if the averments of the petition show that the allowance of the claim of McClatchy & Co. was "without authority of law," within the meaning of said section 8. But, waiving that point, we think that the district attorney, in determining whether or not, in any particular instance, he should bring an action under said section, is vested with a discretion which a court cannot control by mandamus. Of course, if in a clear case he should willfully, corruptly, or inexcusably refuse to perform his duty in the premises, he could be proceeded against for malfeasance or nonfeasance in office. There are also other remedies for the protection of the public treasury; as, for instance, the supervisors are personally liable for the allowance of illegal claims. Moreover, a court will not do a vain or fruitless thing, or undertake by mandamus what cannot be accomplished. As was said by Chancellor Kent

(Trustees, etc., v. Nicoll, 3 Johns. 598:) "It has hitherto been considered as a settled principle that a court will not undertake to exercise power but when they exercise it to some purpose." Now, it is not contended that the language of section 8 goes any further than to declare it to be the duty of the district attorney "to institute suit." But to compel a district attorney, against his will and contrary to his judgment, to merely commence an action, would be an idle thing, in the absence of power to compel him to prosecute it to final determination; and such power is not contended for by appellant, and, indeed, there could be no practicable exercise of such power. The court granting the writ of mandate could not follow the district attorney through the case, and see to it that he filed proper pleadings, offered sufficient evidence, made necessary objections to evidence offered by the defendant, used proper arguments and authorities in discussing questions raised before the court or jury, and conducted the trial with reasonable care and diligence. The judgment is affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.; FITZGERALD, J.

4 Cal. Unrep. 329

IRWIN v. McDOWELL. (No. 19,149.)

(Supreme Court of California. Nov. 10, 1893.)

CHATTEL MORTGAGES—DISCHARGE—PLEDGE—PLEADING—AMENDMENT AT TRIAL.

1. In an action by a mortgagee for conversion of the mortgaged chattels, there is no abuse of discretion in allowing defendant, at the trial, to amend his answer, and to aver that the mortgage was released before defendant took the property.

2. An instrument termed a "bill of sale," executed by C., authorizing I. to take and sell the articles therein specified till C.'s debt to I. is satisfied, when the residue shall be returned to C., and reciting that it is given as security for the debt, is a contract for a pledge, within Civil Code, § 2987, providing that every contract by which the possession of personal property is transferred as security, only, is a pledge.

3. Though such instrument, by reciting that it is given in lieu of a certain chattel mortgage, shows an intention that it shall take the place of the chattel mortgage, it does not, in the absence of the delivery of the articles thereby agreed to be pledged, release the chattel mortgage; Civil Code, § 2988, providing that no pledge is valid till the property is delivered to the pledgee.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by I. Isaac Irwin against S. A. McDowell for conversion of chattels mortgaged to plaintiff. Judgment for defendant. Plaintiff appeals. Reversed.

M. S. Babcock, for appellant. Hunsaker, Britt & Goodrich, for respondent.

SEARLS, C. The defendant had judgment in the above-entitled cause, from which, and

an order denying a motion for a new trial, plaintiff appeals. The case was here on a former appeal from a judgment in favor of plaintiff for a nominal sum, from which he appealed, whereupon the judgment was reversed, and a new trial ordered. 91 Cal. 119, 27 Pac. Rep. 601. The general history of the case is there stated, and will not be repeated here.

At the last trial, the defendant, (respondent here,) for the purpose of showing that the property upon which he levied as sheriff had been discharged from the lien of plaintiff's chattel mortgage before such levy, introduced in evidence a bill of sale of certain other personal property from Robert L. Coutts to plaintiff, executed and acknowledged by said plaintiff and said Coutts under date of August 11, 1890. There was no abuse of discretion on the part of the court below in permitting the defendant, at the trial, to amend his answer so as to aver "that the mortgage on the hay and grain levied on in said action of Coutts v. Coutts, and hereinafter mentioned, was released before the said levy was made."

The "bill of sale," as it is termed, purported to be a conveyance by Robert L. Coutts to plaintiff of certain horses, cows, wagons, harness, etc., on condition that plaintiff was to take immediate possession of the property, and to sell them, or any of them, during 30 days, at a price to be approved by Coutts,—the money to be received by plaintiff, and applied upon his demand against Coutts,—and, at the end of 30 days, plaintiff was at liberty to sell, at his pleasure, until his demand was satisfied, whereupon the residue of the property was to be returned to Coutts. It then proceeds as follows: "This sale is made, and the property placed in the possession of said Irwin, as additional security for a certain debt secured by crop mortgage, and for goods had, and merchandise had and received, by said Coutts from said Irwin." Two or three days after the foregoing bill of sale was executed, Cave J. Coutts, a brother of Robert L. Coutts, with the latter, met plaintiff, and desired him to make some alterations in the bill of sale, to which he at first objected, but finally consented, whereupon, they all repaired to the attorney of plaintiff, who, at the request and by the consent of the parties, added to the bill of sale, immediately following the clause quoted above, as follows: "And a certain real-estate mortgage executed on November the 23, 1889, is held as additional security to the property held under this bill of sale, which is given, in lieu of the chattel mortgage, as security for the note held thereunder." The parties thereupon acknowledged the execution of the instrument before the attorney, who was a notary public, or, as some of the witnesses thought, it was acknowledged when signed. This, however, is not important, as the instrument related to personal property,—not

requiring to be acknowledged. The instrument, as first executed, clearly indicated its object to be to give other and further security for the debt due and owing from Robert L. Coutts to plaintiff, in addition to the chattel mortgage. As amended, it just as clearly indicates an intention that it shall take the place of the chattel mortgage. It refers to a certain other mortgage which plaintiff held upon the interest of Coutts in a ranch, as being held as additional security to the property held under this bill of sale, "which is given in lieu of the chattel mortgage." "In lieu" signifies instead of, in place of. We must conclude, from the language used, that it was the intention of the parties that the instrument, which, upon its face, shows that it was intended simply as security to plaintiff for the debt due him, was intended to take the place of the chattel mortgage. But it by no means follows that the result claimed by appellant ensued, viz. that the chattel mortgage was, upon the signing of the bill of sale, discharged at once. The language used in the instrument indicates that in consideration of the pledge—for that is what it amounts to—of certain horses, cows, wagons, etc., plaintiff was willing to forego and discharge the lien of his chattel mortgage. That was the consideration for what, in effect, was an agreement on his part to forego the claim of his mortgage. But the new security was never delivered to him, and, although he sought diligently for two or three days to obtain possession of the personal property named in the instrument, and which it was the duty of Robert L. Coutts to deliver, he never obtained it; and, at the end of the two or three days, Cave J. Coutts brought an action against the latter, and attached all of the property,—the hay and grain covered by the chattel mortgage, because it had been released, and the horses, etc., named in the bill of sale, because they had not been delivered to plaintiff. Was it released? "Every contract by which the possession of personal property is transferred as security only, is to be deemed a pledge." Civil Code, § 2987. "The lien of the pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge-holder, as hereafter prescribed." Id. § 2988. A glance at the instrument which we have called a "bill of sale" will show that within the purview of section 2987, supra, it was simply a contract for a pledge, and that, until the property pledged was delivered to plaintiff, the contract was executory. The pledge was the consideration for the release of the chattel mortgage, and, until it was perfected by such delivery, it did not operate to release the mortgage, in fact. No duty to execute a release of the chattel mortgage devolved upon plaintiff until he received the consideration for his agreement so to do. Had he, upon demand, refused to give a release, it could not have been enforced,

except upon showing that he had received the consideration upon which his agreement was predicated. The mortgage remained of record, and was notice to the sheriff who levied the attachment, and who, a few days later, upon learning of the existence of the mortgage, released such attachment. *Berson v. Nunan*, 63 Cal. 550. We must not be understood as holding that a mortgage may not be satisfied in fact without a discharge of record, but only that in this case, as the consideration was never received by plaintiff, it was not in fact waived or discharged, and, as it still remained of record, and notice to all the world, even the defendant here, who was sheriff, was not misled by any act of the plaintiff. We are of opinion that the court below erred in holding that the chattel mortgage was released prior to the levy of the attachment, for which error the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial is ordered.

(4 Cal. Unrep. 333)

PEOPLE v. BANNISTER et al. (No. 21,014.) (Supreme Court of California. Nov. 10, 1893.)

CRIMINAL LAW—VERDICT—DEGREE OF GUILT.

1. Under Pen. Code, § 1157, providing that whenever a crime is distinguished into degrees, the jury, if they convict, must find the degree of which defendant is guilty, the jury are not excused from finding the degree though the indictment was for burglary, of which there are but two degrees, and the court instructed that if the jury found defendants guilty they could find them guilty of no higher offense than burglary in the second degree.

2. Where the verdict fails to find the degree of the crime of which defendant is guilty, he is not entitled to a discharge, but merely to a new trial.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; W. R. Dangerfield, Judge.

Arthur Bannister and Frank Hawley were convicted of burglary, and appeal. Reversed.

W. I. Brobeck and P. A. Bergerot, for appellants. Atty. Gen. Hart, for the People.

SEARLS, C. Defendants were informed against and convicted of burglary. The crime consisted of entering a freight car of the Southern Pacific Company with intent to commit larceny. Defendant Bannister was sentenced to one year's imprisonment in the state prison at San Quentin, and defendant Hawley to three years at the state reform school for juvenile offenders at Whittier. The appeal is from the judgment, and the cause comes up on the judgment roll, there being no bill of exceptions. By their verdict the jury found the defendants "guilty as

charged," and recommended them to the mercy of the court. The crime of burglary is by the Penal Code divided into two degrees. Burglary committed in the nighttime is burglary of the first degree. Burglary committed in the daytime is burglary of the second degree. The judgments recite that the court, by its instructions before verdict, advised the jury that if they found the defendants guilty, they could not find them guilty of any higher offense than burglary in the second degree. The jury did not, however, by their verdict, specify the degree of burglary of which they found the defendants guilty. This was error. Section 1157 of the Penal Code provides that "whenever a crime is distinguished into degrees, the jury if they convict the defendant must find the degree of the crime of which he is guilty." The reason for a specification of the degree of the crime becomes apparent when we bear in mind that the severity of the punishment depends upon it. This court has so often declared such a verdict to be erroneous that further comment is unnecessary. *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. Rep. 776; *People v. Ah Gow*, 53 Cal. 628; *People v. Jefferson*, 52 Cal. 452; *People v. Travers*, 73 Cal. 580, 15 Pac. Rep. 293; *People v. O'Neil*, 78 Cal. 388, 20 Pac. Rep. 705; *People v. Campbell*, 40 Cal. 129; *People v. Marquis*, 15 Cal. 38.

The defendants were not entitled to be discharged upon the rendition of the faulty verdict, but are entitled to another trial. *People v. Travers*, supra; *People v. Lee Yune Chong*, supra.

It is stated in respondent's brief that one Thomas Cornwell was informed against in the same information, and that by mistake his name is omitted from the copy of the information in the printed transcript. We do not find in the minutes of the trial any allusion to him, except that he moved to set aside the verdict. There is no judgment in his case, and he is not included in the notice of appeal. We are not called upon to reverse a judgment, of the very existence of which we have no information, upon an appeal which, so far as we know, has never been taken. If Thomas Cornwell was informed against, tried, found guilty, and sentenced to punishment, it may well be he has elected to satisfy the judgment in preference to taking the chances of another trial, and possibly enhanced punishment, even if error intervened, which we do not presume. His case, if any he has, is not involved in this appeal.

The judgments appealed from in cases of Arthur Bannister and Frank Hawley should be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed, and a new trial ordered.

100 Cal. 316

SOUTHERN CALIFORNIA MOTOR ROAD CO. v. SAN BERNARDINO NAT.

BANK et al. (No. 19,139.)

(Supreme Court of California. Nov. 10, 1893.)

JUDGE—DISQUALIFICATION—EVIDENCE.

1. The fact that the judge has a suit pending against the plaintiff, a corporation, in an action on trial before him, is insufficient to disqualify him on account of interest, where the two actions are entirely independent, and the judgment in the one case will in no way affect the judgment in the other.

2. The failure to deny or answer the statement in the affidavit for change of venue, to the effect that affiant is informed and believes that the judge has said he considered himself disqualified to try any case in which plaintiff is a party, will not be taken as an admission of disqualification, where such judge denies the motion for the change.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by the Southern California Motor Road Company against the San Bernardino National Bank and others to cancel a certain promissory note executed by plaintiff to defendant bank, and to enjoin the sale of certain first mortgage bonds given to secure the payment of such note. From an order denying its motion for a change of venue, plaintiff appeals. Affirmed.

R. E. Houghton, for appellant. Curtis, Oster & Curtis, W. A. Purington, and F. A. Berlin, for respondents.

BELCHER, C. This action was commenced in the superior court of San Bernardino county, and in due time the plaintiff moved that the place of trial be changed to another county, upon the ground that both of the judges of the court in which it was pending were disqualified to try it. The motion was heard before Hon. John L. Campbell, one of the judges of the said court, and denied, and from that order the plaintiff appeals.

It does not appear from the transcript what the character of the action is, but it is said in the brief for respondents that it was "brought by appellant against respondents to obtain a judgment that a certain informally executed promissory note, given by appellant to respondent the San Bernardino National Bank is not the promissory note of appellant, and seeking, as incidental relief, to have said bank enjoined from a threatened sale of certain first mortgage bonds of appellant, pledged to secure the payment of said promissory note." The affidavit on which the motion was based was made by R. W. Button, the president of the corporation plaintiff; and, as to Judge Campbell, it stated, in substance, that he, as plaintiff, had brought an action in the superior court of San Bernardino county against the said corporation and I. H. Polk, as receiver thereof, to recover possession of certain land occupied by the corporation's

railroad, and \$5,000 damages for the alleged unlawful occupation thereof; that the action was still pending and undetermined in the said court, and the effect of the judgment, "if John L. Campbell should recover it in said case, will be to prevent said Southern California Motor Road Company and said I. H. Polk, as such receiver, from operating its road from the town of Colton to the city of San Bernardino; that by reason of the existence of said suit and claim of John L. Campbell against said Southern California Motor Road Company and I. H. Polk, as such receiver, I am informed and believe that said John L. Campbell has stated that he considers himself disqualified from trying any case in which the said Southern California Motor Road Company and I. H. Polk, as its receiver, are parties." At the hearing of the motion, counsel for plaintiff read the affidavit, and the complaint referred to therein, and also the notice of the motion and demand for a change of the place of trial. No witnesses were sworn or examined, and no other affidavit or testimony was offered, read, or heard. The motion was then argued by counsel, and denied, and the plaintiff excepted to the ruling. It is admitted that Judge Otis, the other judge of the said court, was disqualified from acting in the case, and it is claimed for appellant that it appears from the affidavit read that Judge Campbell was also disqualified. Whether this claim should be sustained, or not, is the only question presented for decision.

The provisions of the Code bearing on the question are as follows: "No justice, judge or justice of the peace shall sit or act as such in any action or proceeding: (1) To which he is a party, or in which he is interested. (2) When he is related to either party by consanguinity or affinity within the third degree computed according to the rules of law. (3) When he has been attorney or counsel for either party in the action or proceeding." Section 170, Code Civil Proc. "The court may on motion change the place of trial in the following cases: * * * (4) When from any cause the judge is disqualified from acting." Section 397, Code Civil Proc. "If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, * * * it must be transferred for trial to a court," etc. Section 398, Code Civil Proc. It is not claimed that Judge Campbell is a party to this action, or that he is related to any party thereto, or that he has been attorney or counsel for either party to the action; but it is urged that, by reason of his suit, he "is interested in this suit, as upon the judgment entered in this case depends his realizing anything in his suit." And it is said: "A judgment one way would make any judgment he might obtain, of value to him; the other way would make judgment of very little value, if not

entirely valueless." We fail to see any connection between the two cases. On the contrary, so far as we can discover from the record, they are entirely independent, and the judgment in the one case would in no way be affected by the judgment in the other. This being so, the contention of appellant, in this regard, cannot, in our opinion, be sustained.

It is further urged that, as the statement in the affidavit to the effect that the affiant was informed and believed that Judge Campbell had said he considered himself disqualified from trying any case in which the appellants were parties was not answered or denied, it amounted to, and should be treated as, an admission that he was not qualified to try this particular case, and hence his order should be reversed. In support of this position, counsel say: "Judge Campbell knew better than any one else whether or not he was so interested in this case, by reason of the litigation he was prosecuting against the plaintiff in this case, as to consider himself disqualified from trying this case. As was said by the supreme court of Nevada in the case of *Table Mountain Gold & Silver Min. Co. v. Waller's Defeat Silver Min. Co.*, 4 Nev. 222: 'The knowledge of the judge would be more certain and satisfactory than any evidence. As a general thing, a judge must know, better than any other party, whether he is or not interested in the result of a suit before him.'" The rule of law as thus stated is undoubtedly correct, but we draw from it a different conclusion from that drawn by the learned counsel. The law presumes "that official duty has been regularly performed," (section 1963, subd. 15, Code Civil Proc.,) and, as Judge Campbell knew whether or not he was interested in the result of the case, it must be presumed, from his action in denying the motion, that he was not so interested. In the Nevada case cited, which was in all material respects like this, it was said "that in all motions before a judge, during the progress of a trial, he may act on his own knowledge in regard to things which, in their nature, are better known to himself than they could be to others." We advise that the order appealed from be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

SOUTHERN CALIFORNIA MOTOR ROAD CO. v. MERRILL et al. (No. 19,145.)

(Supreme Court of California. Nov. 10, 1893.) Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by the Southern California Motor Road Company against Samuel Merrill and others. From an order denying its motion for a change of venue, plaintiff appeals. Affirmed.

R. E. Houghton, for appellant. Rolfe & Freeman, Conner & Evans, W. P. Gardiner, Purington & Adair, and Willis, Cole & Craig, for respondents.

PER CURIAM. This case is like that of *Southern Cal. Motor Road Co. v. San Bernardino Nat. Bank*, (No. 19,139), 34 Pac. Rep. 711, (just decided,) and was submitted upon the same briefs on the part of the appellant. Upon the authority of that case, the order appealed from is affirmed.

(5 Cal. Unrep. 761)

HAIGHT v. TRYON. (No. 14,974.)

(Supreme Court of California. Nov. 10, 1893.)

NEW TRIAL—NOTICE OF MOTION—PLEADING—CROSS COMPLAINT—APPEAL—SUFFICIENCY OF EVIDENCE.

1. A notice of motion for a new trial, directed against the "findings" rather than against the "decision" of the court, is sufficient, as under Code Civil Proc. §§ 632, 633, the findings constitute the decision.

2. In an action for partnership accounting defendant filed a "cross complaint" which related to the partnership transaction set forth in the complaint, alleged the partnership contract in somewhat different terms, and contained only matters in avoidance, or constituting a defense or counterclaim. *Held*, the averments of the cross complaint were not admitted by failure of plaintiff to answer, as the cross complaint was really an answer to the complaint, and therefore its averments were deemed controverted under Code Civil Proc. § 462.

3. The evidence was insufficient to justify findings in accordance with the averments of the cross complaint where the evidence on the part of plaintiff was positive that there was no such contract between the parties as that alleged in the cross complaint, and defendant merely testified that the cross complaint was true.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by Daniel Haight against Dennis Tryon for partnership accounting. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

R. W. Miller, for appellant. L. F. Cooper and Sawyer & Burnett, for respondent.

BELCHER, C. This is an action for an accounting between partners. The material facts set out in the complaint may be briefly stated as follows: On or about the 1st day of March, 1885, the plaintiff and defendant, at the county of Del Norte, in this state, entered into a verbal contract whereby they agreed to go into the business of buying, slaughtering, and selling beef cattle and mutton sheep, and to divide the profits of the business equally between them. In pursuance of this contract they commenced the said business, and carried it on until February, 1888, when they discontinued it. Plaintiff put into the business a certain amount of money and a certain number of cattle and sheep and certain merchandise, and the defendant put in a certain amount of money and a certain number of cattle and sheep. From the sales the plaintiff received a certain sum of money, and the defendant a

larger sum. During the continuance of the business the animals were all disposed of except four head of cattle, of the value of \$100, which defendant converted to his own use. No accounting has ever been had, and there is left in the hands of defendant the sum of \$3,799.84, and \$100 for the said cattle appropriated by him to his own use, one-half of which sums is due and owing to the plaintiff; wherefore plaintiff prays for an accounting and judgment. The defendant answered the complaint, denying that he entered into the contract set out therein, and averring that on or about the 20th day of February, 1885, at the county of Curry, state of Oregon, plaintiff and defendant entered into a verbal contract whereby they agreed to furnish Charles Tryon and Ben Adams money, cattle, and sheep that they might enter into the business of buying, pasturing, selling and slaughtering beef cattle and sheep; that the profits and losses were to be shared equally between plaintiff and defendant after defendant Tryon should receive from plaintiff Haight \$1,000 per year for the use of his ranch in Curry county, Or. Then follow denials of most of the other allegations of the complaint, and an averment that defendant put into the business the sum of \$7,000. The answer prayed for an accounting, and that defendant have judgment against the plaintiff for the amount found due. At the time of filing the answer the defendant also filed a separate paper, denominated a "cross-complaint," in which he set forth that on or about the 20th day of February, 1885, at the county of Curry, state of Oregon, plaintiff and defendant entered into a verbal contract whereby they agreed to furnish Charles Tryon and Ben Adams money, cattle, and sheep for them to enter into the business of buying, slaughtering, and selling cattle and sheep; that the cattle and sheep were to be kept on Lone ranch, a large farm in said county of Curry, then and up to November, 1888, owned by defendant, and out of the said business defendant was to receive first \$1,000 per year for the use of the ranch or farm, and, after said sum was paid to him, then plaintiff and defendant were to share between them the profits and losses of such furnishing; that the said business was carried on by Charles Tryon and Ben Adams up to about the month of August, 1885, when plaintiff and defendant, finding they were losing money, took it away from them, and continued and carried it on on their own account and in their own names until November 5, 1888; that the ranch was so used from February 20, 1885, to November 5, 1888, and defendant received no rent therefor; that, in addition to the use of the ranch, defendant advanced money, cattle, and sheep to carry on the business, amounting with the rent of the ranch to \$7,000; that the plaintiff did not advance to carry on the business in money, cattle, and sheep over \$1,057.55, and that there is due from plaintiff

to defendant, under their agreement, the sum of \$5,942.45; that the business was conducted at a loss, and was discontinued on November 5, 1888, and that no accounting has ever been had; that three head of cattle remain undisposed of, one in possession of plaintiff and two in possession of defendant. The defendant then prays for an accounting of all the transactions between the parties; that he have judgment against the plaintiff for \$5,942.45; that any property remaining be sold, and the proceeds paid into court; and for general relief. The plaintiff demurred to the cross complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was overruled. No answer to the cross complaint was filed. Upon the issues thus framed the case was tried, and the court found that there was due from the plaintiff to the defendant the sum of \$2,500; for which sum judgment was entered in favor of the defendant. From this judgment, and an order denying his motion for a new trial, the plaintiff appeals.

The notice of motion for a new trial stated that the motion would be made upon the grounds, among others, "that the evidence is insufficient to justify the findings," and "that the findings are contrary to the evidence." It is claimed by the respondent that such a notice should be directed against the "decision" of the court, and not against the findings, and hence that the notice was insufficient, and the motion was therefore properly denied. This claim is clearly untenable. Under our statute the findings constitute the decision, (sections 632, 633, Code Civil Proc.; *Sawyer v. Sargent*, 65 Cal. 259, 3 Pac. Rep. 872,) and it has been held that such a notice as that given here complies with the requirements of the Code and is sufficient. *Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. Rep. 22.

It is further claimed that the cross complaint was a proper pleading in the case, and, no answer to it having been filed, that its averments were admitted, and no evidence in support of them was necessary; and hence that the findings cannot be assailed for want of evidence to justify them. And upon this theory the court below seems to have based its decision, the principal averments and findings, except as to the amount due, being in almost identically the same language. This claim is also, in our opinion, untenable. The so-called "cross complaint" was not in fact, as we think, a cross complaint, or anything more than an answer. It related to the transaction set forth in the plaintiff's complaint, the partnership between the parties, though alleging in some respects different terms, and contained only matters in "avoidance or constituting a defense or counterclaim," and was deemed to be controverted by the opposite party. Section 462, Code Civil Proc. And the fact that it was called a "cross complaint" did not make it one. It is

immaterial what the defendant called his pleading. Whether he designated it an "answer" or "cross complaint," its character will be determined by the court from the facts set up. *Holmes v. Richet*, 56 Cal. 307; *Meeker v. Dalton*, 75 Cal. 156, 16 Pac. Rep. 764; *Mills v. Fletcher*, (Cal.) 34 Pac. Rep. 637.

The only question remaining, which need be considered, is, did the evidence justify the findings? We do not think it did. The evidence was oral and documentary and was quite voluminous. To state it briefly would require considerable space, and subserve no useful purpose. On the part of the plaintiff it was positive that there was no such contract between the parties as that alleged by the defendant, so far as it related to Charles Tryon and Ben Adams, and to the rent of defendant's Oregon farm, and we are unable to find anything on the other side which can be said to raise a substantial conflict upon these issues. The brief statement by defendant, as a witness, that the cross complaint was true did not, in our opinion, have that effect. It follows that the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: TEMPLE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause is remanded for a new trial.

100 Cal. 310

CLYNE v. BENICIA WATER CO. (No. 18,109.)

(Supreme Court of California. Nov. 10, 1893.)

WATER RIGHTS—WHEN APPURTENANT TO LAND—ENFORCEMENT.

1. Defendant water company made a contract with the owner of land on a stream, whereby the latter conveyed to it the right to take water from the stream, and to maintain a main water pipe through her land; in consideration of which, defendant agreed to put a one-inch tap in said main pipe, wherefrom the landowner could draw, free of cost, the water needed for irrigation and domestic purposes. Defendant supplied such water as would flow through the tap mentioned, but laid no pipe through the land. Some years later, the land was sold under a mortgage placed thereon prior to the above agreement, and conveyed to plaintiff. *Held*, that the right to such water as would flow through the inch tap was appurtenant to the land, and passed to plaintiff.

2. Since the agreement between defendant company and the landowner gave the former the right to appropriate any or all waters of the stream, it was necessary for defendant to restore any water so taken from the stream, before being able to contend, as a defense to an action for specific performance of the contract to supply water, that, by the foreclosure and sale thereunder, it had lost all the riparian rights acquired under the agreement, and that, hence, the consideration therefor had failed.

Commissioners' decision. Department 2. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by James Clyne against the Benicia Water Company. From a judgment for plaintiff, defendant appeals. Modified.

James D. Thornton and George A. Lamont, for appellant. R. E. Houghton and John Lynch, for respondent.

TEMPLE, C. Action to enforce specific performance of an agreement. The judgment was for plaintiff, and this appeal is upon the judgment roll. The findings show that July 5, 1883, Eliza D. Nichols was the owner of a tract of land in Solano county, bordering a natural water course known as "Paddy Ranch Creek." She and her grantors had for 10 years used the water of said creek for domestic purposes, and for irrigating about four acres of land, part of said tract. That July 5, 1883, said Nichols executed a mortgage, whereby she mortgaged said land to one Boynton to secure a loan to her of \$7,000 and interest, which mortgage was on that day duly recorded. That defendant, being a water company, desired to construct a reservoir on Paddy creek, above the lands of Nichols, and with that view, November 5, 1883, entered into an agreement with said Nichols as follows: "This agreement, made this 5th day of November, 1883, between Eliza D. Nichols, of the county of Solano, state of California, party of the first part, and the Benicia Water Company, a corporation duly organized under the laws of the state of California, party of the second part, witnesseth, that the said party of the first part, in consideration of the covenants on the part of the said party of the second part hereinafter contained, hereby grants to the said party of the second part the right to lay and maintain a main water pipe through the land now owned and occupied by said first party, and the said first party hereby waives all right to the flow of water in Paddy Ranch creek. And the said party of the second part, in consideration of the covenants of the said party of the first part, hereinbefore mentioned, agrees to and with said party of the first part: (1) To put a one-inch tap in said main pipe at such point on the premises as said party of the first part may direct, from which tap said first party may draw, free of cost, all the water required by her for domestic purposes, and for the irrigation of her vegetable garden, containing about four acres of land. (2) To pay said party a fair and reasonable compensation for any damages that may be done to the vines and fruit trees of said first party in laying and maintaining said main water pipe; the amount of damages, if any, to be determined by arbitration. (3) That said water pipe shall be laid at a depth of two and a half feet below the surface of the ground on said premises. In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written. Signed in duplicate. [Seal.] Eliza

D. Nichols. [Seal.] The Benicia Water Company. By Andrew Goodyear, President." The agreement was not recorded. The defendant, in accordance with the terms of the agreement, proceeded to supply the Nichols ranch with water, furnishing the full amount that would flow through an inch tap, but laid no pipe on the Nichols ranch. March 19, 1889, Boynton commenced an action to foreclose his mortgage, but defendant was not made a party to such suit. A judgment and decree was duly entered, foreclosing the mortgage, and the property sold in pursuance of it April 29, 1889, and, no redemption having been made, a deed was executed accordingly, and the grantee went into possession. The foreclosure was in all respects regular, and conveyed the title of Eliza D. Nichols to the grantee. Defendant continued to supply water in accordance with the contract until March 29, 1890, when it closed the tap for that ranch, and refused to turn it on again, denying the plaintiff's right. Plaintiff owns the Nichols ranch through the foreclosure proceedings, and has no other title.

The answer denies certain allegations of the complaint, and sets up certain facts, from which appellant argues that there was a total failure of consideration for the defendant's undertaking. No rescission is averred or found. Defendant's position, at the trial, seems to have been that the right of Eliza D. Nichols under the contract did not pass to plaintiff as an appurtenance. It is not averred or found that defendant furnished water through a pipe on, or conducted to, the Nichols ranch. The agreement was to put a one-inch tap in its mains, from which Eliza D. Nichols could draw all the water required for certain purposes on the Nichols ranch. It is found that defendant did, "in accordance with the terms of said contract, and up to the time the tap was closed, supply and furnish from its main pipe, and through said tap, all the water necessary and required," and that the amount so furnished and necessary was all that would flow through the one-inch tap placed on the main pipe by defendant. The water was used on the Nichols ranch for more than five years. We must presume that such an amount of water was conducted to the ranch in some kind of a channel or pipe. Which ever it was, it would constitute an appurtenance to the Nichols ranch, and the right to it, including the flow of water from the main, passed under the conveyance to plaintiff. *Farmer v. Water Co.*, 56 Cal. 14.

Appellant argues that in consequence of the foreclosure of the mortgage, and the sale thereunder, defendant lost whatever riparian rights it acquired from Nichols; that it was a failure of consideration, through the fault of the plaintiff and his grantors. This may be so and, if so, would have entitled the defendant to rescind; but it did not offer to re-

scind, and restore to plaintiff everything of value which it acquired under the contract. Counsel says it has nothing which it received under the contract, because plaintiff owns all riparian rights which belonged to the Nichols ranch as completely as Nichols did before the contract was entered into. But this idea of restoration will not do. By the contract, defendant had the right to appropriate all the waters of Paddy Ranch creek, and deprive the Nichols ranch of the flow which it was entitled to as riparian lands. Whether defendant has, as a fact, appropriated such waters, does not appear, and it was not necessary that it should be made to appear, because rescission was not pleaded. If the defendant has taken the water from the creek under the contract, it must restore it, as a condition of rescission. The mere fact that plaintiff can sue for it is not enough. If that were the rule, restoration need never be required, for mere rescission will always give that right. It must deliver the goods, except in some peculiar cases where it is excused.

Counsel says, further, that to compel specific performance, under the circumstances, would be inequitable. By bringing the suit, plaintiff affirms the contract made by Nichols. Still, if defendant had made such issue at the trial, I have no doubt the trial court would have required a conveyance of the riparian right as a condition of the relief granted. Had plaintiff refused to confirm the transfer of riparian rights, I think relief should have been refused. I see no harm to any one in requiring it now, and recommend that the judgment be modified to that effect. I think, however, appellant is not entitled to costs on this appeal.

We concur: SEARLS, C.; BELCHER, C.

'PER CURIAM. For the reasons given in the foregoing opinion, the judgment in said cause is modified so as to require plaintiff to convey to defendant his right to the water of the Paddy Ranch creek, belonging to him as owner of the Nichols ranch, and said judgment is in all other respects affirmed. It is further ordered that respondent recover his costs on this appeal.

LILLIS et al. v. PEOPLE'S DITCH CO.
(No. 13,807.)

(Supreme Court of California. Nov. 10, 1893.)

RES ADJUDICATA—QUESTIONS DETERMINED—DIVERSION OF WATER.

Suit was brought to restrain a ditch company from diverting water from a slough. Defendant alleged that it had acquired a prescriptive right to divert, by means of a ditch of given dimensions, a certain number of feet per second. The court found merely that defendant had acquired the right to divert sufficient water to fill such a ditch without specifying the number of feet which might thus be diverted,

or the capacity of the ditch. *Held*, that this was not an adjudication, under Code Civil Proc. § 1911, as to the number of feet which might be diverted, since the same did not appear on the face of the judgment, or as necessarily included therein, but only as to the right to divert a certain indeterminate amount, and defendant, therefore, in a subsequent action, could prove its right to take an amount greater than it had alleged a right to in the former action. *Lillis v. Ditch Co.*, 30 Pac. Rep. 1108, 95 Cal. 553, followed.

In bank. Appeal from superior court, Fresno county; J. B. Campbell, Judge.

Action by Lillis and others against the People's Ditch Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Brown & Daggett, for appellants. N. O. Bradley, G. E. Lawrence, and W. D. Tupper, for respondent.

PER CURIAM. The questions presented upon this appeal are substantially the same as those presented in *Lillis v. Ditch Co.*, 95 Cal. 553, 30 Pac. Rep. 1108, and upon the authority of that case the judgment and order denying a new trial are affirmed.

100 Cal. 268

EL DORADO COUNTY v. MEISS. (No. 18,107.)

(Supreme Court of California. Nov. 8, 1893.)

LICENSE TAX—SHEEP RAISING—POWER OF COUNTY—CREATING COUNTY OFFICERS—ACTION FOR TAX.

1. An ordinance passed by county supervisors, imposing a license tax on persons engaged in sheep raising in the county, is authorized by County Government Act, § 25, subd. 27, conferring on the supervisors power "to license, for purposes of regulation and revenue," all legal business carried on in a county, which provision is not in conflict with, but authorized by, Const. art. 11, § 12, prohibiting the legislature from imposing taxes on counties for county purposes, but permitting it by general law to vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

2. Such constitutional provision allows the imposition by county authorities of a general license tax applicable to one doing business in the county, though not a resident thereof, as well as to the residents thereof.

3. Under Const. art. 11, § 5, declaring that the legislature, by general and uniform laws, shall provide for the election or appointment in the counties of supervisors, sheriffs, clerks, and such other county and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office, a county cannot create the office of license tax collector, and make appointments therefor.

4. A county can maintain an action for a license tax, though the provision of the ordinance of its supervisors imposing the license tax, which creates the office of license tax collector, and appointing a person to fill it, is void; since, the amount of the tax being fixed and declared by the ordinance to be a debt due the county, to be collected by action in the name of the county, its general power to sue is not affected by the provision that the action shall be by direction of the license tax collector.

5. Under the provision of a county ordinance imposing a license tax on persons engaged in "raising, grazing, herding, or pasturing" sheep, one herding and pasturing his sheep in

one county, except that he drives them to his farm, in the county imposing the license tax, to be sheared, where they remain but a few days, is not liable for the license tax.

In bank. Appeal from superior court, El Dorado county; N. D. Arnot, Judge.

Action by the county of El Dorado against Meiss for a license tax on the business of raising sheep. Judgment for plaintiff. Defendant appeals. Modified.

Irwin & Irwin and Armstrong & Platanauer, for appellant. Prentiss Carpenter and Richard S. Miner, for respondent.

DE HAVEN, J. On March 3, 1891, the board of supervisors of El Dorado county passed an ordinance requiring "every person engaged in the business of raising, grazing herding or pasturing sheep and goats, or sheep or goats," in that county, to procure from the license tax collector a license therefor. The ordinance made it the duty of the license collector to collect the license, and further provided that he might enforce the collection, "as provided by section 3360 of the Political Code;" that is, by action brought for that purpose in the name of the people of the state. In April, 1891, the supervisors of the county passed another ordinance, providing generally for the collection of all license taxes in that county, and for that purpose undertook to create the office of license tax collector, and by section 3 of this ordinance it was declared: "Sec. 3. The board of supervisors, at its first regular session in each year, shall appoint a qualified elector of the county such license tax collector for the term of one year next following such appointment; provided that, until the appointment of said collector at the January session of said board, in the year 1892, T. B. Epps shall be and he is hereby constituted such license tax collector in and for said county." And by section 6 of the same ordinance "said license tax collector" was authorized, upon the failure of any person to pay the license tax imposed by any ordinance, to direct a suit to be brought against such person, in the name of the county, for the recovery of such license tax; and it was further provided that such tax should be deemed to be a debt due the county of El Dorado.

The defendant herded and pastured a band of sheep in the county of El Dorado during the summer of 1891, and, having failed to pay the license imposed by the ordinance first referred to in this opinion, the present action was brought to recover the same. The superior court, in addition to the foregoing facts, also found that the defendant was a resident of the county of Sacramento during the time his sheep were pastured in El Dorado, and that said sheep were upon the farm of defendant in Sacramento county on the first Monday in March, 1891, and were duly assessed in that county for that year, and that defendant paid the taxes

thereon for that year in the county of Sacramento; and upon these facts the court rendered judgment in favor of plaintiff. The defendant appeals.

1. We see no valid objection to the ordinance passed March 3, 1891, imposing a license tax upon persons engaged in the business of raising, herding, or pasturing sheep in that county. The constitutionality of a similar ordinance of the county of Mono was sustained in *Ex parte Mirande*, 73 Cal. 365, 14 Pac. Rep. 888. The power "to license for purposes of regulation and revenue" all and every kind of business carried on in a county and not prohibited by law, and to provide for the collection of the same by suit or otherwise, is expressly conferred upon the boards of supervisors of the several counties of the state by subdivision 27 of section 25 of the county government act; and this provision is not in conflict with, but, on the contrary, is authorized by, section 12 of article 11 of the constitution of this state, which declares: "Sec. 12. The legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes; but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." A license tax is a tax within the meaning of this section. *People v. Martin*, 60 Cal. 153. It is contended, however, by the defendant, that under this section the legislature is only authorized to confer upon the county the power to impose a license tax upon the inhabitants of such county, and that the license in question is void because it is general, and requires every person engaged in the business of sheep-raising in the county of El Dorado to pay the license, whether he is an inhabitant of the county or not. We see nothing in the language of the section of the constitution referred to which can be construed as thus limiting the power of the legislature, and supporting this contention of defendant. This section authorizes the legislature by general laws to vest in the corporate authorities of counties, cities, and towns, respectively, the power to assess and collect taxes for county or municipal purposes, but the power when conferred can only be exercised in accordance with the fundamental rule that a tax, to be valid, must be equal in its burdens and uniform in its operation; and, in view of this general principle, it has been held that a county cannot discriminate between its own citizens and those of other counties in the imposition of a license tax for carrying on any business in such county. *Lassen Co. v. Cone*, 72 Cal. 387, 14 Pac. Rep. 100. If the ordinance under consideration here permitted the defendant, a resident of the county of Sacramento, to carry on the business of sheep raising in El Dorado county upon more favorable terms than residents

of the latter county, exempting the defendant from the payment of the tax which it imposes upon the latter for conducting the same business, it would be void, under the authority of the case last cited. It is only because it is general, and makes no discrimination whatever on account of residence between those engaged in the business upon which the license is imposed, that the ordinance can be sustained.

2. It is further claimed by the defendant that the ordinance creating the office of license tax collector for the county of El Dorado is void, because of want of power in the board of supervisors to create such an office; the duty of providing for the election or appointment of all necessary county officers, and prescribing their duties and fixing their terms of office, being devolved upon the legislature by section 5 of article 11 of the constitution. That section, so far as necessary to be here stated, is as follows: "The legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office." It was held in the case of *People v. Ferguson*, 65 Cal. 288, 4 Pac. Rep. 4, that the board of supervisors of a county might create the office of license tax collector, and that the exercise of such power was not in conflict with the section of the constitution just quoted. This opinion, however, was not concurred in by all of the members of the court, and we think the dissenting opinion of Mr. Justice McKee in that case, in so far as it relates to this particular point, states the correct rule. A license tax collector is an officer. He exercises a public duty in the collection of this part of the public revenue, and the board of supervisors of a county have no more power to create such an office upon their own views of public necessity or convenience than they would have to create any other kind of office deemed by them necessary or convenient for the transaction of the public business. The duty of providing for the election or appointment of the particular officers named in section 5 of article 11 of the constitution, "and such other county officers * * * as public convenience may require," and to prescribe their duties and fix their terms of office, is by this section vested exclusively in the legislature of the state, and can be exercised by no other body. The legislature cannot divest itself of this duty by any delegation of the power. "This provision of the constitution," said this court in *Welsh v. Bramlet*, 33 Pac. Rep. 67, "is mandatory, and must be construed, not only to give to the legislature the exclusive authority to provide for the officers in the several counties, fix their terms of office, and prescribe their duties, but also as declaring

that such provision must be made 'by general and uniform laws,' and that any law which the legislature may enact upon this subject must be uniformly applicable to all the counties of the state." But, although the appointment of Epps as tax collector under the ordinance was void, we do not think this fact is sufficient to defeat the right of the county to maintain this action. The amount of the license is fixed by a valid ordinance, and the ordinance further provides that such license tax shall be deemed a debt due to the county of El Dorado, and contemplates that, in the event of its nonpayment, the county shall have the right to sue and recover the same. The fact that the ordinance prescribes that such suit shall be brought in the name of the county, by direction of the license tax collector named therein, who, as we have seen, was not legally appointed, does not deprive the county of its general power to sue and enforce payment of the license. The right of the county to sue is not dependent upon the validity of that part of the ordinance creating the office of tax collector, and appointing a person to fill it.

3. The license imposed by the ordinance is five dollars for each 100 head of sheep, and under it the defendant was not liable to pay for any fractional part of that number of sheep. It appears from the findings that the defendant was the owner of two bands of sheep, one of which he pastured in the county of El Dorado for four months during the year 1891, and in relation to the other the court found as follows: "That defendant owned another band of sheep, consisting of 1,925 head, which he drove from his farm in Sacramento county to Alpine county, where they were herded and pastured during the summer of 1891, except they were driven down to his farm in El Dorado county to be sheared, and were sheared there, remaining about seven days, when they were returned to Alpine county, where they remained until he drove them down to his farm in Sacramento county." The facts stated in this finding do not show that the sheep therein referred to were raised, herded, or pastured in the county of El Dorado within the meaning of the ordinance imposing the license tax. The language of this ordinance is that "every person engaged in the business of raising, grazing, herding, or pasturing sheep," etc., must procure the license named. It is evident, we think, that the defendant, who neither raised, herded, nor pastured this band of sheep in the county of El Dorado, and who only took and kept them there temporarily on his own farm for the purpose of shearing them, is not liable to pay any license therefor under this ordinance. Of course, the license tax cannot be evaded by the mere pretense of driving sheep through a county, or into a county, for an alleged temporary purpose, when it is evident that the real object in so doing, and what is

really done, is to graze and pasture the sheep in the county. But the facts stated in this finding show no such attempted evasion of the ordinance, and the judgment of the superior court is erroneous in so far as it adjudges that defendant is liable to pay a license for simply shearing this band of sheep in the county of El Dorado. The judgment of the superior court is reversed, with directions to enter a judgment upon the findings in favor of the plaintiff, and against the defendant, for the sum of \$145, with interest thereon from June 30, 1892.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; FITZGERALD, J.

(100 Cal. 227)

PEOPLE v. WELLS. (No. 21,001.)

(Supreme Court of California. Nov. 8, 1893.)

COMPETENCY OF JUROR—PREVIOUSLY FORMED OPINION.

Pen. Code, § 1076, provides that no person shall be disqualified as a juror by reason of having formed an opinion upon the cause submitted to the jury, founded upon public rumor or common notoriety, if it appear to the court on his oath that he will, notwithstanding such opinion, act impartially upon the matter submitted to him. *Held*, that where the examination of a person as to his qualifications as a juror simply showed that he had an opinion as to the merits of the case which was based upon what parties directly interested had told him regarding the facts, there was nothing to justify the court in concluding that his opinion was formed from public rumor or common notoriety, and he was disqualified, even though he stated under oath that he could and would give defendant a fair and impartial trial.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Oscar O. Wells was convicted of felonious assault, and appeals. Reversed.

J. M. Brooks and J. W. Ballard, (Augustus A. Montano, of counsel,) for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The defendant was convicted under an information of having committed a felonious assault upon the person of one Marion Bradley Sparks, on the 31st day of May, 1892, in the county of Orange. During the impanelment of the jury one Moulton was examined as to his qualifications, and, having stated that he had frequently conversed about the case, and that from what he had heard had formed an opinion which would take evidence to remove, he was challenged by the defendant on the ground of actual bias. The challenge was denied, and an exception taken to the ruling of the court. The defendant exhausted his peremptory challenges, and now relies upon his exception to such ruling for a reversal of the judgment. After the juror had stated that he had formed an opinion as to the merits of the cause, his examination proceeded as follows: "Question. Has your opinion been formed, Mr. Moulton, by the public ru-

mors that you have heard from others respecting the case? Answer. My opinion was formed from what I received from others, and any man would form the same opinion had he heard the statements. The Court. Mr. Sanborn wants to know if your opinion is based upon what you heard. A. Upon facts I heard from parties directly interested in the case. Q. From what you heard from others? A. Yes, sir. Q. Facts that were of common notoriety in the neighborhood? A. The facts came to me very straight from those directly who understood the case. Q. Facts as commonly referred to in the neighborhood? A. Yes, sir. Mr. Brooks. Q. Is it from mere public rumor and common notoriety that you have formed your opinion, or is it from the direct statements made to you from some one? A. It is from statements made by some one else to me." The juror further stated in answer to an inquiry of the court that, notwithstanding the opinion which he now had, he could and would act fairly and impartially upon the matters submitted to him, if he were accepted as a juror.

Actual bias is defined in section 1073 of the Penal Code to be "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." It is also provided in section 1076 that no person shall be disqualified as a juror by reason of having formed an opinion upon the matter or cause to be submitted to such jury, "founded upon public rumor, statements in public journals, or common notoriety, if it shall appear to the court upon his declaration under oath that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him." Whether the state of mind of the juror is such as to constitute actual bias within the above definition is a question of fact to be determined by the court, and the court in determining that fact must also determine whether any opinion which the juror may have formed was founded upon public rumor, statements in public journals or common notoriety. The court's decision upon these points, when the evidence disclosed upon the examination of the juror is susceptible of different constructions, is to be regarded on appeal like its determination of any other question of fact resting upon the weight or construction of evidence. At the same time there must be some evidence to support the finding of the court that the juror's opinion is founded upon public rumor, or common notoriety. If there is an entire absence of evidence to support such a finding, the court has no authority to declare such to be the fact. At common law a juror who entered the box with an opinion as to the guilt or innocence of the accused was ipso facto disqualified from acting in the case, but section 1076 of the Penal Code of

this state, already quoted, creates an innovation upon this principle, and declares an exception to the common-law rule. But, in order that a juror disqualified at common law by reason of having previously formed an opinion as to the guilt or innocence of the accused, may come within this provision of the statute, it must appear affirmatively to the court from the evidence before it that such opinion is formed from public rumors, or statements of public journals, or common notoriety; and it must further appear to the court by the juror's declaration under oath that, notwithstanding such opinion, he can and will act fairly and impartially upon the matters to be submitted to him. The examination of the juror in this case simply discloses that he had an opinion as to the merits of the case, and that opinion was based upon what parties directly interested had told him regarding the facts. There is certainly nothing in that statement to justify the court in drawing the conclusion that his opinion was formed from public rumor or common notoriety. Conceding that the words "directly interested" are somewhat vague and indefinite, and do not necessarily refer to parties who are competent witnesses to the facts, still in no sense are they consistent with an inference that the statements were mere repetitions of public rumors, or matters of common notoriety. But, omitting from the statement of the juror that these things came to him from parties directly interested in the case, and allowing the examination to rest upon the sole fact that the juror entered the box with an opinion as to the guilt or innocence of the accused, that fact of itself is a disqualification under the law, and it is a disqualification even though the juror should declare to the court under oath that, notwithstanding such opinion, he would and could act fairly and impartially upon the matters to be submitted to him. The juror would not only be disqualified at common law, but disqualified under the Penal Code, for he has not brought himself within the provisions of section 1076; for those provisions require an affirmative showing to the court that his opinion is based upon public rumor, common notoriety, or statements from public journals. Such a showing is not made in this case. There is no evidence whatever to support such a finding of fact, and such a finding of fact is necessary in order that the challenge for actual bias could be properly denied. The right of the defendant to appeal to this court upon the exception here involved I think cannot be questioned, and my views upon the subject are fully stated in the concurring opinion rendered in the case of *People v. Wong Ark*, 96 Cal. 125, 30 Pac. Rep. 1115. The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: BEATTY, C. J.; HARRISON, J.

(100 Cal. 282)

**ELLEDGE v. NATIONAL CITY & O. RY.
CO. (No. 19,167.)¹**

(Supreme Court of California. Nov. 10, 1893.)

**MASTER AND SERVANT—NEGLIGENCE—DANGEROUS
PREMISES—EVIDENCE.**

1. A railroad company which sets a laborer to work near an overhanging embankment, with knowledge on the part of its foreman that there is a crack in the embankment, conspicuous from the rear, but not visible from the front, is liable to the laborer for injuries sustained from the falling of the embankment, since it failed to provide him with a safe place in which to work.

2. The fact that the embankment may have been secure when the excavation commenced, and that it became unsafe by the process of excavation, does not affect the company's liability to plaintiff, who entered its employ a few hours before he was injured, since, so far as he is concerned, the place was dangerous when he was set to work.

3. Knowledge as to the dangerous character of the place by the foreman, charged with performing whatever duty the company owed its employes, is imputable to the company itself, so as to render it liable for plaintiff's injuries.

4. In an action against a railroad company for personal injuries sustained by one of its laborers, owing to the fall of an overhanging embankment, an exclamation by defendant's foreman when the accident happened, "My God! I expected that!" is admissible as part of the *res gestae*.

5. An instruction that proof of defendant's negligence is made out "when" certain facts are shown is not objectionable, as assuming that such proof has been made.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by John Elledge against the National City & Otay Railway Company for personal injuries. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Luce & McDonald, for appellant. Wellborn, Stevens & Wellborn, for respondent.

TEMPLE, C. Plaintiff sues for damages for personal injuries alleged to have been caused by defendant's negligence. Plaintiff avers that he was employed by defendant as a laborer, and engaged under its direction in loading stone upon a car, and "that the car on which defendant was loading stone as aforesaid, on said day, was placed by said defendant, and stood during said day, near and alongside, to wit, about ten feet of a rock or cliff or embankment; that said cliff was of stone, and was thought by plaintiff to be solid and secure, and plaintiff, prior to the falling of said cliff, as hereinafter described, had no knowledge or intimation that said cliff was insecure, or that the place where he was working was unsafe or dangerous, but that defendant, by the exercise of reasonable care and diligence, could have known that said cliff was insecure and dangerous; and that defendant did well know that said cliff was insecure and dangerous, and liable to fall, but withheld all knowledge of such facts from plaintiff. The answer consists of denials. A verdict for the plaintiff

was rendered for \$3,000 damages. The appeal is from the judgment, and from an order refusing a new trial.

The defendant is a corporation operating a line of railroad in San Diego, and plaintiff was a section hand in the employ of defendant, engaged in loading rock from a bank or cliff on one of defendant's cars for use in the repair of the roadbed. The car stood from 8 to 10 feet from a bank nearly vertical, from 10 to 16 feet high, formed by a cut made in the construction of the road. The work had been progressing at that point for three or four days, at least. How long, does not appear. The work was done under the direction of Jerry O'Connell, road master, who had authority to employ and discharge men, and did employ the plaintiff. The plaintiff had on previous occasions been in the employ of defendant, but had never, previously, been employed in blasting rock. On the last employment, he commenced work about 7 o'clock in the morning of the day on which he was injured. When he reached the place, he found no foreman there, but he and a fellow workman, finding drills, put three blasts in the bank about ten feet from the cliff which afterwards fell, to his injury. About three hours after the last blast, while plaintiff and others were loading a car under the immediate direction of O'Connell, some rocks and earth slid down, injuring plaintiff. At the trial, defendant introduced no evidence, and in its motion for a new trial, and on this appeal contends (1) that the injury was caused solely by mischance and accident, or by the negligence of plaintiff and his fellow servants; (2) there is no evidence showing negligence on the part of defendant. Respondent contends that the injury occurred because a safe place was not provided, in which he could perform his service. It is charged "that plaintiff, without any fault or negligence on his part, but owing entirely and solely to the gross carelessness and negligence of the defendant, in requiring and allowing plaintiff to work in said dangerous place, and in failing to warn and notify plaintiff that the place was dangerous, and that said cliff was loose, insecure, and dangerous, was injured as above set out." The liability of the defendant is therefore based entirely upon the charge that it failed to furnish a safe place in which to work, but, on the contrary, set him to work at an unsafe place, knowing its insecurity, while plaintiff was wholly ignorant of its dangerous character.

In the late case of *Daves v. Southern Pac. Co.*, (Cal.) 32 Pac. Rep. 708, the law upon this vexed subject was fully considered. In that case, Bresnahan, the section foreman, had full authority to employ and discharge men, and they were entirely subject to his orders during their employment. One morning they had started out upon a hand car to the place where they were to be employed. A train being due, they turned upon

¹ For opinion on rehearing, see 34 Pac. Rep. 852.

a side track to avoid it. Bresnahan carried the key to the switch, and himself unlocked it and turned it. He then directed the deceased to examine the hand car, to see what repairs were needed upon it. Daves stooped down under the car to do so, and the incoming train ran upon the side track, through the carelessness of Bresnahan in leaving the switch open, and Daves was crushed. It was held that the fact that Bresnahan had authority to employ and discharge the men, with full control over them in performing their work, was immaterial; that an employer owes certain duties to his employees, which he cannot avoid responsibility for by delegating to another; that whoever is authorized and required to perform this duty for the master represents the master as to the performance of that duty, and no further. Grade of employment is of no consequence. The question is, "Was, then, the act or omission which caused the injury a personal duty which the defendant corporation owed to the deceased while he was engaged in the performance of his duty as its employee? If it was, and the deceased was not at fault, then the defendant corporation was liable; otherwise, not." The duties which an employer owes to his employees are said to be: "To furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed; and to make such provision for the safety of the employees as will reasonably protect them against the dangers incident to their employment." It was held that the corporate defendant in that case was not liable, because the place was, "of itself, in the first instance, a reasonably safe one," and was made unsafe solely through the negligence of Bresnahan in leaving the switch turned upon the side track, when he ought to have turned it back to the main track; that, in this act, Bresnahan, though having entire control of the workmen and the switch, did not represent the corporation, but was merely a fellow workman with Daves. He did not represent the employer, because the corporation had discharged its duty, in providing a safe place in which to do the work, and was not responsible if the place was rendered unsafe by the negligence of the fellow workmen of Daves. In the case at hand, it appears that the plaintiff had been engaged in excavating where the accident occurred for several days; that there was a seam or crack, as some of the witnesses call it, behind the part of the bank that slid off, conspicuous from the rear, but not visible from the front; that O'Connell, who certainly represented the defendant for the purpose of performing whatever duty it owed to its employees, knew all about it. On the Satur-

day previous to the accident, his attention was called to it, and, when the car was placed in position, O'Connell again noticed it, and one of the men said, "She still hangs," and O'Connell replied, "Yes; it is liable to stay there until about the first rains," and the workman replied, "Yes, and liable to come down at any time, too." Plaintiff was then called from another point, and set to work filling the car, soon after which the accident occurred. When O'Connell saw what had happened, he said to a workman: "My God! I expected that! Run and help McCann." McCann and plaintiff were each partly buried in the debris. Plaintiff had been in defendant's employ for about five hours before the accident. He had not been warned as to the dangerous condition of the cliff, and knew nothing of it. The crack was not visible from the front, where he was at work. Here it is evident the employer had not performed the duty it owed to the servant. He was set to work in a place known to be, or which the employer ought to have known was, unsafe. He was not informed of the danger. Under the rule laid down in *Daves v. Southern Pac. Co.*, the defendant is liable.

Appellant argues that, if the place was unsafe, it was in this case, as in the *Daves Case*, made unsafe by the workmen; that the bank was probably sufficiently secure when the excavation commenced, and, if it afterwards became unsafe, it was due to the manner in which the work was conducted. It is true the rule announced does not go so far as to hold, expressly, that an employer is bound to his servant to afford such superintendence and control as will afford reasonable protection against the acts of fellow servants in the discharge of their respective duties, nor is it necessary to do so here. If the bank was made unsafe by the process of excavation, it was before the employment of plaintiff. The workmen were not then his fellow servants. So far as he is concerned, the work commenced that morning, and there was evidence which tended to show that the bank had become dangerous before that time.

It is further argued that O'Connell's knowledge of the insecurity was but the knowledge of a fellow laborer, and cannot be imputed to the defendant. The defendant not being a sentient being, knowledge can only be imputed to it when some agent is chargeable with it. The evidence leaves no doubt upon the proposition that O'Connell was the agent who was required to perform whatever duty defendant owed to its employees. "If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it, to the injury of another servant in the same common employment, then the offending servant, in the performance of such duty, acted as the representative or agent of his employer, for which the employer is responsible."

Daves v. Southern Pac. Co., 98 Cal. —, 32 Pac. Rep. 708. The danger, upon any proper examination, was "conspicuous," though the evidence was not visible where plaintiff was at work. Defendant must be held to have known of it.

Appellant also alleges some errors of law at the trial:

1. He contends that it was error to permit the witness to state, against his objection, the exclamation of O'Connell when the cliff came down. This is plainly part of the *res gestae*. It was unpremeditated, and could hardly have been made if O'Connell had not feared that it might come down. It does not depend for its probative force upon O'Connell's veracity, and therein is entirely unlike a deliberate admission made after the event.

2. Objection is made to certain instructions given at the request of plaintiff. All but one are founded upon the proposition that O'Connell was not shown to be the representative of the defendant at the time of the accident. They do not require further discussion. The other is the tenth, which is as follows: "The burden of proof as to the defendant's or its agent's knowledge, or culpability in lacking knowledge, of any insecurity and dangerousness of said cliff, is on the plaintiff; but this proof is sufficiently made out by the plaintiff when it is shown that said cliff was insecure and dangerous in such respect that, if a proper inspection had been made by defendant, the security and danger would have been ascertained in time to have prevented the injury." The objection is to the use of the word "when," instead of "whenever" or "if." It is said that it assumes that such proof was made. This is against the manifest intention. A proposition is laid down in the first part of the instruction to the effect that the burden is on the plaintiff to prove certain facts. The last part simply tells what evidence is sufficient for that purpose. I do not think the jury were misled. I recommend that the judgment and order be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(100 Cal. 322)

KEYES et al. v. CYRUS et al. (No. 15,294.) (Supreme Court of California. Nov. 10, 1893.)

PROBATE HOMESTEAD—EXEMPTION FROM SURVIVORS' DEBTS.

The homestead set apart to a widow under Code Civil Proc. § 1465, which provides that, if no homestead has been selected in the lifetime of the deceased, the probate court must select a homestead "for the use of the surviving husband or wife and the minor children," is exempt, not only from the claims of the creditors of the deceased husband, but also from her own debts contracted by her previous to his death. Reatty, C. J., dissenting.

In bank. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by H. M. Keyes and others against Henry E. Cyrus and others to restrain an execution sale of certain land. From a judgment in plaintiffs' favor, defendants appeal. Affirmed.

Barham & Bolton, for appellants. Rose & Pond and J. W. Oates, for respondents.

HARRISON, J. July 22, 1889, M. M. Keyes and Barbara Keyes, his wife, made their promissory note to John Cyrus for \$7,175, and as security for its payment executed to him a mortgage upon certain lands in Sonoma county. M. M. Keyes died October 17, 1889, and his widow, Barbara, was appointed administratrix of his estate, and continued to act as such until August 10, 1891, when her final accounts were settled, and she was discharged from her trust. No homestead had been selected in the lifetime of said Keyes, and on June 30, 1890, the superior court for Sonoma county, upon due proceedings had therefor, by its order made that day, set apart as a homestead for the use of the said Barbara certain lands belonging to the estate of said Keyes other than those included in the mortgage, and on the 7th of July a copy of the said order was recorded in the office of the county recorder. The property so set apart as a homestead was community property of the said Barbara and her husband, and he left no minor children surviving him. At the time the land was set apart to her, Barbara was residing thereon, and continued to reside there until December 17, 1891, when she conveyed the premises to the plaintiffs. After the death of Keyes, Cyrus presented to the administratrix a claim against his estate upon the note and mortgage, which was duly allowed and approved, and thereafter, in an action instituted in the said superior court for the foreclosure of the mortgage, a judgment was rendered against said Barbara as administratrix, and also individually, for the amount of the note, and directing a sale of the mortgaged premises and the application of the proceeds thereof upon the judgment, and, if there should be any deficiency, that it should be docketed against said Barbara. Under this judgment the mortgaged lands were sold June 15, 1891, and, the proceeds being insufficient to satisfy the judgment, the deficiency thereof, amounting to \$3,798, was docketed against Barbara on the 16th of June, 1891. January 5, 1892, the defendants herein, to whom Cyrus had assigned his judgment, caused an execution to be issued on this deficiency judgment, and placed in the hands of the sheriff, under which he levied upon the lands that had been set apart to Barbara, and was advertising the same for sale, when the plaintiffs brought this action to restrain the said sale. Judgment was rendered in their favor, and the defendants have appealed.

The cause is brought here upon the judgment roll alone, and the question presented for determination is whether a homestead set apart to the widow by the superior court under the provisions of section 1465, Code Civil Proc., is liable to forced sale for a debt contracted by her previous to the death of her husband. The affirmative of this proposition is maintained by the appellants, upon the ground that the section of the statute authorizing the court to set apart a homestead out of the estate of a decedent contains no express declaration that when set apart it shall be exempt from forced sale, while on the part of the respondents it is contended that every legal homestead, whether made so by voluntary selection or by the action of the court, is exempt from a forced sale. The word "homestead" has both a popular and a legal signification. In its popular sense it signifies the place of the home,—the residence of the family; "it represents the dwelling house at which the family resides, with the usual and customary appurtenances, including the outbuildings of every kind necessary or convenient for family use, and lands used for the purposes thereof." *Gregg v. Bostwick*, 33 Cal. 227. It is in this sense that the word is used in the constitution, and also in the statute; in other words, it is the actual homestead to which they refer, and to which they purport to add certain legal incidents. The term itself is nearly as old as the English language, but its use in legislation is quite modern, and is peculiarly American. The ultimate object of all legislation respecting the homestead is to protect the family in the right to preserve their home, both from their own improvidence, and also from the rapacity of their creditors; and, in view of this fact, it is proper to assume that any legislation upon the subject of the homestead is intended for its protection, and that when the legislature has made provision for setting apart a homestead out of the property of a decedent, it was its intention that it should be exempt from forced sale. Such statutes, being remedial in their nature, are to be construed liberally, and in favor of carrying out the manifest purpose of the legislature, rather than that their operation be restricted to the strict letter in which they are framed. The policy of such legislation has never been questioned. It is in furtherance of the welfare of the state that its citizens shall be a permanent body, whose individual interests in its prosperity and development shall, as far as possible, be identified with the public interest.

A consideration of the terms used in the chapter of the Code of Civil Procedure in which section 1465 is contained corroborates the conclusion that the legislature intended that the homestead set apart under its provisions should have the legal incident of exemption from forced sale. The chapter is itself entitled, "Of the provision for the support of the family, and of the homestead;

and the heading to article 1 of the chapter in which this particular section is found is, "Of the provision for the support of the family." These headings are a portion of the statute, and may be examined for the purpose of determining the particular intent of the legislature with regard to the chapters in which they are placed. *Barnes v. Jones*, 51 Cal. 306. Section 1465 itself provides that, if no homestead has been selected in the lifetime of the decedent, the court must select a homestead "for the use of the surviving husband or wife and the minor children;" and section 1466 provides that, if the amount set apart under this section be insufficient for the support of the family, the court must make a further allowance for their maintenance, thus showing that whatever is set apart under section 1465 is for the "support" as well as the "use" of the family. The authority given to the court in the first part of section 1465 to set apart for the family "all the property exempt from execution, including the homestead selected," implies that the property, when set apart, is exempt from execution; and the subsequent provision therein for setting apart a homestead in case none has been selected during the lifetime of the decedent also implies that such homestead has the same exemption from forced sale as a homestead that had been selected by the decedent in his lifetime. The manifest object of the section is the support of the family, and to make provision for their support and maintenance. These demands of the family are deemed superior to those of heirs or creditors. *Estate of Moore*, 57 Cal. 442. "Setting apart a homestead is a part of the probate proceeding as much as is a family allowance." "It is a right bestowed by the beneficence of the law of this state for the benefit of the family." *Id.* A homestead may be set apart to the widow, even though the estate be insolvent, and the property so set apart constitute the entire estate of the decedent; but, if the homestead thus set apart to her could be immediately taken in execution by one of her creditors, it would fail to be available for her use or support, and it might happen that her creditor would fare better than a creditor of the decedent whose money had perhaps been used to purchase the very property so set apart. The question here presented was not involved in *Estate of Walley*, 11 Nev. 260, and what was said thereon in the opinion in that case was not concurred in by the full court.

As the general policy of the law is to protect the homestead of the family, the foregoing construction of this section harmonizes with that policy, and is consistent, rather than in conflict, with the provisions of the Civil Code for creating a homestead. Those provisions do not, either in terms or by implication, make that the exclusive mode of impressing the actual homestead with the legal incident of exemption from forced sale.

They relate exclusively to its voluntary selection, and afford a mode of designating it and making it a matter of record, so that the world may have notice of the property which constitutes the actual homestead. A homestead selected under these provisions has also certain other incidents in addition to its exemption from forced sale; such, for example, as the character of the estate created thereby, and the right of survivorship incident to that estate. Section 1240 of the Civil Code, which declares that "the homestead is exempt from execution or forced sale, except as in this title provided," is not in terms limited to the homestead selected by the parties, and, as the Codes are to be construed as a single statute, (Pol. Code, § 4480,) the provisions of this section must be held to apply to every homestead, whether selected and recorded by the voluntary act of the parties or by an order of the superior court. The judgment is affirmed.

We concur: McFARLAND, J.; DE HAVEN, J.; GAROUTTE, J.; FITZGERALD, J.; PATERSON, J.

BEATTY, C. J. I dissent upon grounds which are fully stated in the opinion in Estate of Walley, 11 Nev. 260. The homestead set apart by the probate court goes to the surviving husband or wife freed of all liability for any debt of the deceased spouse, but there is no provision of law exempting it from liability for debts of the survivor, whether contracted before or after the order setting it apart, and nothing, therefore, to prevent the operation of the general rule prescribed by section 688, Code Civil Proc. Nor is it at all necessary, in order to subserve the general policy of the law, to construe the statute as it is construed in the opinion of the court. When a homestead has been set apart by the probate court to a widow, and thus exempted from the claims of creditors of the deceased husband, if she desires to exempt it from the claims of her own creditors, she has only to make a declaration as head of a family if she has children or other dependent relatives residing with her, in which case it is exempt to the full value of \$5,000; or if she has no children or dependent relatives she can, like others similarly situated, secure exemption to the extent of \$1,000. This gives her all the advantages of other persons in her situation, and I can see no reason for giving her any greater right as against the debts that she voluntarily contracts.

4 Cal. Unrep. 335

PETERSEN v. TAYLOR. (No. 15,116.)
(Supreme Court of California. Nov. 10, 1893.)

PLEADING—FAILURE TO DENY EXECUTION OF
WRITING—APPEAL—REVIEW.

1. In an action for money had and received, the complaint alleged that defendant had on

July 2, 1884, executed a written instrument certifying that he held \$655 until certain disputes should be settled between two named claimants of the fund, and that both of the claimants had three years later assigned the certificate to plaintiff. The answer alleged that the dispute was settled on July 8, 1884, six days after the date of the certificate, and that both the claimants had on that day executed to defendant a written release of all their rights to the money, a copy of which was set out in the answer. Held, that plaintiff's failure to deny the execution of the release by affidavit filed with the clerk of court, as required by Code Civil Proc. § 448, admitted the genuineness and due execution of the release, and it must be taken to be what it appears to be on its face.

2. Where findings are waived, every presumption in support of the judgment must be indulged, except such as are cut off by the specifications of error; and though there is nothing in the testimony, all of which is certified to be in the record on appeal, showing the date of the execution of a written instrument, the judgment cannot be attacked on appeal for the insufficiency of the evidence in this respect, where this particular ground of insufficiency was not called to the attention of the trial court in the specifications.

In bank. Appeal from superior court, city and county of San Francisco; J. P. Hoge, Judge.

Action by one Petersen against Jos. W. Taylor to recover money alleged to have been received by defendant for plaintiff's use. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

Nagle & Nagle, for appellant. J. C. Bates, for respondent.

PATERSON, J. This is an action to recover the sum of \$780 claimed to be due plaintiff on two causes of action; the first is for \$125 alleged to have been received by the defendant from one Calvert for the use and benefit of plaintiff, and the other is for \$655, which it is alleged the defendant holds for plaintiff as assignee of E. & B. Bonnett, under a certificate of which the following is a copy: "This is to certify that I have the sum of \$655.00 collected from the city and county of San Francisco in the suits of B. Bonnett and C. H. Parker vs. The City and County of San Francisco, claimed by Elie Bonnett, but attached in the suits of Petersen vs. B. Bonnett as the money of B. Bonnett, to abide settlement or suit against me to determine the ownership of said sum. July 2, 1884. Jos. W. Taylor." Findings were waived, judgment was entered in favor of defendant, and plaintiff has appealed.

As to the first cause of action, it is sufficient to say there is a substantial conflict in the evidence, and the judgment of the court thereon must stand.

The plaintiff alleged that after defendant collected from the city and county of San Francisco the \$655 referred to in the last cause of action stated, and assigned and delivered to Elie Bonnett, for the benefit of all concerned, the certificate above mentioned, all disputes about the ownership of the money were settled, and the interests

therein of both Elie and B. were sold and transferred to plaintiff; that thereafter, to wit, on December 1, 1887, plaintiff notified defendant of the assignment to him, and demanded payment, which demand was refused. In his answer, defendant denied plaintiff's ownership of the \$655, or any part thereof, but admitted that he signed and delivered the instrument set forth in the complaint. He alleged that all disputes were settled, and the ownership of the property determined, on July 8, 1884, and a written release given, of which the following is a copy: "We have this day settled all of our affairs, and the judgments in the actions of B. Bonnett vs. The City and County of San Francisco and C. H. Parker vs. The City and County of San Francisco belong to Jos. W. Taylor. [Signed] B. Bonnett. Elie Bonnett. Jos. W. Taylor." He also pleaded in bar of the statute of limitations, and two judgments in his favor in actions brought by plaintiff against him upon the same cause of action. At the trial the instrument called a "certificate" was introduced in evidence, with proof of its assignment to plaintiff November 30, 1887, and that the money had never been paid to Elie Bonnett or plaintiff. B. Bonnett testified that Petersen had a judgment against him for \$655, and attached that amount in his hands, which moneys belonged to Elie, but which Taylor thought belonged to him, (B.) that Taylor collected several thousand dollars on the claim of Elie against the city and county of San Francisco, which he had assigned to Taylor for collection; that the \$655 was a part of this money, and Taylor, instead of paying it over, agreed to hold it as custodian till all disputes concerning the ownership thereof should be settled. Upon this showing, appellant claims that he was entitled to recover for money had and received. The contention, however, ignores the effect of the failure to deny the execution of the written instrument set out in the answer. Section 448, Code Civil Proc., provides that: "When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant." It is not claimed that any such affidavit was filed in this case. The genuineness and due execution of the instrument were therefore admitted, and it must be taken to be what it appears to be on its face. *Sloan v. Diggins*, 49 Cal. 38.

Plaintiff alleged in his complaint that the money was to be held by the defendant, under the certificate above referred to, "until certain disputes then existing in the ownership thereof should be settled and determined between one Elie Bonnett and B. Bon-

nett." The answer alleges that such settlement was made on the 8th day of July, 1884, at which time the statement of the settlement was signed by the three parties above-named. The certificate is dated July 2, 1884. The settlement was made six days later. Appellant contends that, as the settlement is not dated, it may have been executed the day before this action was commenced, and after the assignment to him of the certificate; but, as findings were waived, every presumption in support of the judgment must be indulged, except such as are cut off by the specifications. The appellant's specifications, in this case, are insufficient as a basis for an attack upon the ground that the agreement was not entered into on the date alleged in the answer.

At the conclusion of the evidence, it is said, in the statement, that "the foregoing was all of the testimony of the parties," and appellant contends that, as there is nothing in the testimony which shows the date of the execution of the instrument set out in the answer, and above referred to, no presumption can be indulged, so far as the date of the instrument is concerned, and no specification was needed. But we understand the rule to be without exception that, where a decision is attacked on the ground of the insufficiency of the evidence, the particulars in which the evidence is claimed to be insufficient must be stated. The objection cannot be raised for the first time in this court. It is only fair to the court below, and to the party resisting a motion for a new trial, that their attention should be called before the statement is settled to the particulars in which the moving party claims the evidence is insufficient. Judgment and order affirmed.

We concur: HARRISON, J; GAROUTTE, J.; FITZGERALD, J.

100 Cal. 336

BLACKBURN et al. v. NELSON. (No. 19,-212.)

(Supreme Court of California. Nov. 14, 1893.)

BOUNDARIES—MONUMENTS—COURSES AND DISTANCES.

In order to locate an intermediate post in a survey of land, which was run also by courses and distances, the footsteps of the surveyor should be followed, instead of taking a reverse course.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by D. D. Blackburn and others against Andrew Nelson to quiet title. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wilcoxon & Bouldin, for appellant. Graves & Graves, for respondents.

GAROUTTE, J. Action to quiet title. The appeal is taken from a judgment in favor of plaintiffs, and the only question involved is as to the location of the western boundary line of the rancho Pasa de Robles. The rancho was surveyed in 1859, and its boundary lines, as far as it is necessary to examine them for the purposes of this case, are described as commencing at a post marked "P. R. No. 3;" then west 84 chains and 20 links to a post marked "P. R. No. 4;" thence south 255 chains 87 links to the corners of sections 31, 32, 5, and 6. There is no dispute either as to the location of P. R. No. 3, or the termination of the west line at the point where the four sections corner, but the post marked "P. R. No. 4" is destroyed; and this litigation is the result, for the location of the corner where that post originally stood is determinative of the merits of this case. The township of government land lying immediately west of the aforesaid rancho was surveyed and sectionized in 1869, long after the title to the rancho was settled, and its exterior boundaries finally located. Hence, if any conflict arises between these respective surveys, the grant survey must prevail. Appellant contends that P. R. No. 4 should be located by running north 255 chains and 87 links from the corner of the four sections mentioned. Respondents insist that the northwest corner of the rancho should be located by running west from P. R. No. 3 84 chains and 20 links, and with this determination we agree. The northwest corner of the rancho is located by the patent at a post marked "P. R. No. 4." It is also located as being 84 chains and 20 links west of a post marked "P. R. No. 3." Hence, it is not only located by a monument, but by course and distance. The location by monument is valueless, for the monument has disappeared. Hence, the course and distance is necessarily controlling. If the patent had referred to no monument at this corner of the rancho, but had

located the corner simply by the course and distance given, then no question could arise but that the corner should be 84 chains and 20 links west of P. R. No. 3; and the monument having disappeared, and there being no oral testimony as to its former location, the case is here presented as if no monument marked "P. R. No. 4" was referred to in the patent. In locating P. R. No. 4, the court has followed the footsteps of the surveyor, rather than to take the reverse course, and run a north line from the common section corner, and this is the proper course. There is no reason why the north line of the grant should be shortened to 75 chains and 59 links, which is the point where appellant locates P. R. No. 3, and thus contradict the calls of the patent in this regard, in order that the west line should run due south, and conform to the calls of the patent. If the west line of the rancho cannot run due south without shortening the north line, then, as between the two lines, the course of the west line must give way, for it runs to a monument, and the monument is controlling. The question here presented is elementary, and we see no necessity for a citation of authority. Judgment affirmed.

We concur: HARRISON, J.; PATERSON, J.

100 Cal. 276

WREN v. WREN. (No. 14,296.)

(Supreme Court of California. Nov. 10, 1893.)

HUSBAND AND WIFE—AGREEMENTS BETWEEN—WIFE'S EARNINGS.

1. Under Civil Code, § 158, allowing husband and wife to enter into any engagement or transaction with each other respecting property, and section 159, providing that they may by contract alter their legal relations to property, and section 160, making their mutual consent a sufficient consideration for such an agreement, a husband may relinquish to his wife his right in money to be earned by her in nursing and boarding a person, so that she may sue therefor without joining him. *Read v. Rahm*, 4 Pac. Rep. 111, 65 Cal. 343, explained.

2. She is not required in such case to allege that defendant had notice of the agreement between herself and husband when the services were rendered.

In bank. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Wren against Wren. From a judgment for defendant, plaintiff appeals. Reversed.

Frank J. Sullivan, for appellant. Mich. Mullany and Wm. Grant, for respondent.

DE HAVEN, J. The plaintiff, who is a married woman, brought this action to recover \$300 from the defendant for personal services as a nurse, alleged to have been rendered by her to him. At the time these services were rendered, the plaintiff and her husband were living together, and the defendant was

an inmate of their house, but neither the plaintiff nor her husband was under any natural or legal obligation to care for the defendant without charge. In addition to the foregoing facts, it is alleged in the complaint that, prior to the rendition of the services mentioned, it was orally agreed between plaintiff and her husband that she should have and receive all moneys earned by her in nursing defendant as her sole and separate property. The superior court sustained a demurrer to the complaint, and thereupon rendered judgment in favor of defendant.

The sole question to be determined on this appeal is whether the complaint shows that the earnings of plaintiff in nursing defendant became her separate property, or whether such earnings constitute community property, for which her husband alone has the right to sue. The earnings of a wife during marriage and while living with her husband and in his house are community property, and, as such, are subject to the management, control, and disposition of the husband; but the husband may relinquish to the wife the right to such earnings, and when he has done so they become the separate property of the wife. This general proposition is not disputed by defendant, but he contends that the agreement alleged in the complaint did not have this effect, because it related to future earnings, something not then in existence, and therefore not the subject of a verbal gift. We do not, however, regard this agreement as constituting a "gift," pure and simple, in the legal sense of that term. Section 158 of the Civil Code provides that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property which either might if unmarried;" and section 159 of the same Code provides that a husband and wife may by contract alter their legal relations as to property; and the succeeding section makes the mutual consent of the parties thereto a sufficient consideration for such an agreement. Under these sections, there can be no doubt that a husband and wife may agree between themselves, without any other consideration than their mutual consent, that money earned by the wife in performing any work or service which does not devolve upon her by reason of the marriage relation shall belong to her as her own, and, when money has been earned by the wife under such an understanding or agreement with the husband, it is her separate property, and she may maintain an action to recover the same. An agreement between husband and wife by which the husband relinquishes all claim to the earnings of the wife, is one which relates to the acquisition of property by the wife, and is an engagement or transaction respecting property, within the meaning of section 158 of the Civil Code, above cited. This same question arose in

the case of *Riley v. Mitchell*, 36 Minn. 3, 29 N. W. Rep. 588. Under section 4, c. 69, of the General Statutes of that state, (1878,) husband and wife are given the right to "contract with each other as fully as if the relation of husband and wife did not exist," except in matters concerning real estate; and the supreme court in that case held that an agreement between husband and wife that the latter might receive the compensation to be earned by her in nursing a boarder in the family gave her the right to such earnings, and the consequent right to maintain an action for the purpose of collecting the same. The court in that case said: "While it may be true that a married woman will not, solely by virtue of the provisions in Gen. St. 1878, c. 69, § 1, be entitled to moneys due from boarders or others earned by her in and about the keeping and management of the family household, there can be no doubt that under section 4, same chapter, she may become entitled to receive the same by virtue of a contract between herself and her husband. We do not mean by this that they may stipulate for a pecuniary compensation to be paid by one to the other for performing the duties that pertain to the relation, such as caring for and managing the family, and the household of the family, but confine the proposition to services rendered to others, and compensation from others for such services." We think this may be regarded as a correct statement of the right given to husband and wife to contract with each other in relation to the savings of the wife by the sections of our own Civil Code above cited. It must be conceded that there is language found in the opinion of this court in the case of *Read v. Rahm*, 65 Cal. 343, 4 Pac. Rep. 111, which seems to sustain the contention of defendant here that the alleged agreement between the plaintiff and her husband was in the nature of a gift, and ineffectual for that purpose, because it related to future earnings. The following is the language contained in that opinion which is relied upon by the defendant: "There can be no doubt that any indebtedness due from Welsh for board for himself and sons was due to the community, nor could the husband make a gift to his wife of his interest in what should be paid by Welsh for such board in the future. He could not give that which he had not yet acquired." The question involved in that case related to the effect of a deed made by the wife by the direction of her husband in settlement of an indebtedness due to the community, and the court held that such deed operated as a gift from the husband to the wife. As this was the only question before the court, it is evident that its attention was not particularly called to the different matter referred to in the above quotation, and what is there said cannot be regarded as an authoritative decision upon the point presented here. The

plaintiff was not required to allege in her complaint that the defendant had notice of the agreement between herself and husband at the time of the rendition of the services mentioned in the complaint. This point was also passed upon in the case of *Riley v. Mitchell*, 36 Minn. 3, 29 N. W. Rep. 588, and we think was there correctly decided. It was held in that case that, when there is no question of set-off existing in favor of the defendant against the husband at the time of the rendition of the services, it makes no difference whether the defendant was or was not informed at the time that the wife, and not the husband, was to receive the pay for such services. Judgment reversed, with directions to the superior court to overrule the demurrer to the complaint. The appeal from the order sustaining the demurrer is dismissed.

We concur: PATERSON, J; FITZGERALD, J.; GAROUTTE, J.; HARRISON, J.

(4 Cal. Unrep. 339)

CLARKE v. BAIRD. (No. 15,178.)

(Supreme Court of California. Nov. 10, 1893.)

APPEAL—RECORD.

On appeal by plaintiff from an order vacating an order for the inspection of books of account, and from an order denying a motion to strike out defendant's answer, no error is shown where the record states that final judgment was rendered for plaintiff several months before the order for inspection was made, and before the motion to strike out, and the purpose of the order and motion at such a time is not disclosed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Johanna F. Clarke, administratrix, against Andrew Baird. From an order vacating an order for the inspection of books of account, and from an order denying a motion to strike out defendant's answer, plaintiff appeals. Affirmed.

Alfr. Clarke, for appellant. H. C. Schaertzer, for respondent.

VANCLIEF, C. The transcript contains two notices of appeal,—the first from an order vacating "an order for inspection of certain books of account," made at the instance of plaintiff; and the second "from the order denying plaintiff's motion to strike out the answer of defendant," on the alleged ground that he had refused to give his deposition in the case. The transcript consists of two bills of exceptions, one to each order appealed from, but contains no part of the pleadings in the action. It is stated in each of the bills of exception that "plaintiff recovered judgment November 28, 1891," but not even the substance or nature of the judgment is stated. It appears that the order for the inspection of books of account was an ex parte order, made on July 15, 1892, seven and a half

Cal. Rep. 32-34 P.—61

months after the judgment in favor of plaintiff, and that the order vacating the above-mentioned order was made on July 29, 1892. Plaintiff's motion to strike out defendant's answer was heard and denied on July 29, 1892. It is difficult to conceive what lawful purpose could have been subserved by striking out defendant's answer, and inspecting his accounts with a third person, (Hannah Wittram,) or even with the plaintiff, eight months after final judgment; and surely no such purpose is made to appear by the bills of exception. From aught that appears in the record, it would seem that plaintiff should have moved to strike out defendant's answer, and to inspect his books before judgment, if she was entitled to such relief in that action. Had she done so, the action of the court, if properly excepted to, might have been reviewed on appeal from the judgment. As the record discloses no error, the orders appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion the orders are affirmed.

DE HAVEN, J. I do not think either of the orders appealed from an appealable order, but, as the practical effect of a dismissal of the appeals is the same as their affirmation, I concur in the judgment affirming the same.

(100 Cal. 293)

ASEVADO et al. v. ORR et al. (No. 18,139.)

(Supreme Court of California. Nov. 10, 1893.)

INJUNCTION — DAMAGES — ACTION ON THE CASE — BOND — PLEADING — DEMURRER — JURY.

1. An action on the case will not lie for improperly suing out an injunction unless it is charged in the complaint as an abuse of the process of the court through malice and without probable cause.

2. The voluntary dismissal of an action is not an admission of want of probable cause.

3. Where it is not alleged in an action on an injunction bond that plaintiff in the injunction suit is a party thereto, the action cannot be maintained against him.

4. To determine the liability of the obligors in an injunction bond, the voluntary dismissal of the suit by plaintiff has the same effect as a decision of the court that the injunction was improperly sued out.

5. In an action on an injunction bond defendants cannot escape liability on the ground that the writ of injunction was ambiguous, and should not have been obeyed, as they are in no position to make such an objection.

6. A demurrer to a complaint containing two counts cannot be sustained if either count is good.

7. A joint demurrer by several defendants must be overruled if the complaint is good as to either of them.

8. A complaint is not necessarily defective in which there is united with some defendants another against whom no liability is shown, and an order overruling a demurrer for misjoinder of parties is not reversible error if the

rights of the parties have not been prejudiced.

9. The fact that the court excused a juror is no ground for reversal where no exception was taken by appellants to the jurors who tried the case, and it does not appear that they did not have an opportunity to exercise all the peremptory challenges allowed them.

Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Joseph Asevado and others against Thomas Orr and others. From a judgment for plaintiffs, defendants appeal. Reversed in part.

Warren & Taylor and T. M. Osmont, for appellants. Gillis & Tapscott, for respondents.

HARRISON, J. The appellant Thomas Orr brought an action in June, 1891, against the respondents in the superior court of Siskiyou county to restrain them from depositing any sand or gravel in North Fork Cornish ditch, and from diverting the waters of Main Greenhorn creek from said ditch during a certain portion of each day; and immediately after the commencement of the action procured a writ of injunction to issue out of the court, which was served on the plaintiffs herein, restraining them pending the litigation from doing the acts complained of. For the purpose of procuring the issuance of the injunction the plaintiff, in accordance with the order of the judge therefor, filed an undertaking in the amount of \$500, executed by the other appellants herein, conditioned "that, in case the said injunction should issue, the said plaintiff, Thomas Orr, would pay the defendants in the said action such damages, not exceeding the sum of \$500, as the defendants therein might sustain by reason of the said injunction, if the said superior court should finally decide that the said plaintiff, Thomas Orr, was not entitled thereto." In December, 1891, the action was dismissed upon motion of the plaintiff's counsel, and thereafter the respondents herein brought this action against Orr and the sureties on the undertaking to recover the damages sustained by reason of the injunction. The complaint contains two counts,—one against Orr, claiming the sum of \$6,150 for damages resulting from the issuance of the injunction; and the other against the sureties upon their undertaking to respond in the sum of \$500 for the amount of such damages. The defendants jointly demurred to the complaint, and, their demurrer having been overruled, they answered the complaint, and a trial was thereafter had in which the jury found that the plaintiffs had suffered damages in the sum of \$750. Judgment for that amount was entered against the appellant Orr, and for \$500 against the other appellants. From this judgment the defendants have appealed.

1. In *Robinson v. Kellum*, 6 Cal. 399, an action was brought against the defendant to recover damages for wrongfully suing out an

injunction against the plaintiff, and upon the appeal from the judgment rendered therein in favor of the plaintiff the court said: "An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the court through malice and without probable cause. If the act complained of is destitute of these ingredients, then the only remedy of the injured party is an action upon the injunction bond, which is specially provided by the statute as a protection against injury, even without malice;" and reversed the judgment because the complaint failed to aver those facts. To the same effect are the following authorities: *Cox v. Taylor*, 10 B. Mon. 17; *Manlove v. Vick*, 55 Miss. 567; *Burnett v. Nicholson*, 79 N. C. 548; *Hayden v. Keith*, 32 Minn. 277, 20 N. W. Rep. 195; *Lawton v. Green*, 64 N. Y. 330; High, Inj. § 1648. The courts of the state are open to every citizen for the redress of his wrongs, and unless he is at liberty to seek such redress without rendering himself liable in damages to the defendant in case he shall fail to establish his complaint, this right would in many instances be a barren privilege. The law has provided that in certain classes of actions a defendant may be restrained during the pendency of the action from enjoying property, or exercising dominion over the same, where his right to the property or of dominion is controverted by the plaintiff; and in such cases the plaintiff is required to indemnify the defendant against any injury that he may sustain from such restraint if it shall be finally determined that the plaintiff did not have a cause of action. The amount of this undertaking is fixed by the court as the measure of damage to be sustained, and is the limit of the defendant's right of recovery. It is to be assumed that the court has properly exercised its discretion in determining this amount; but if, at any time pending the litigation, it should be made to appear to the court that the undertaking is insufficient, it would have the power, and it would be its duty, to require an increase of the undertaking as the condition of allowing the plaintiff to continue the injunction. It is only when the process of the court is abused, or when the plaintiff seeks to avail himself of its power to harass or injure another by suing him upon a charge in which he is conscious of having no right of action, that he becomes amenable in damages for bringing such suit. Such an action is, however, in the nature of a malicious prosecution, and in any action to recover damages therefor want of probable cause and malice are essential ingredients to the complaint, and must be clearly alleged and proved in order to sustain the action. *Cox v. Taylor*, supra. The complaint in the present case does not aver either malice or want of probable cause, and therefore fails to show any cause of ac-

tion against the defendant Orr. The contention on the part of the respondents that the voluntary dismissal of the action was an admission by the plaintiff that he had no probable cause for commencing it, is not tenable. The plaintiff may have commenced the action in good faith, and, in the absence of any averment to the contrary, it must be so assumed; but if, after its commencement, he had become satisfied that he would not be able to establish his allegations, either by reason of having been originally misinformed, or because he was unable to procure witnesses in support thereof, good faith towards the defendants would prompt him to dismiss the action, rather than to force them to the annoyance and trouble of contesting his claims at a trial. It is not alleged that the appellant Orr was a party to the undertaking filed by him upon the issuance of the writ of injunction, and consequently he is not liable thereon. *Lindsay v. Flint*, 4 Cal. 89; *Ghiradelli v. Bourland*, 32 Cal. 588. It follows that the complaint fails to state any cause of action against Orr, and that the judgment rendered against him was without authority, and must be reversed.

2. The appellants Bohnert and Walbridge agreed by their undertaking that they would pay to the plaintiffs herein any damages which they might sustain by reason of the issuance of the injunction. Their liability depends simply upon proof that the injunction was issued, that the defendants suffered damages thereby, and that the court has decided that the plaintiff was not entitled to the injunction. The voluntary dismissal of the action by the plaintiff had the same effect as a decision of the court that he was not entitled to the injunction, (*Dowling v. Polack*, 18 Cal. 625;) and the evidence before the jury was sufficient to justify its verdict for the amount in which it was rendered. These appellants, however, urge that their demurrer to the complaint should have been sustained. They united with Orr in a general demurrer to the complaint upon the grounds that it did not state facts sufficient to constitute a cause of action; that there was a misjoinder of parties defendant; and that several causes of action were improperly united, viz. an action on the case for damages, and an action upon a special contract. The demurrer upon the two latter grounds is in reality but one, as the specification for misjoinder of parties states as its ground the joining of an action against Orr for damages with an action against these appellants upon their bond; but, assuming the demurrer to be sufficient in form, we think it was properly overruled. The second count in the complaint sufficiently states a cause of action against these appellants upon their undertaking, and a demurrer to the entire complaint cannot be sustained if either of the counts is good. So, also, a joint demurrer by all of the defendants must be overruled if the

complaint is good against either of them. A complaint is not necessarily defective in which there is united with some defendants another against whom no liability is alleged or recovery sought, and an order overruling a demurrer for misjoinder of parties defendant does not constitute a reversible error if it can be seen that the rights of the parties have not been prejudiced. The complaint in the present case seeks no recovery against these appellants except upon their undertaking, and it is evident that their rights could not be prejudicially affected by the fact that their principal, who did not unite with them in the undertaking, has been made a codefendant. The repetition in the second count of the complaint of the matters set forth in the first count, and which affect Orr alone, may be regarded as merely surplusage, and, as these matters are insufficient to constitute a cause of action against Orr, they could not have injured the appellants. In *Stark v. Wellman*, 96 Cal. 400, 31 Pac. Rep. 259, the two causes of action which the plaintiff had united in his complaint were against the same defendant, and it was held that the statute gave him the right to object to their being so united. In the present case, however, the cause of action alleged against Orr is different from the cause of action alleged against these appellants; and, where the substantial rights of the parties have not been affected by a misjoinder of causes of action, a judgment that is rendered after a trial of the case upon its merits should not be reversed because the court overruled a demurrer for such misjoinder. *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. Rep. 176, and 12 Pac. Rep. 449.

The action of the court in excusing the juror De Witt did not give to the defendants an available exception. Assuming that he was competent to be a juror in the case, it does not appear that the defendants were prejudiced by his exclusion. Their right to have the cause tried by an impartial jury did not give them the right to have it tried by any particular jurors. No exception was taken by them to any of the jurors who tried the cause, and it does not appear that they did not have an opportunity to exercise all the peremptory challenges allowed them.

The court did not err in refusing to instruct the jury that the writ of injunction was void by reason of its ambiguity, and that, therefore, the plaintiffs were not entitled to damages because of their obedience to it. They were bound to obey the spirit as well as the letter of the injunction, and were justified in acting so as not to render themselves liable for a contempt in disregarding it on the ground that it was ambiguous. It does not lie in the mouth of one who has secured an injunction which is ambiguous in its terms to object to its obedience on the part of the defendants, or to their claim for recompense for the damage they have sustained thereby.

The appellant Orr obtained the writ, served it upon them, and must be deemed to have intended a compliance with its terms on their part in some form. If they have done so, and have suffered damage, it is not for him to say that they misconceived the terms which he caused to be incorporated therein. *Webb v. Laird*, (Vt.) 20 Atl. Rep. 599. His acquiescence in their obedience must be accepted as his own construction of the manner in which he intended it to be obeyed, and his bondsmen are liable upon their undertaking for the damages consequent thereon. The judgment against the appellant Orr is reversed, and the judgment against the appellants Bohnert and Walbridge, and the order denying a new trial, are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.

100 Cal. 334

BUTLER v. ASHWORTH et al. (No. 15,396.)

(Supreme Court of California. Nov. 13, 1893.)

APPEAL—NOTICE—BOND.

1. Under Code Civil Proc. § 1046, declaring a notice without the title of the action or proceeding in which it is made, or with a defective title, as valid and effectual as if duly entitled, if it intelligently refers to the action or proceeding, a notice of appeal, in which a mistake is made in the first name of respondent in the title of the action, is sufficient where it is duly entitled as to the court and the department in which the action was tried, and intelligently refers to the number of the cause, and to the judgment and order appealed from.

2. Where the undertaking on appeal names the court, and the department thereof, in which the action was tried, gives the number of the cause, and accurately describes the judgment and order appealed from, but contains a mistake in the first name of respondent in the title of the cause, a justice of the supreme court may, under Code Civil Proc. § 954, allow a new undertaking to be filed.

Department 1. Appeal from superior court, city and county of San Francisco; C. W. Slack, Judge.

Action by Hannah Butler against Thomas Ashworth and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Respondent moved to strike the transcript from the files and to dismiss the appeal. Motions denied.

Humphrey & Welch, (W. C. Burnette, of counsel,) for appellants. Geo. B. Merrill, for respondent.

PATERSON, J. Respondent has moved to dismiss the appeal herein, and to strike from the files the transcript on appeal. In preparing his notice of appeal, counsel for the appellant entitled the cause "Emma Butler vs. Thomas Ashworth et al.," and it is claimed that this invalidates the appeal. An affidavit has been filed in which counsel for appellant states that the mistake was caused by the fact that when he was em-

ployed in the case he placed his private papers for use therein in an envelope, and indorsed the same with the title of the action, but in doing so, through inadvertence and mistake, wrote the plaintiff's name therein as Emma Butler, and, in preparing the notice of appeal and other papers in which the mistake as to plaintiff's name occurred, he wrote the same from the title of the cause as the same appeared upon said envelope, and never discovered the mistake until he was preparing the transcript to be used on appeal herein. Section 1046, Code Civil Proc., provides that "an affidavit, notice, or other paper, without the title of the action or proceeding, in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligently refer to such action or proceeding." The notice in question is duly entitled as to the court, and the department thereof in which the action was tried, and intelligibly refers to the number of the cause, and to the judgment and order denying the defendant's motion for a new trial. In preparing the undertaking on appeal, counsel for appellant made the same mistake, but as the undertaking names the court and department thereof, gives the number of the cause, and accurately describes the judgment and order denying the motion for a new trial, we think, if the defect is a material one, the case comes within the provisions of section 954, Code Civil Proc., which authorizes the filing of a new undertaking, approved by a justice of the supreme court. A request to file such undertaking was made at the hearing, and granted. The motion to strike the transcript from the files is denied. The motion to dismiss the appeal is also denied, an undertaking approved by the chief justice of this court having been filed herein.

We concur: HARRISON, J.; DE HAVEN, J.

100 Cal. 348

ELECTRIC LIGHT & POWER CO. v. CITY OF SAN BERNARDINO. (No. 19,282.)

(Supreme Court of California. Nov. 25, 1893.)

CITIES—CONTRACTS—STREET LIGHTING.

The lighting of streets by electric arc lights placed above the intersections of streets is not "street work," within Mun. Corp. Act, § 777, as amended by St. 1891, p. 54, providing that in the erection of public buildings, and in all street and sewer work, it shall be done by contract let after notice by publication.

Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by the Electric Light & Power Company against the city of San Bernardino. Judgment for defendant. Plaintiff appeals. Reversed.

Harris & Gregg, for appellant. Wm. Gird and John Brown, Jr., for respondent.

GAROUTTE, J. The plaintiff in this case is the Electric Light & Power Company, a corporation organized in this state, and the defendant is the city of San Bernardino, a municipal corporation of the fifth class. The plaintiff entered into an express contract for lighting the streets of the city of San Bernardino for one year following the 1st day of October, 1891, with 42 electric lamps. The city agreed to pay therefor the sum of \$546 per month. The contract was fully complied with on the part of the plaintiff, and the defendant made payments on the contract for all the months except July, August, and September, 1892. The respondent refused to pay for lighting the city during these last-named months, and this action is brought to recover the contract price, amounting to \$1,638. In answer to plaintiff's complaint, the defendant alleges that the lighting of the city was done under the contract set forth, but asserts that the contract was unauthorized, in that it was not let pursuant to any notice or advertisement for bids for lighting the city, and that no advertisement inviting bids for the lighting of the city was ever given by the board of trustees of said city. At the close of plaintiff's case, the defendant moved for judgment of nonsuit on the grounds specified in his answer, and the court granted the

motion, and ordered judgment for defendant. This appeal is prosecuted from such judgment.

The merits of this appeal are determined by the construction given section 777 of the municipal corporation act, as amended by the Statutes of 1891, p. 54. That portion of the section to which it is necessary that we direct our attention is as follows: "In the erection, improvement and repair of all public buildings and works, in all street and sewer work, and in all work in or about streams, bays or water-fronts, or in or about embankments or other works for protection against overflow, and in furnishing any supplies or materials for the same, when the expenditure required for the same exceeds the sum of \$100, the same shall be done by contract, and shall be let to the lowest responsible bidder after notice by publication in a newspaper of general circulation. * * *". The city was lighted by plaintiff, as shown by the testimony, by arc electric lights suspended at a considerable height above the intersection of the streets, from wires, which wires were supported by wooden masts. Does the lighting of streets, as here described, come within the term "street work," as used in the foregoing provision of the statute? We are satisfied that it does not, and to give such a meaning would demand a construction of the statute entirely unjustifiable by its language. "Street work" is a phrase of common usage, and has a well-defined signification. The words mean exactly what they indicate upon their face, namely, work upon a street,—work in repairing or making a street. The phrase is found in the decisions of this court, and in the statutes of the state, times without number, and its construction as indicated, to our knowledge, has never been questioned. The parties plaintiff and defendant entered into an express contract. The plaintiff furnished the light at the time and upon the terms demanded by the contract, and the city now refuses to pay the balance due under its contract, upon the ground that notice was not given in the newspapers and bids requested. Such being the status of the case, it certainly is not demanded of us that doubtful constructions, even if this provision gave occasion for them, should be resolved in favor of the defendant. The provision, fairly construed by all rules of construction, does not bring the subject of this litigation within the term "street work," as there used. There can be no question as to the sound policy of a law requiring municipal corporations to enter into contracts for the payment of money only after full notice and opportunity for competition, but that is not a matter for our consideration here. We must take the statute as we find it. We can neither add to it nor subtract from it. It is our duty alone to construe it as it stands enacted. For the foregoing reasons, it is ordered that the judgment

be reversed, and the cause remanded, with directions to the trial court to enter judgment for the plaintiff upon the pleadings.

We concur: PATERSON, J.; HARRISON, J.

100 Cal. 359

WAGNER v. SUPERIOR COURT OF LOS ANGELES COUNTY. (No. 15,506.)

(Supreme Court of California. Nov. 25, 1893.)

On rehearing. Petition denied.

For report of decision on appeal, see 34 Pac. 648.

PER CURIAM. The petition for a rehearing will be denied. It appears that on September 28, 1892, the petitioner, L. M. Wagner, was adjudged insolvent by the superior court of Los Angeles, and subsequently the court, in the matter of the insolvency proceeding, made a distribution of all of the estate of the insolvent which had come into the possession of the assignee, and granted to the petitioner here a certificate of discharge of all debts and claims existing against her at the date of the filing of her petition to be adjudged insolvent, and also made an order discharging the assignee, which latter order was subsequently vacated. When the order was made granting to the petitioner here a certificate of discharge, the insolvency proceeding was ended as to her, and the court had no further jurisdiction over the person of the insolvent; and its jurisdiction could only be restored by an application upon the part of some creditor to set aside and annul the decree or certificate discharging her from her indebtedness, as provided by section 53 of the insolvent act. It seems, however, that since the making of the orders referred to two petitions have been filed in the superior court, each praying that the certificate of discharge granted to the petitioner herein be annulled upon the ground of alleged fraud in obtaining it. One of these petitions was filed by the assignee in the insolvency proceeding, and the other by a creditor of the insolvent, Wagner. The court thereupon made an order requiring the petitioner herein to appear on October 30, 1893, and show cause why the order discharging her from her indebtedness should not be vacated; and upon the same day, upon further petition of the assignee, the court made an order requiring the petitioner to appear before the court upon September 19, 1893, for examination in relation to her property; and also directed that subpoenas should issue, requiring the attendance as witnesses of other persons claiming to own such property. This latter petition and order seems to be based upon section 47 of the insolvent act, and the object of this proceeding is to prohibit the court from proceeding under this latter order. We think the application must be granted. After the

final discharge of the petitioner in the insolvency proceeding, the court was without authority to proceed under section 47 of the insolvent act and examine the petitioner here for the purpose of ascertaining whether or not all the property of the insolvent estate had come into the hands of the assignee, or to examine any other person against whom no citation had been issued under section 24 of the insolvent act. We think this conclusion is sustained by the reasoning of Woodruff, J., in *Re Dole*, 9 N. B. R. 193, and also by the case of *In re Witkowski*, 10 N. B. R. 209. Our former judgment in this case as actually entered by the clerk, and the writ issued in pursuance thereof, were not in exact accordance with the opinion filed, and the judgment is amended by striking therefrom all that part which prohibits the superior court from requiring the said L. M. Wagner to show cause why the order of discharge theretofore granted to her should not be vacated, annulled, and set aside; and the writ of prohibition will be amended in the same particulars. The prohibition only extends to proceeding further under the order of September 1, 1893, requiring the said Wagner to appear in the superior court on September 19, 1893, and submit to an examination relating to her property, and which also directed subpoenas to issue requiring the attendance of certain persons therein named as witnesses.

BEATTY, C. J., (dissenting.) The filing of a new opinion by the court denying a rehearing of this cause presents a proper occasion for me to state the grounds of my dissent from the judgment and from the present order. In this new opinion the facts which I deem most material to the discussion, although correctly stated, are somewhat obscured by the more particular statement of facts which, to my mind, are wholly immaterial. I shall therefore endeavor to state the case—which is very simple—in a manner which will clearly present the single question we are called upon to decide.

L. M. Wagner was adjudicated an insolvent on her voluntary petition. Hall was appointed assignee. In the usual course of proceedings, Wagner, the insolvent, received her certificate of discharge from the claims of creditors, and a few months later the final account of Hall, the assignee, was settled, and he was discharged. Shortly afterwards, Hall and a creditor of the insolvent filed separate petitions on the same day, each alleging fraud on the part of the insolvent in concealing her property, and preventing it from reaching the hands of her assignee. In the creditor's petition he prayed for an order setting aside the insolvent's certificate of discharge. That is a proceeding now pending in the superior court, with which we have nothing to do in this case. The petition of the assignee prayed for an order vacating and annulling the order by which he had been

discharged, and also prayed for an order setting aside the insolvent's certificate of discharge. This latter order, it is conceded, the assignee had no right to ask; but the fact that he asked for an order to which he was not entitled was no reason for refusing to vacate the order by which he had been discharged, and accordingly the court made such an order, as it had the undoubted right to do, and the effect was to put the insolvency proceeding in the same condition in which it was before the assignee was discharged. *Rued v. Cooper*, 34 Pac. 98, (decided here August 31, 1893.) No one now questions the validity or effect of that order, and it also, like the proceeding by the creditor above mentioned, may be dismissed from further consideration. Here, then, was the simple and ordinary case of an insolvency proceeding, in which the insolvent debtor has been discharged from the claims of creditors, but the assignee is still actively engaged in the execution of his trust,—collecting the insolvent's estate for the purpose of distribution to the creditors. This being the condition of affairs, Hall, the assignee, filed a separate and distinct petition in the superior court having jurisdiction of the insolvency proceeding, alleging that the insolvent had concealed a portion of the property covered by her assignment to him, and praying for an order to her to come into court and submit to an examination touching the matter so alleged. Upon the filing of this petition the superior court made the order prayed for, and this is the order which we are here asked to prohibit the superior court from proceeding under.

The only question to be decided, therefore, is whether a superior court, in which an insolvency proceeding is regularly pending, has the power, on petition of the assignee, after the discharge of the insolvent debtor, to cite and examine the insolvent under section 24 of the insolvent law. The court, in its last opinion, says that this latter petition and order "seems to be based upon section 47 of the insolvent act." I cannot see why this should be said. Neither the petition nor the order refers to any particular section of any act. The petition states facts which bring the case within section 24, and counsel, in their argument, rely upon section 24. If this were not enough to give them the benefit of the provisions of that section, it might be suggested that the respect due to the orders and proceedings of the superior courts, and the presumptions in favor of their validity, should prevent us from holding such orders void if there is any law anywhere in the statutes which will sustain them; and even if counsel had relied exclusively upon section 47,—as they have not,—the action of the court should be sustained if it is fully warranted by section 24. Section 24 of the insolvency act gives to assignees in insolvency the right to take the same proceedings by "citation, examination," etc., against "persons

suspected of having concealed or embezzled, conveyed away or disposed of any property of the debtor," which are authorized by sections 1459-1461, Code Civil Proc., on the part of administrators or executors against persons suspected of having concealed or embezzled property of decedents. It does not confer a special jurisdiction over the insolvent debtor, as is done by section 47 of the insolvency act, and by section 26 of the national bankruptcy act, but a general jurisdiction over all persons suspected of concealing or embezzling any portion of the property assigned. Conceding that by the discharge of the insolvent the court has lost the special jurisdiction over him conferred by section 47 and other provisions of the act, it does not follow that it has lost the general jurisdiction over all persons suspected, etc., conferred by section 24. Indeed, I suppose no one would contend that the court by the discharge of the debtor loses jurisdiction to cite and examine other suspected persons on petition of the assignee; and, if the court has this jurisdiction over the rest of mankind, I cannot see any reason why the insolvent himself should be exempt from it. He has the same inducement to conceal and embezzle the property that others have, and, as a general thing, much better opportunities. The provision is remedial, salutary, summary, and inexpensive, and if any one has less reason than another to complain of its application it is the insolvent, who is availing himself of the benefits of the law. If he is innocent, the examination cannot hurt him; if he is guilty, it is right that he should be compelled to divulge the facts. The conclusion of the court that he alone is exempt from a process to which all the world is subject cannot be sustained unless the discharge of the insolvent is held to operate as a license to him to embezzle the estate which he has assigned with a degree of impunity not enjoyed by any other person. But clearly his discharge has no such effect. Its whole scope is to release him from claims of creditors, and even as to them it is void if it has been obtained by fraud, and they may attack it directly or collaterally. As to the assignee and his claim to the property assigned, it has no effect. If he finds that the debtor has in his hands property covered by the assignment, whether concealed or embezzled before or after his discharge, it is the right and the imperative duty of the assignee to endeavor to recover it for the benefit of the creditors; and to this end he has, and ought to have, free recourse to all the remedies, direct and auxiliary, which the statute has provided.

The cases cited from the N. B. R. in the opinion of the court are not authority for its conclusion, for two reasons. In the first place, the rulings in the different circuit courts on this point are not uniform. See decision of Judge Blatchford, contra, in *Re Heath*, 7 N. B. R. 448. But more important than this is the fact that the national bank

ruptcy act contains no provision equivalent to section 24 of our insolvency law, giving a general jurisdiction over all persons "suspected," etc., to cite and examine them. The only provisions of that act applicable to a proceeding like that in question here are contained in section 26, and they apply to the bankrupt alone. In other words, they confer a special summary jurisdiction over him, which, as was held by the circuit court in the cases referred to, ends with his discharge. But this conclusion was based upon a construction of various clauses of section 26, no equivalent of which is to be found in any part of our insolvency law.

It is further to be observed that the argument in favor of this construction, so far as it is based upon the terms of the law, was not wholly satisfactory to the author of the opinion, for he seems to have considered it necessary to reinforce it by an additional argument founded upon the great hardship of holding to a construction that would expose the bankrupt during the remainder of his life to oppressive and vexatious proceedings on the part of his assignee. It is this part of the argument alone which is applicable to the present proceeding, and to my mind it is entitled to very little weight. To hold that an action or special proceeding capable of being used oppressively or vexatiously ought not to exist, would lead logically to the abolition of all legal remedies. There is no man living who is not continually exposed to the danger, such as it is, of malicious prosecutions, civil and criminal; that is to say, it is in the power of any maliciously disposed person to put him upon his defense on a trumped-up charge. But this has never been deemed a sufficient ground for depriving individuals of the right to institute actions on their mere volition; and their liberty to do so has not resulted in any great hardship, for the very sufficient reason that few persons care to incur the trouble and cost of commencing a litigation in which they are sure to be defeated, and for which, if they have proceeded wantonly or maliciously and without probable cause, they are liable to an action for damages. I think the fear that this particular process might be employed to oppress unfortunate debtors is purely visionary; and, even if there were anything in reason or experience to justify it, I repeat that I cannot see why, when the rest of mankind is subject to it, the one person who has sought the benefits of the law should be alone exempt.

AUSTIN v. DICK. (No. 18,213.)

(Supreme Court of California. Nov. 8, 1893.)

Department 2. Appeal from superior court, Modoc county; C. L. Clafin, Judge.

Action by J. T. Austin against Morris Dick to contest defendant's right to an office for which contestant and contestee were candidates. From a judgment finding that no one was declared elected, defendant appeals. Affirmed.

Goodwin & Stewart, J. W. Harrington, and H. L. Spargur, for appellant. D. W. Jenks and G. F. Harris, for respondent.

PER CURIAM. On the authority of *Austin v. Dick*, (No. 18,184; decided October 30, 1893,) 34 Pac. Rep. 655, the judgment appealed from is affirmed.

(Nov. 20, 1893.)

PER CURIAM. The judgment of this court entered on November 8, 1893, affirming the judgment of the superior court in this action, was inadvertently so entered, and the same is vacated and set aside; and now, upon the authority of *Austin v. Dick*, (No. 18,184,) 34 Pac. Rep. 655, the judgment appealed from is reversed, with direction to the superior court to dismiss the proceedings; the defendant to recover his costs.

(100 Cal. 339)

McCLURE v. McCLURE. (No. 15,188.)

(Supreme Court of California. Nov. 20, 1893.)

MORTGAGES—CONSIDERATION—SUFFICIENCY.

The compromise by a wife of a suit for divorce against her husband, and her abandonment of her alleged right of homestead in his property, is a valid consideration for a mortgage executed by the husband in her favor to secure a note.

Commissioners' decision. Department 1. Appeal from superior court, Lake county; R. McGarvey, Judge.

Action by Frank McClure against N. H. McClure. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Hudson & Sayre, for appellant. Thomas B. Bond and Woods Crawford, for respondent.

VANCLIEF, O. Action to foreclose a mortgage executed by defendant to secure his promissory note for \$2,000, made to his wife, Mrs. M. E. McClure, and by her assigned to the plaintiff, who is the son of defendant and his said wife. The only defense upon which any point is made here is that there was no consideration for the note or mortgage. The judgment was in favor of the plaintiff, and defendant appeals from the judgment, and from an order denying his motion for a new trial.

It is contended by counsel for appellant that the evidence does not justify the finding by the court that there was "a valuable and adequate consideration" for the execution of the note and mortgage. The making of the note and mortgage was one of the results of a compromise of pending lawsuits between defendant and his wife. On April 5, 1887, defendant and wife, with minor children, were residing on the mortgaged premises, which were then community property of the husband and wife, but had not been selected or recorded as a homestead by either. On that day, on account of some difference between them, the defendant angrily ordered his wife to leave their home. Thereupon they divided their household furniture and provisions of food, and she

left her house, and went to a house which she leased, about a mile from the mortgaged premises, saying then, and often afterwards, that she intended never to return to or to live with her husband; and she never did. About three weeks after thus leaving, she made and filed her declaration of homestead on the mortgaged premises, containing, among other things, the following: "I do now, at the time of making this declaration, actually reside with my husband and family on the land, but am temporarily abiding off said land and premises." On October 15, 1887, the defendant commenced an action against his wife to quiet his title against her claim of homestead, and to annul her recorded declaration thereof, as a cloud upon his title, on the ground that she was not residing on the land at the time said declaration was made and recorded. On July 3, 1888, the defendant commenced another action against his wife for a divorce on the alleged ground of her willful desertion. To this complaint she answered, denying that she had willfully deserted, etc., and also filed a cross complaint, praying for a divorce from her husband, but upon what ground does not appear. On December 19, 1888, the divorce case was called for trial, when the attorney for the plaintiff therein asked for a recess for the purpose of effecting a compromise of the matters of difference between the parties, which was granted. During the recess the terms of a compromise of the action and cross action for divorce and the action to annul the declaration of homestead were agreed upon, and were entered in the minutes of the court in connection with the dismissal of those actions as follows: "The plaintiff appearing in person and by J. M. Hamilton, Esq., and C. F. Fishback and S. K. Welch, Esq., and defendant appearing in person and by R. W. Crump, her counsel, and on motion of counsel for plaintiff the action of N. H. McClure v. M. E. McClure is dismissed, and the cross complaint of the defendant herein in this action is, on motion of counsel for defendant, dismissed, and the action N. H. McClure v. M. E. McClure, to quiet title to real estate, is, by consent of counsel, dismissed; each party in each case to pay his own costs, respectively. It is agreed between the parties that N. H. McClure shall execute to M. E. McClure a note for \$2,000.00, due one year from January 1, 1887, with interest at 10 per cent., secured by mortgage on the property claimed in this action to be community property, situate near Upper Lake, in this county. M. E. McClure agrees to convey to N. H. McClure all her right, title, and interest in and to said property claimed to be community property, and to relinquish the homestead filed thereon by her, and to assign the policy of life insurance taken out by N. H. McClure for her benefit to the said N. H. McClure, free from all claims or demands against him whatsoever, of record or otherwise. Both parties

agree that each will convey to the other by quitclaim deed his interest or pretended interest in the property of the other in the state of Missouri."

The defendant testified that he agreed to this compromise reluctantly, but was induced to do so by the advice of his attorneys. Mr. Crump, the attorney for the wife in the divorce suit, testified that Mr. Fishback, attorney for the husband in that suit, drew all the papers relating to the compromise in such form as he desired, and that he thinks they were all executed at the time the note and mortgage were executed; and there is no evidence to the contrary. Nor is there any evidence that the wife had not fully performed her part of the compromise agreement before this action was commenced, though it is contended that the mode adopted by Mr. Fishback to divest her of her alleged homestead right was not effectual. The mode adopted was a conveyance by the wife to the husband of all her rights and interest in the community property, including the homestead. It is claimed that her homestead right (if she had any such right) could have been divested or abandoned only by the joint act of herself and husband in the mode provided by sections 1243 and 1244 of the Civil Code, and upon this alone depends defendant's contention that there was no consideration for the note and mortgage. It is unnecessary to determine what was the effect of the wife's declaration of homestead, made and recorded under the circumstances above stated; nor is it necessary to determine what effect her conveyance to her husband of all her right to community property had upon her disputed right to a homestead. It is not questioned, nor is it questionable, that the compromise agreement was a sufficient consideration for the note and mortgage while it remained unrescinded, and after its terms had been performed on the part of the wife in the mode dictated by the husband through his learned attorneys, it not appearing that she was ever requested to perform, or refused to perform, in any other mode. Besides, she could not have abandoned the homestead in the mode prescribed by the Code without the concurrent abandonment thereof by her husband; nor, if the agreement required her to abandon in that mode, could she have been put in default without the offer of the husband to join her in the act. While the compromise agreement subsisted as a valid contract, it remained a valid consideration for the note and mortgage, whether fully performed by the wife or not. Dr. Wharton, in his work on Contracts, (section 533,) says: "As has been incidentally noticed, a promise to compromise a claim utterly unfounded will not be regarded as a valid consideration. * * * It is otherwise when a suit is brought bona fide on probable cause; and a promise to compromise such suit is a valid consideration, even though the

suit should be held to be unfounded. Were it otherwise, there could be no compromise of litigation, since there is no litigation in which one or the other party, if the case be pressed to judgment, does not fail to make out his case. Not only will such agreements, when there is no fraud, be sustained by the courts, but they are highly favored as productive of peace and good will in the community, and reducing the expense and persistency of litigation. The rule is peculiarly applicable in family settlements, where right and wrong on both sides are so often dependent on feeling; in which cases the courts, unless there be an imposition, will not undertake to weigh actual gain or loss." In this case there is no pretense of fraud or imposition, nor is it pretended that the compromised suits were not brought and defended bona fide. It is further to be observed that Mrs. McClure died on January 31, 1890, two days after having assigned the note and mortgage to the plaintiff, who had assisted in supporting her after her separation from her husband. It would seem that her death, under the circumstances, relieved defendant's title from any cloud caused by her declaration of homestead, though this question is not necessarily involved, and need not be decided. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

4 Cal. Unrep. 341

PEOPLE v. NICOLosi. (No. 21,018.)

(Supreme Court of California. Nov. 20, 1893.)

LARCENY—POSSESSION OF STOLEN PROPERTY—EVIDENCE—INSTRUCTIONS.

1. A trunk alleged to have been stolen by defendant was found in a shanty which had been occupied by defendant and another for several weeks. The officer searching for it found it, with another trunk, under defendant's bed, covered over with old clothing; and defendant, when asked what it was, replied that it was nothing. When ordered to open it, he said he did not have the key, but when the trunk was examined the lock was found to be broken, and a letter was found in it, addressed to defendant's brother. Being asked whose name it was, and how it came there, defendant said it was his name, and that he put the letter in the trunk himself. Defendant said that the trunk had been left there two weeks before by a man whom he did not know, and who promised to pay him for keeping it. It was shown that the trunk had been stolen about two weeks before it was found in defendant's possession. Held sufficient to warrant a finding that defendant stole the trunk.

2. As the evidence clearly proved that the trunk was found either in the sole possession of defendant, or the joint possession of defendant and the person occupying the room with him, the court properly refused to charge that if the trunk was only found in a house which defendant occupied jointly with another, equally capable of having committed the theft, then no defi-

nite presumption of guilt could be made, the instruction not being applicable to the facts.

3. It was not error for the court to permit a witness to describe the trunk found with the one that had been stolen, such evidence not being given to show that such trunk had been stolen or lost.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Jaratarno Nicolosi was convicted of larceny, and appeals. Affirmed.

E. R. Annable and Paris & Allison, for appellant. Frank F. Oster, Dist. Atty., for the People.

VANCLIEF, C. The defendant and Giovanni Lena were, by information, jointly accused of the crime of grand larceny, committed by feloniously stealing and carrying away a trunk and contents thereof consisting of ladies' apparel, the property of a Miss Jennie Fetty. On a separate trial the defendant was found guilty, and sentenced to imprisonment in the state's prison; and he brings this appeal from the judgment, and from an order denying his motion for a new trial.

1. Counsel for appellant contend that the evidence is insufficient to justify the verdict, in that there was no evidence tending to prove the defendant guilty, except proof that the stolen property was found in his possession. But I think there was other evidence sufficiently corroborative of the inference from possession of the stolen property to justify the verdict. The trunk was found in the possession of defendant and Lena, in a small rought, 10x14 board shanty, in which they had been living only about four weeks, in the town of Riverside, San Bernardino county, by J. W. Dickson, the marshal, and F. P. Wilson, constable, of that town. The shanty had but one window, and that was darkened by boards nailed on the inside, and a gunny sack on the outside. The marshal, while searching for the drunk in the shanty, and in the presence of defendant and Lena, discovered something under their bed or bunk covered with a quilt, gum coat, and other old clothing, and asked defendant what it was. Defendant answered, "Oh, nothing." The marshal then pulled off the covering, and discovered two trunks, one of which was Miss Fetty's trunk, and ordered defendant to open it. Defendant said: "It ain't my trunk. I cannot open it up. I haven't got any key to the trunk." Upon examination, the marshal discovered that the lock had been broken, and he opened the trunk, and found therein an envelope addressed as follows: "Mr. L. Nicolosi, No. 105 Upper Main St., Los Angeles, Calif." Being asked whose name that was, and how it came there, defendant said: "That is my name. I wrote it and put it there two or three days ago." Being reminded that he had said he could not open the trunk, and

asked to explain, he said nothing. The address on the envelope was that of his brother. Defendant further told the marshal that the trunks were brought there about two weeks before by a man who drove up with a light spring wagon and a gray horse, whom he had never seen before nor since, and who told defendant that he (the stranger) would like to leave those trunks there for a few days, and that he would call for them, and pay for the trouble of keeping them; and thereupon he (defendant) and his partner (Lena) carried the trunks into their cabin. Defendant also said he had not been doing anything since he came to Riverside; that he had come up from Los Angeles to pick oranges. It was proved that Miss Fetty's trunk had been stolen about two weeks before it was found in the possession of defendant and Lena. These circumstances of themselves were sufficient to excite a very strong suspicion of defendant's guilt, even though it had not been known that Miss Fetty or any other person had lost a trunk, and together with the proof that the trunk had been stolen, and found in the possession of the defendant, justified the verdict of the jury. *People v. Chambers*, 18 Cal. 383; *People v. Velarde*, 59 Cal. 457.

2. The defendant asked the court to instruct the jury that if the trunk was "only found lying in a house or room in which he (defendant) lived jointly with another equally capable of having committed the theft, then no definite presumption of guilt could be made." Had the evidence tended to prove only that the trunk was found in a room occupied by defendant and Lena, without showing any connection or relation between them, or how the trunk came there, perhaps it would have been insufficient to prove possession of the trunk by the defendant, individually or jointly with Lena, in which case the instruction asked might have been proper. But the evidence is clear, and without conflict, that the trunk was found either solely in possession of defendant, or in the joint possession of defendant and Lena. This was admitted by the defendant, who testified that he and Lena had voluntarily taken it into their room, and kept it there about two weeks. Therefore, the instruction asked was not applicable to the evidence. It falsely assumed that there was evidence by which the jury might have been justified in finding that the trunk "was only found lying in a house or room" occupied jointly by defendant and another, whereas, it was clearly proved that the trunk was not only thus found, but that it had been taken and kept there by the voluntary assistance of the defendant, and was in his possession.

3. While Dickson was testifying for the people, he spoke of and described the other trunk found with Miss Fetty's trunk under defendant's bed. Defendant's attorney objected to "his saying anything in regard to

any other trunk than the one described in the complaint, on the ground that it is irrelevant, immaterial, and incompetent, and having a tendency to prove the commission of another crime." It is contended that the court erred in overruling this objection. No evidence was given or offered tending to prove the other trunk had been stolen or lost. It was merely described as one of the things discovered in close proximity to the stolen trunk, as were the quilt, gum coat, and other old clothes with which the trunks were covered. I think the court did not err in permitting a mere description of all things found with the stolen trunk under the defendant's bed. I think the order and judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

100 Cal. 345

In re WERINGER'S ESTATE. (No. 19,184.)
(Supreme Court of California. Nov. 25, 1893.)

HUSBAND AND WIFE — PROVISIONS FOR WIFE — MEDICAL ATTENDANCE—FUNERAL EXPENSES AND MONUMENT—ADMINISTRATOR'S ACCOUNT.

1. A husband who has means being declared liable by Civil Code, § 174, for his wife's support, her estate should not be charged with the expense of doctors, nurses, and medicines obtained by him for her in her last illness.

2. Error in allowing an item in an administrator's account for family allowance will not be presumed, but as, in case the court made an order granting family allowance authorizing payment of the amount named in the account, no voucher would be necessary, one alleging error must show that such order was not made.

3. At common law, a husband was liable for the funeral expenses of his wife.

4. While a husband's duty to give his wife decent burial includes the placing of some mark of identification over her burial place, still if he was poor, and she left a considerable estate, the court might allow a reasonable amount from her estate towards a monument.

Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Accounting by the administrator of Lucy Weringer, deceased. From a decree settling the account, her distributees appeal. Reversed.

Mahon & Laird, for appellants. E. Brundage, for respondent.

PATERSON, J. This is an appeal from a decree settling an annual account of the administrator. Among the items allowed were the following: "Dr. Cook, medical services last illness, \$45.50; Dr. Fergusson, same, \$10.50; Dr. Rogers, same, \$50; Blodget & Dudley, drugs, \$18.35; Mary Dougherty, nurse last illness, \$25." We think the objections to these items were properly taken by the contestant, and that they were improper.

erly allowed. Section 174, Civil Code; Gerlach v. Terry, 75 Cal. 290, 17 Pac. Rep. 207. The administrator testified as follows: "Before and at the time that my said wife, Lucy Weringer, died, I was engaged in business in Bakersfield, and was handling large sums of money. I also owned considerable valuable real estate and personal property. I called in the doctors to attend to my wife during her last illness. The nurse, Mary Dougherty, I hired to wait upon and care for my wife during her last illness." At common law the husband was bound to bury his deceased wife in a suitable manner, and was bound to defray the necessary funeral expenses. Although the rule is not universal in this country, it prevails in most of the states. Schouler, Dom. Rel. § 199. The duty is one which is involved in the obligation of the husband to maintain the wife while living. He has the control of the body of his deceased wife, and must care for the same, and may select a proper place for the interment, regardless of the wishes of her parents or other relatives. Staples' Appeal, 52 Conn. 426; Smyley v. Reese, 53 Ala. 89.

It is claimed by appellants that the court improperly allowed the item of \$2,000 on account of family allowance, but there is nothing in the record upon which such contention can be sustained. The court may have made an order granting family allowance which authorized payment by the administrator of the amount named, and, that being so, no voucher was required. Error must be shown; it cannot be presumed.

The court allowed an item of \$670 for "funeral expenses and monument." It does not appear how much of the item was for the monument. Whether or not the administrator ought to have been allowed anything on account of the monument depends upon circumstances. Included in the obligation to give his deceased wife decent burial is the duty of placing some mark of identification over her last resting place. If the husband be poor, and the deceased leave a considerable estate, the former ought not to be expected to contribute much to a monument; and it would be proper in such a case, we think, for the court to fix a reasonable amount to be allowed for that purpose. The amount allowed for the expenses of the funeral and a monument should be governed by the custom of people of like rank and condition in society; a distinction being made in this respect, however, between solvent and insolvent estates. 2 Woerner, Adm'n, § 359. The order is affirmed as to the family allowance, but is reversed as to the other items, and the cause is remanded, with directions to the court below to hear the parties further, and determine the matter in accordance with the views herein expressed.

We concur: HARRISON, J.; GAROUTTE, J.

100 Cal. 352

PEOPLE v. WEIGER. (No. 21,007.)
(Supreme Court of California. Nov. 25, 1893.)
FALSE PRETENSES — INTENT OF DEFENDANT — ADMISSIONS IN CIVIL ACTION.

1. On trial for violation of Pen. Code, § 532, which denounces as a criminal "every person who knowingly and designedly, by false or fraudulent representations, defrauds any other person of property," it is no defense that defendant had no intent to defraud when he obtained goods by false representations, but fully intended to pay for the goods, and felt sure of his ability to do so when the bill would become due.

2. The fact that defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him; and an admission made by him in such proceeding is voluntary, and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody, or charged with a criminal offense, when he made such admission.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Charles Weiger was convicted of obtaining goods by false pretenses, and appeals. Affirmed.

Holl & Dunn, for appellant. Frank D. Ryan and Atty. Gen. Hart, for the People.

TEMPLE, C. Appeal from the judgment, and from an order denying a new trial.

The defendant was convicted of the offense of obtaining goods by false and fraudulent pretenses. He was prosecuted under section 532 of the Penal Code, which denounces as criminal "every person who knowingly and designedly, by false or fraudulent representations or pretenses, defrauds any other person of money or property." On the trial, defendant testified in his own behalf to the effect that he had no intention, when he obtained the goods, of defrauding the Sharpless firm; that he fully intended paying for the goods, and felt perfectly sure of his ability to do so, when the bill would become due. The court instructed the jury upon the subject of criminal intent as follows: "The intent necessary to constitute the offense charged in this case is the intent to procure a credit, whereby possession of property was obtained. It is not the intent to pay for such property after having thus procured it. Such intent—the one last mentioned—does not shield the defendant from the consequences of the intent first mentioned. So, if, upon a consideration of all the evidence, you are satisfied beyond reasonable doubts that the defendant intended by the representations which it is admitted he made, and which he admitted he knew were not true, to Sharpless Bros., to obtain the property alleged to have been received by him, and did receive such property, then he is guilty of the offense charged, even though he intended, when he made such representations, to pay for the goods when the bills for them became due. The obtain-

ing of goods by such false representations is fraudulent, and the fraudulent character of such transaction is not changed by the fact that there may have been an intention at the time to pay for the goods. The reason of what I have just stated to you will be apparent to your minds by considering the fact that in very few cases—perhaps in none—could a man be convicted of this act of obtaining money or property under false pretenses, if he could make it apparent that, notwithstanding his obtaining the money or property, he would make it good at some future time by restoring the property or paying the money. I have been thus particular of speaking of the intent here for the reason that I desire that you will not be led into any confusion on that subject; and I repeat that, while it may have been the intention of the defendant to pay for the goods, that intention constitutes no defense, if, at the time when he made the representations, he made them for the purpose of obtaining the goods, or obtaining the credit on which he received the goods." The jury had already been told that to constitute the offense there must exist the intent to defraud; that there must be actual fraud committed, and accomplished by the use of false pretenses, made for the purpose, and the owner must have been induced to part with his property by the fraud. Counsel claims that this instruction is erroneous, and contrary to the statute, which he contends does not denounce as criminal obtaining goods by false pretenses, but simply the act of defrauding another by obtaining goods in that mode; that if defendant obtained the goods with the honest intent of paying for them according to the contract, and believed himself able to do so, he has not defrauded the Sharpless firm, although he obtained the goods by false pretenses. In the assumption that it must be held that defendant did not intend to defraud the Sharpless firm if he intended at the time to pay for the goods according to the contract of sale, and truly believed that he was able to do so, I think counsel is in error. Deception, deliberately practiced, for the purpose of gaining an unfair advantage of another, is fraud. Goods obtained by such practices are obtained by fraud. One deprived of his property by such means is defrauded. By the false pretenses the Sharpless firm was made to believe that defendant had a capital of \$12,000 cash, and owed nothing, whereas he had at the most not more than \$4,500, and owed \$10,000. Relying upon this false statement, they parted with their goods. They were unwilling to do this upon his mere promise to pay, without proof of his ability to do so. His intention to pay, the law presumes from the fact of the purchase. The crime consists in the false statement in regard to ability to do that which the law would compel him to do if he possessed the financial ability. Although sufficiently obvious upon reason, there are abun-

dant authorities for this position. In England the rule was declared in *Queen v. Naylor*, L. R. 1 Cr. Cas. 4. In that case a special verdict was rendered, in which the jury found, among other facts, that defendant, when he obtained the goods, intended to pay when it should be in his power to do so. The case having been reserved for consideration before the court of crown cases reserved, the opinion was as follows: "We are all of the opinion that this conviction must be affirmed." There was no essential difference in the statutes. The condition of the cases in this country upon this subject is well stated in *Buntian v. State*, 15 Tex. App. 515, as follows: "Again, it is contended, 'If defendant intended to refund the money and return the pledge at the time he obtained the money, then he is not guilty of swindling,' and that it was error in the charge of the court that the jury was not so instructed. The crime denounced in the statute is the obtaining by false pretenses. As was said in *State v. Thatcher*, 35 N. J. Law, 445, 'The defendant's ability or his ultimate intention to do what the law would compel him, as the principal debtor, to do, cannot save him.' And the language of the supreme court of Massachusetts is equally explicit: 'The intent to defraud is the intent, by the use of such false means, to induce another to part with his possession, and confide it to defendant, when he would not otherwise have done so. Neither the promise to pay, nor the intention to do so, will deprive the false and fraudulent act in obtaining it of its criminality.' *Com. v. Tenney*, 97 Mass. 50; *Com. v. Mason*, 105 Mass. 163. 'The offense is complete when the property or money has been obtained by such means, and would not be purged by subsequent restoration or repayment. Evidence of the ability to make the repayment is therefore immaterial and inadmissible. The possession of the means of payment is entirely consistent with the fraud charged.'" I think, therefore, the court did not err in giving the instruction. In holding this, it is not necessary to agree with the reason given by the learned judge for the rule. That statement could not have injured the defendant. It will follow, also, that defendant's objection to the information cannot be sustained.

Upon the trial the prosecution offered in evidence a copy of a deposition of the defendant in the proceeding in insolvency. It was admitted that defendant had filed his petition in insolvency; that, while such proceedings were pending, defendant was cited to answer concerning his property; and that the deposition offered was the testimony given by him. But defendant objected to it as evidence on the ground that it was incompetent, and that the statements regarded as admissions or confessions were not voluntary. The objection was overruled, and defendant excepted. The deposition was

read, and showed by defendant's statements that when he made the representations in question he had only about \$3,500, and owed \$9,000. This, of course, proved that the representations were false, and that defendant knew it. No case was cited, nor have I found any, in which it has been held that statements made by a witness in a civil case, when the witness is not in custody, and has not been charged with a criminal offense, voluntarily given, are not competent evidence against him in a prosecution subsequently inaugurated; and the statements are voluntary if he might have objected to answering on the ground that it would criminate him, and failed to do so. 1 Bish. Crim. Proc. § 1255, lays down the rule thus: "The answers and other testimony which are voluntarily given as a witness in any case or proceeding, civil or criminal, as before a commissioner in bankruptcy, a committee of the legislature, a committing magistrate, a grand jury, a coroner, a fire inquest, or any court in an ordinary lawsuit, are, as admissions or confessions, competent against him on any issue in a criminal case to which they are pertinent." See, also, 1 Greenl. Ev. § 225. The question has been discussed in numerous cases, and the rule seems clearly established, as stated in *Hendrickson v. People*, 10 N. Y. 13, "that where a witness answers questions upon examination upon a trial tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes." 2 Starkie, Ev. 50; Rosc. Crim. Ev. 45. Such answers are deemed voluntary, because the witness may refuse to answer any question tending to criminate him. If, however, he should be compelled to answer, after claiming his privilege, his answer will be considered compulsory, and cannot be given in evidence against him." The fact that defendant testified in a proceeding in insolvency, and appeared in obedience to a citation, did not deprive him of the privilege. His statements must therefore be considered voluntary. It is hardly necessary to say that had the defendant, at the time he testified, been in custody, or had the criminal charge then been pending against him, and those charges under examination, a different question would have been presented. I recommend that the order and judgment be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

(100 Cal. 177)

CARRAHER v. SAN FRANCISCO BRIDGE CO. (No. 15,049.)

(Supreme Court of California. Oct. 25, 1893.)

RAILROADS—CROSSINGS—HORSE FRIGHTENED.

1. Plaintiff, driving a horse and cart, approached defendant's crossing, when a train ap-

peared on the crossing two feet from the horse, the engine being behind. The horse shied, and upset the cart. There was a coal shed, which was within seven feet of the crossing, and obstructed a view of all cars more than eight feet from the crossing. The evidence as to signals was conflicting. Defendant generally kept a flagman near the crossing, and the engineer testified that the flagman signaled him that the way was clear, from a place behind the coal shed, where the flagman and plaintiff could not have seen each other. *Held*, that a verdict for plaintiff could not be disturbed.

2. Defendant, having a contract to build a length of sea wall, was hauling sand for filling, in a train of cars on a temporary track along the water front, said train making about 20 trips a day. Subcontractors were hauling stone and other material in large quantities by team on a road crossing over said track. *Held*, that a charge that said crossing was not a highway crossing was irrelevant on the question of defendant's liability for injuries to one of the teamsters.

3. A teamster driving a horse and cart on a road crossing a railroad track, who is injured by his horse shying at the train, it not debarred from recovery by the fact that the horse was frightened by the ordinary movement, noise, or appearance of the train, if it further appear that the horse was ordinarily well broken and gentle, and was permitted, by defendant's negligence in running the train, to come so close to the crossing, before he or his driver saw the train, that said ordinary movement naturally frightened him.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; E. B. Mahon, Judge.

Action by Michael Carraher against the San Francisco Bridge Company. Judgment for plaintiff. Defendant appeals. Affirmed.

For report of former appeal, see 22 Pac. Rep. 480.

R. Percy Wright, for appellant. Cary & Sullivan, for appellee.

VANCLIEF, C. Action to recover damages for a personal injury to plaintiff alleged to have been caused by the negligence of defendant. The cause was tried by a jury, whose verdict was for the plaintiff, assessing the damages at \$1,000, and judgment accordingly. The defendant has appealed from the judgment, and from an order denying a new trial. The case was here on a former appeal from a similar judgment, and was reversed, on the ground of error in an instruction to the jury. 81 Cal. 98, 22 Pac. Rep. 480. The defendant had a contract with the board of harbor commissioners to construct a section of the sea wall on the water front of the city of San Francisco, which, among other things, required the defendant to fill with sand and rocks a strip between the wall and shore. The sand for this filling was obtained from Black Point, and thence transported by the defendant to the place to be filled (a distance of a mile and a half) on a temporary railroad, by means of a train of 12 to 16 cars, propelled by a steam locomotive. The rock to be filled in was hauled by teams from Telegraph Hill. Cummings & Co. had a subcontract with defendant to haul the rock, or a portion of it, and em-

ployed the plaintiff as one of the teamsters for that purpose. The road on which the rock was hauled crossed the railroad track at a point where the latter ran along the water front. While plaintiff was returning with the horse and cart, he was driving, after having delivered a load of rock, and having approached very nearly to the crossing, the foremost car of the sand train passed over the crossing, and frightened his horse. In attempting to back or turn, the horse, cart, and plaintiff were precipitated into an open excavation, whereby the plaintiff's wrist was broken. The engine was not in front of the train, but at the rear, pushing or backing it. Plaintiff testified that, when the foremost car came upon the crossing, he judged the horse's head was within two feet of the car. A coal house and tool house stood only four to seven feet from the crossing, which, according to plaintiff's testimony, prevented him from seeing the approaching train until it came within seven or eight feet of the crossing, and from a diagram furnished by defendant it appears that this may have been true; yet it was contradicted by witnesses on the part of the defendant. The evidence was also conflicting as to whether any signal of the approach of the train was given by whistle or bell. The defendant generally kept a flagman near that point, and the engineer on the train testified that on the occasion of the accident the flagman signaled him that the way was clear. There is also a substantial conflict of evidence as to whether plaintiff's negligence contributed to his injury. The intervening coal house on the line of sight, which the evidence strongly tends to prove, is sufficient of itself to establish a conflict on this issue. It follows that the order denying a new trial cannot be reversed on the ground that the verdict is not justified by the evidence. The most that reasonably can be claimed by appellant is that, on the issue as to contributory negligence, a preponderance of the evidence, as it appears in the record, seems to be in favor of the defendant.

The erroneous instruction on account of which the former judgment was reversed was not repeated on the new trial, but appellant contends that the court erred on the new trial in refusing to give the following instruction, requested by defendant: "The railroad crossing near which the plaintiff was injured, spoken of in the testimony here, was not on any public street. It was on a portion of section six of the sea wall, then in course of construction by the defendant, San Francisco Bridge Company, and under its control."

This requested instruction seems to be wholly composed of matters of fact, any dispute as to which should have been submitted to the jury. But, conceding the instruction (whether fact or law) to be true, what is the consequence? In order to determine the legal effect of the facts stated, other rele-

vant facts which the evidence tended to prove should be considered, namely, that plaintiff hauled about 25 loads of rock per day, that being considered a day's work; that 15 other teams were employed by Cummings & Co. in hauling rock over the same road, and crossing at the same time and for the same purpose; that other teams were hauling lumber and other materials over the same crossing for the construction of the wharf during the same time; and that defendant's train of sand cars made about 20 trips a day. Under these circumstances, was the degree of care required by law of the defendant, while running its sand train, less than it would have been if the roads had been public roads? I think that, under these circumstances, the legal effect of the facts that these roads had been constructed by defendant for its private use, and were wholly under its control, was that defendant was bound to exercise ordinary care for the safety of its employes and subcontractors who were using them by its authority and for its benefit; and it appears that defendant usually recognized its obligation to this extent by signaling the approach of the train by all the modes ordinarily employed for that purpose, but as to whether any kind of signal could have been heard or seen by teamsters approaching the crossing from the wharf the evidence is conflicting. The only signal as to which there is no conflict was that said to have been given by the flagman to the engineer of the train, from a position north of the coal house, where it could not be seen by the plaintiff or any other teamster approaching from the wharf, and from which position the flagman could not have seen the road leading from the wharf to the crossing. On principle, I think this case cannot be distinguished from that of *Strong v. Railroad Co.*, 61 Cal. 326, in which the following instruction had been denied: "If plaintiff's horses were frightened by the mere ordinary appearance of defendant's locomotive or train, or by the ordinary noise of its passage, and his injury caused thereby, he cannot recover." This court, by Mr. Justice McKinstry, said: "This instruction ignores the other circumstances of the case. We cannot say that the plaintiff ought not to have recovered if, by reason of the carelessness of the engine driver, and without any want of prudent care on his own part, he found himself in such close proximity to the locomotive as that his team, composed of horses ordinarily well broken, and of ordinary gentleness, were startled, frightened, and ran. All the circumstances were to be considered by the jury." So here, in his contention that plaintiff cannot recover because his horse was frightened merely by the ordinary movement, noise, or appearance of the cars, counsel for appellant ignores all the other material evidence tending to prove that the movement of the cars which frightened plaintiff's

horse was without ordinary care for the safety of the plaintiff and others who may have been rightfully approaching the crossing, and that the want of such ordinary care was the proximate cause of the injury complained of; but it is to be presumed that the jury considered all such evidence, and, since it tended to prove every fact involved in the verdict, I think the judgment and order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

100 Cal. 344

WILL v. LYTLE CREEK WATER CO.

(No. 19,244.)

(Supreme Court of California. Nov. 25, 1893.)

DEFAULT—OPENING—AFFIDAVIT OF MERITS.

1. Defendant's name being the "L. Creek Water Co.," its demurrer wrongly entitled it the "L. Creek Water & Improvement Co." It appeared that there was a corporation with the latter name. The mistake was made by the attorney's stenographer, and was not discovered till two or three days after default entered, when defendant promptly moved for its vacation. *Held* no abuse of discretion to grant said motion.

2. An affidavit of merits, by counsel, that affiant is personally familiar with the facts; that he knows, of his own knowledge, of facts which constitute a full, meritorious, and legal defense; that defendant has a complete defense,—is sufficient, and not objectionable, merely, as being made by counsel.

Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by Glenn Will against the Lytle Creek Water Company on a money claim. From an order opening the judgment by default, plaintiff appeals. Affirmed.

Willis & Cole, for appellant. Walter Bordwell, for respondent.

PATERSON, J. This is an appeal from an order setting aside a judgment upon default. Within the time allowed by law for answering, the attorney for the defendant herein filed a demurrer to the complaint, but this demurrer was entitled Glenn Will v. The Lytle Creek Water & Improvement Company. It appears that the mistake was made by the attorney's stenographer, and that there is a corporation named the Lytle Creek Water & Improvement Company. The mistake was not discovered until two or three days after the default was entered, but defendant moved promptly to have the default set aside. As there was no laches, and the mistake was a very natural one, we think that the court did not abuse its discretion in granting the motion.

The affidavit of merits was sufficient. Although made by the attorney of the defend-

ant, it is stated therein that the affiant is personally familiar with the facts connected with the transactions upon which said action is brought; that affiant knows, of his own knowledge, of facts which constitute a full, meritorious, and legal defense to said action; that defendant has a complete defense to said action. It cannot be said, as claimed by appellant, that it is impossible for this statement to be true. The affiant may have had satisfactory evidence, written and oral, that the claim of the plaintiff had been entirely settled and paid off, if any ever existed. The affidavit is not objectionable on the ground, solely, that it was made by counsel for the defendant. *Byrne v. Alas*, 68 Cal. 479, 9 Pac. Rep. 850. The order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

4 Cal. Unrep. 344

SMITH v. CITY OF SAN LUIS OBISPO.

(No. 19,296.)

(Supreme Court of California. Nov. 25, 1893.)

APPEAL—REVIEW OF DECISION ON PRIOR APPEAL.

Where, on the retrial of an action after a judgment of reversal by the supreme court, the conclusion of the trial court, based on the same facts established on the first trial, is in accordance with the decision on such appeal, such conclusion will not be reviewed on a second appeal.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Ejectment by Levi Smith against the city of San Luis Obispo. From a judgment for defendant, plaintiff appeals. Affirmed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Wm. Shipsey, for respondent.

GAROUTTE, J. This is an action of ejectment, and for a defense the city avers a dedication of the realty as a public street. The case has once been before the court, (95 Cal. 463, 30 Pac. 591,) and a new trial ordered. At the previous trial in the lower court, judgment went for the plaintiff, but it was reversed upon appeal for the reason that the conclusions of law were not supported by the findings of fact; this court holding that the findings were such as to indicate a dedication of the land as a public street, and that consequently judgment should have gone for defendant. Upon the second trial, the court made the same findings of fact, and in accordance with the previous decision of this court, as a conclusion of law, held that defendant was entitled to judgment. This appeal is prosecuted from the judgment and order denying the motion for a new trial, and the evidence is before us for review.

The conclusion of the court, based upon its findings that the land was dedicated to public use, will not now be reviewed, for the law of the case to that effect was estab-

lished by the decision of the court upon the previous appeal.

The only remaining contention upon the part of appellant is that the evidence fails to support the findings of fact. We think the specifications of the insufficiency of the evidence wholly lacking in material respects, but, aside from this objection, we deem the evidence entirely sufficient to form a basis for the findings made. Appellant has failed to indicate in his brief any particular finding that is unsupported, and, upon a perusal of the evidence, we also have failed to discover a lack of support therein. The findings are very full, covering the probative facts of the case; there is evidence to support each one of them; and, the law of the case being established to the effect that such findings warrant the judgment, it is ordered that the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

100 Cal. 214

RAKER v. BUCHER, Sheriff. (No. 18,015.)
(Supreme Court of California. Dec. 5, 1893.)

SHERIFFS—CONCLUSIVENESS OF RETURN—ACTION
BY EXECUTION DEBTOR FOR DAMAGES—ALLEGATIONS OF COMPLAINT—APPEAL—WEIGHT OF EVIDENCE.

1. In an action under Code Civil Proc. §§ 692, 693, by an execution debtor against a sheriff, to recover the statutory penalty and damages for selling land without notice, the sheriff's return on the execution, that he has given notice, is not conclusive in his favor. *Egery v. Buchanan*, 5 Cal. 54, distinguished.

2. In such case, the complaint of the execution debtor need not allege the return, and its falsity.

3. A finding against the apparent weight of evidence will be set aside if the conflict is not substantial.

In bank.

Petition for rehearing. Denied.

For decision on appeal, see 34 Pac. 654.

BEATTY, C. J. In his petition for a rehearing, counsel for respondent insists that, in reversing the judgment in this case, we have at the same time reversed, without noticing it, a former decision of this court, upon which he relied, and had a right to rely, in advising his client and presenting his case to the trial court; and this supposed grievance is so strongly urged that we feel called upon to point out the fact that it has no existence. The case to which counsel refers is entitled *Egery v. Buchanan*, and is reported in 5 Cal. 54. It was cited in support of the proposition that, in an action by an execution debtor against a sheriff to recover the statutory penalty and damages for selling land without notice, the sheriff's return on the execution to the effect that he has given notice is conclusive evidence in his favor. It will be seen, however, upon the most casual examination of the case, that it is not authority for any such proposition. That

was not, like this, an action on the case against the sheriff for damages, but was a summary proceeding by motion in an action between other parties to enforce the penalties prescribed by section 9 of the act of April 29, 1851, (St. 1851, p. 191;) and all the court was called upon to decide, and all it did decide, was that in that summary proceeding the return of the sheriff (a return of nulla bona) was conclusive in his favor; or, in other words, that the court could not try, upon affidavits, in a collateral proceeding in an action between other parties, issues which were the proper subject of an action against the sheriff, in which he could demand, if he chose, a trial by jury. If this is not made plain by the opinion itself, it certainly is made plain by reference to the authorities cited by counsel, and referred to by the text writers named in the opinion of the court. These decisions—and no doubt many more could be found to the same effect—certainly do establish the doctrine that, as against a collateral attack by motion in the action in which the execution issues, the return of the sheriff of nulla bona is conclusive in his favor; and this is the common-law rule, which was held to have been unaltered and unaffected by the statute above referred to. But the same decisions which enforce this rule expressly concede that the party injured by the neglect or misconduct of the sheriff has his remedy by action, and so it was expressly said in *Egery v. Buchanan* that the remedy of the plaintiffs was by action for a false return. The language of the opinion immediately following this statement, to the effect that a sheriff's return is not traversable, etc., was used with reference to the proceeding then under review, and not with reference to an action against the sheriff. If the court had meant to say that, in an action for a false return, the return itself is conclusive in favor of the sheriff, the remark would not only have been obiter; it would have been absurd. But it seems to us perfectly apparent that the court neither meant to say nor did say anything of the kind. On the contrary, it stated in plain terms that the remedy of plaintiffs was by an action for a false return.

What, then, is an action for a false return? "False return" was simply the specific name (probably derived from the forms of the original writ) for one of the numerous class of actions on the case. It was not an action in rem, for the purpose of cancelling or setting aside the return in order to pave the way for another action for damages, but was itself an action for damages, founded upon the official misconduct of the sheriff; and therefore all that the court meant, in saying that the remedy of the plaintiffs was by an action for a false return, was that they must proceed by action, not necessarily in the form of the common-law action, but, as our system of pleading and practice enjoins, by filing a complaint

alleging the facts material to the right of recovery. And such is precisely the course which this plaintiff has pursued. He has proceeded regularly by action, and his complaint, as it appears to us, contains every allegation necessary to show his right to recover the statutory damages for selling land without the legal notice. Code Civil Proc. §§ 692, 693. There was no demurrer to his complaint, but an answer taking issue upon the fact of notice; and this issue was tried in the superior court as if it was properly raised, all plaintiff's evidence tending to prove want of notice being received without objection. If the complaint is in any respect deficient in substance, the objection should at least have been taken at the trial before it was too late to amend, and, not having been so taken, it ought not now to prevent the granting of a new trial, if the issues actually tried have been found contrary to the evidence. But we do not see that the complaint is in any respect deficient. The only objection suggested by the argument of counsel is that it should, like the declaration in the common-law action for a false return of nulla bona, have alleged the return, and its falsity. But the reasons for putting in those allegations under the common-law practice have no existence under our system, which provides for but one form of action, in which no facts need be alleged except those which must be proved. It was not the return to the writ of fieri facias by which the execution creditor was damaged, but the failure to make the money which the sheriff might have made by properly executing it, and the allegations of the return, and its falsity, were only necessary to show that the plaintiff was proceeding in proper form, for there was one form of procedure by motion, rule, or action where the writ had not been returned, and another form of procedure when it had been returned; and when the return had been made, and was true, the proper procedure was by motion, or by action of debt founded on the return, or in assumpsit for money had and received. So that it was necessary to allege the falsity of the return, when such was the case, in order to show that plaintiff had commenced the proper action, and to avoid a variance. See *Tidd's Practice and Chitty's Pleadings*, passim. But in this case there was no such necessity. The plaintiff was damaged, and his cause of action under the statute complete, as soon as the defendant delivered a certificate of purchase to the purchaser at the execution sale, if in fact the sale was without notice, for the title of the purchaser does not depend on the sheriff's return, and in the absence of such return the debtor is obliged either to redeem his land, or run the risk of losing it by proof aliunde that the sale was valid.

If these views are well founded, counsel will see that a more careful study of his au-

thorities would have made it plain to him, as it seems to us, that we have not, on this point, made a wide, or any, "departure from what has been deemed settled rules of law."

As to the other proposition upon which counsel bases his petition for a rehearing, viz. that we have gone contrary to the settled practice of the court, in reversing a finding of fact as to which the evidence is conflicting, we have only to remark that the rule he invokes is not that a finding will be sustained whenever there is any evidence, however slight, tending to prove the fact found, but is more correctly stated as follows: A finding, though against the apparent weight of evidence, will not be disturbed if there is substantial conflict of evidence as to the fact found. In this case we think the conflict is not substantial. Counsel seem to think that because a sheriff's return is, in some cases, conclusive, it is therefore to be regarded as of great weight in the cases in which it is merely prima facie sufficient to establish the facts stated. But the considerations of policy and convenience upon which the rule is founded, that, as between the parties to an action and their privies, the return of a sheriff is conclusive, have no application in a suit against him for neglect of official duty. In such cases his return, although prima facie evidence in his favor, is essentially weak evidence; and when, in the face of positive testimony that subsequent to the making of the return he has distinctly admitted its falsity, he offers neither denial nor explanation of such admissions, the effect of his return as evidence in his favor is completely overcome, and is not sufficient to sustain a finding that the return is true. Rehearing denied.

We concur: DE HAVEN, J.; GAROUTTE, J.; McFARLAND, J.; PATERSON, J.; HARRISON, J.

4 Cal. Unrep. 346

THRELKEL v. SCOTT. (No. 18,157.)

(Supreme Court of California. Nov. 25, 1893.)
FRAUDULENT CONVEYANCES — BETWEEN HUSBAND AND WIFE—MOTION TO SET ASIDE.

1. In an action to set aside a conveyance as in fraud of creditors, an allegation in the complaint that the grantor was insolvent when the conveyance was made, and that it was done with intent to defraud creditors, is sufficient, without specifically stating the manner in which the fraud was accomplished, and the conduct and acts in reference to it.

2. In such an action, statements made by the grantor shortly before executing the conveyance, showing his knowledge of his indebtedness, are admissible on the question of his intention in conveying away his property.

3. The fact that one conveys a large portion of his property, without valuable consideration, to his wife, knowing at the time that his debts cannot be paid without recourse to such property, tends strongly to prove that the conveyance was made with intent to defraud creditors.

4. The fact that the wife, on receipt of the deed, promised to pay all her husband's debts, does not preclude a finding that the convey-

ance was fraudulent as against his creditors, since it may have been intended to give her an advantage as to the time of making payment, and thus hinder and delay creditors.

5. Knowledge of the wife as to her husband's intention to defraud creditors on transferring his property to her is immaterial where she parted with no valuable consideration.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

Action by G. L. Threlkel, administrator, etc., of Robert N. Scott, deceased, against Harriet A. Scott, to set aside a conveyance by deceased to defendant as in fraud of creditors. From a judgment for plaintiff, defendant appeals. Affirmed.

Tuttle & Tuttle, for appellant. Hale & Craig and J. M. Fulweiler, for appellee.

TEMPLE, C. This action was brought under section 1589, Code Civil Proc., to recover for the estate property conveyed by the deceased, on the ground that the conveyance was made to defraud creditors. Defendant appeals from the judgment and an order refusing her a new trial. The case has been here before. See 89 Cal. 351, 26 Pac. 879. Since the first appeal the complaint was amended by adding an averment to the effect that the conveyance was made with the intent to defraud creditors. The complaint now avers facts showing the due appointment of the plaintiff as administrator; his qualification as such; that deceased was indebted in the sum of about \$5,000, for which amount claims have been presented to plaintiff, as administrator, and which have been duly allowed. The assets in the hands of plaintiff, and their value, are stated, showing that they are insufficient to pay the claims allowed. The complaint then proceeds to charge: That October 4, 1888, deceased, being ill and contemplating approaching death, conveyed to the defendant, his wife, certain property, specially described in the complaint, and that defendant has since claimed to be the lawful owner thereof. That the conveyance was without any valuable consideration, and that at the time said Scott was indebted for all the liabilities presented against his estate and was insolvent. "That with intent to defraud his creditors, and to prevent the application of the proceeds of his said property to the payment of his just debts and liabilities, he fraudulently conveyed the same to his said wife, the defendant herein; and plaintiff avers upon information and belief that it will require the whole of said property, and the value thereof remaining after the satisfaction of liens existing thereon at the time of said conveyance, to meet and discharge the said allowed claims due and payable out of the funds of said estate."

The point is made on demurrer to the amended complaint that it does not sufficiently set out the facts constituting the alleged fraud. It is contended that the

manner in which the fraud was accomplished, and all conduct and acts in reference to it, should be specifically stated. I think the facts are stated with sufficient particularity. They are the insolvency of the intestate, and the conveyance with the intent to defraud his creditors. These facts alone are sufficient. The case is not like that where deceit or imposition is charged. Each of these ultimate facts may be proved by a great variety of probative facts, the nature of which are not disclosed by the general statement. In such cases justice requires that further information should be given to enable a defendant to understand the charge made against him. Not so here. In fact, it is difficult to see how the charge can be made more specific.

Objection is made to the ruling admitting certain statements alleged to have been made by Scott at the time the deed was executed, and some six weeks prior to that time. These statements tended to show that Scott knew of his indebtedness, and hence to throw light upon the question of his intention when he executed the deed. The evidence was properly admitted.

It is not necessary to review the action of the court in overruling defendant's motion for nonsuit, for defendant did not rest there, but proceeded to put in further evidence. The question now is, does the evidence sustain the findings? The fact that one conveys a large portion of his property, without a valuable consideration, to his wife, knowing at the time that his debts cannot be paid without recourse to such property, tends strongly to prove that the conveyance was made with intent to defraud creditors. There is nothing in *Bull v. Bray*, 89 Cal. 294, 26 Pac. 873, opposed to this. On the contrary, this proposition is taken for granted in the opinion in that case. It is there only held that, however clear the evidence may be, the fraudulent intent must be found as a fact, and cannot be deduced as a conclusion of law from the finding that one greatly indebted conveyed a portion or all of his property as a gift. Although such facts, if found, might sufficiently prove fraud, still, under our statute, fraud is itself always a fact to be found by the jury, or the court when sitting without a jury. The fact of fraud was found here, and the finding is sustained by the evidence.

We do not know whether the court believed the testimony to the effect that Mrs. Scott promised, on receipt of the deed, that she would see all the debts paid; but, even accepting such statement as a fact, it would still leave room for the finding of a fraudulent intent. It might still have been intended to give her an advantage, in that she could take her own time to pay. This would tend to prove a design to hinder and delay creditors.

There was evidence from which the court might justly infer that Scott knew that the

insurance policy, if the amount were paid to the estate, would not pay all his debts. There was evidence tending to show that he knew of his indebtedness, and the presumption is that he knew the condition of his affairs. Whether Mrs. Scott knew the condition of her husband's affairs is immaterial, as she gave no valuable consideration for the property; but I think there was evidence tending to show knowledge on her part. The judgment and order should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

100 Cal. 282
ELLEDGE v. NATIONAL CITY & O. R. CO.
(No. 19,167.)

(Supreme Court of California. Dec. 9, 1893.)

On rehearing. For former opinion, see 34 Pac. 720.

PER CURIAM. The petition for rehearing is denied, but that part of the opinion which appears to hold that an employe can recover for injury caused by the negligence of a coemploye, committed before the employment of the plaintiff, is stricken out.

100 Cal. 367
PEOPLE v. KINDELBERGER. (No. 21,020.)
(Supreme Court of California. Nov. 27, 1893.)

CRIMINAL LAW—REMARKS OF JUDGE—URGING JURY TO AGREE.

In a criminal prosecution, where the jury return into court some time after the case has been submitted to them, and state that there is no prospect for an agreement, it is prejudicial error for the judge to state that, in view of the evidence, he is at a loss to understand why the jury should disagree, since such remark cannot fail to create the impression that in his opinion the evidence required a conviction; and such error is not cured by his afterwards telling them that they are sole judges of all questions of fact, and of the credibility of the witnesses.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Defendant Kindelberger was convicted of assault with intent to rape, and appeals. Reversed.

D. T. Sullivan and W. J. Donovan, for appellant. Atty. Gen. Hart, for the People.

DE HAVEN, J. The defendant was found guilty of the crime of assault with intent to commit rape, and was sentenced by the judgment of the superior court to imprisonment in the state prison for a term of seven years. The appeal here is from the judgment, and is brought to this court upon the judgment roll alone, without any bill of exceptions.

The jury retired to deliberate upon their verdict at 9 o'clock in the evening, and, not having agreed, the jurors, upon their own request, were brought into court at 10 o'clock in the forenoon of the next day, when the following proceedings took place: "The Court: Well, upon what point do you desire instruction or points? A Juror: By request of the jurymen, I would ask if there could be any other form of verdict in the case? The Court: Is that all? A Juror: That is all, except that we are unable to agree. No prospect of agreeing. The Court: In reply to the latter part of the statement,—that the jury are unable to agree, and that there is no prospect of their agreeing,—the court has this to say: That, in view of the testimony in this case, the court is utterly at a loss to know why twelve honest men cannot agree in this case. Let me have that information, please. In that connection, further, I have this to say: That, in my short experience upon the bench, I have occasionally been associated with juries where some jurors, having an idea that they are smart men, prominent men, with large heads and big capacity, on going to the jury room, take occasion to express ill-digested and rapid opinions upon the case, and then stick to these opinions, right or wrong, unreasonably refusing to listen to the opinion and arguments of their fellow jurors, and so hang a jury. I have on some occasions, having something of a personal knowledge of jurors on the jury, taken occasion to caution the jurors against that course, and to say that jurors ought to go into the jury box without prejudice, without fear, without favor, with a desire to arrive at the truth, to sift and digest the testimony carefully and conscientiously, and not stubbornly to express an ill-digested opinion, and stick to it. I repeat, gentlemen, that I see no reason on earth why a jury in this case, upon this testimony, cannot agree."

In thus addressing the jury, the learned judge of the superior court committed an error to the prejudice of the defendant. Nothing can be clearer than that in this charge the judge informed the jury that he had a fixed and definite conviction in regard to the verdict which they ought to return, and that in his opinion the evidence to support such conclusion was so plain and satisfactory that honest and intelligent jurors, who had heard the testimony, ought not to disagree as to its weight and effect; and we think the jury understood, or at least may have understood, from these unguarded remarks, that in the opinion of the judge the defendant was guilty, and that such should be the verdict. When, upon the trial of a defendant, the evidence is clearly insufficient to justify a verdict of guilty, it is the duty of the judge to so inform the jury, and to advise a verdict of acquittal. This power is sometimes exercised by courts, and is one so frequently invoked in the trial of criminal

cases that its existence may be regarded as a matter of common knowledge upon the part of jurors of ordinary intelligence and experience; and this fact is not to be lost sight of in considering the impression likely to have been made upon the jury by the charge of the judge in this case. To any one knowing that it is the duty of the court to advise an acquittal if the evidence is such that, in the opinion of the judge, 12 honest men would have no right to convict him, the remarks of the judge in this case could not fail to create the impression that he thought the jury ought to convict upon the evidence before them. But it is not necessary that we should be able to say that the jury must have so understood the charge. Unless it appears that it could not have been so understood, we cannot say that the charge was without prejudice to the defendant. The court has no right, except when advising an acquittal, to give any expression of its opinion as to the weight of evidence, or to tell the jury that the evidence is so clear that they, as honest men, ought not to disagree, which is in effect the same as telling them that there is no conflict in the evidence, and that, as honest men, they can render but one verdict. In a subsequent part of the charge the learned judge did inform the jury that they were the sole judges of all questions of fact, and of the credibility of the witnesses, and that the court had no right to trench upon their province in this respect; but the error already noticed in the previous part of the charge was not cured by this subsequent statement. The fact still remained impressed upon the minds of the jurors that it was the opinion of the judge that there ought to be no disagreement, and that the testimony would justify but one verdict. Judgment reversed, and cause remanded for a new trial.

We concur: McFARLAND, J., FITZGERALD, J.

100 Cal. 370

PEOPLE v. HANDLEY. (No. 21,021.)

(Supreme Court of California. Nov. 28, 1893.)

ARSON—DESCRIPTION OF PROPERTY—PLEADING AND PROOF.

An information for arson of a dwelling house which specifically describes it by its street number, and alleges that it was occupied by defendant, sufficiently identifies the property, without giving the owner's name; and the statement of such name in the information does not necessitate its proof on the trial, since it is merely an addition to a description which is full and complete without it.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Martin H. Handley was convicted of arson, and appeals. Affirmed.

Robert Ferrall, for appellant. Atty. Gen. Hart, for the People.

FITZGERALD, J. The defendant was convicted of the crime of arson in the second degree, and sentenced to imprisonment in the state prison for the term of six years. From the judgment of conviction, and the order denying his motion for a new trial, this appeal is taken. Appellant relies for a reversal on two grounds: First, failure to prove the alleged ownership of the burned building; second, insufficiency of the evidence to sustain the verdict.

The house alleged to have been burned by the defendant is described in the information as follows: "A certain inhabited building, situate at number 139 Dolores street, in said city and county of San Francisco, the property of one Ellen Bolton, then and there actually occupied by the said Martin H. Handley," the defendant. It is claimed by appellant that the name of Ellen Bolton, the alleged owner of the building, does not appear, except as stated, anywhere in the record, and that there was no evidence adduced on the trial in support of such allegation of ownership. On this point, Miss Nellie Thompson, a witness for the prosecution, testified as follows: "* * * My mother owns the premises 139 Dolores street. First saw defendant on 2d March. He wanted to see the house, and asked for the keys. Was with another man. Showed him the house. Said he would take it, and paid \$2. Next day paid the balance, and got the keys,—four in all. Said would move in the following day. I was present at the fire, March 6th. The man with Handley was about his size, fair complexion, blonde mustache." The rule with reference to the proof required to support an information or indictment is that every fact or circumstance necessary to constitute the crime charged is material, and must be alleged and proved. But the allegation of a fact or circumstance not legally essential to the charge is mere surplusage, and may be disregarded. There are allegations, however, not necessarily essential, and which may be dispensed with; but, when they are laid in the information or indictment, they become material, and must be proved in all cases, when descriptive of the identity of that which is necessary to the charge. In the case before us, the name of the owner, although alleged, was immaterial, because it was not a necessary part of the description of the crime charged, therefore not necessary to be proved. Omitting the name of Ellen Bolton from the description contained in the information, such description is a sufficient identification of the house which the defendant is charged with burning; and the evidence adduced at the trial tended to show that, at the time of the fire referred to, he occupied it as the tenant of another, who was the owner thereof, and that he paid such owner the rent therefor. It therefore follows that proof of

the name of the owner, under these circumstances, would be merely an addition to a description which in itself is full and complete without it.

With reference to the remaining point, relating to the insufficiency of the evidence, it is sufficient to say that it justifies the verdict. Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

4 Cal. Unrep. 349

PEOPLE v. HILL. (No. 21,017.)

(Supreme Court of California. Nov. 28, 1893.)

CRIMINAL LAW—EVIDENCE—INTENT.

On a prosecution for embezzlement, evidence that defendant, two months after the offense charged in the information embezzled another sum of money from defendant, is not admissible to show his intention in taking the first sum.

Commissioner's decision. Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Claude L. Hill was convicted of embezzlement, and appeals. Reversed.

M. E. C. Munday, for appellant. Atty. Gen. Hart, for the People.

BELCHER, C. The defendant was convicted of the crime of embezzlement, and the judgment was that he be punished by imprisonment in the state prison at Folsom for the term of three years. From this judgment, and an order denying his motion for a new trial, he appeals. The information charges that on the 10th day of August, 1892, the defendant received from one Robert C. Brinkley, as his agent, the sum of \$390 in lawful money of the United States, which he was to pay over to one W. E. De Groot for and on account of Brinkley, but that, in violation of the terms and objects of his agency, he did then and there, on the day named, "unlawfully, willfully, fraudulently, corruptly, and feloniously retain, withhold, secrete, embezzle, and convert and appropriate to his own use," out of the \$390 so received, the amount and sum of \$300, whereby said Brinkley was deprived and defrauded of the said sum by the defendant. The appellant contends that the verdict was not justified by the evidence, and hence that the judgment should be reversed.

It was proved that Brinkley and defendant had been acquainted for 25 years. In February, 1892, defendant came to this state, and immediately went to the house of Brinkley, in Los Angeles, and remained there until September following, when he left for San Francisco, where he obtained employment. In May, 1892, Brinkley went east, and was there engaged and traveling about with a theatrical company. During his absence, defendant attended to his financial affairs, paid his bills, etc. Brinkley testi-

fied: "During the time I was in the east, Mr. Hill stayed at my house, and transacted my business for me here. He paid my family expenses. I sent the money to my wife, and she turned it over to him." And Mrs. Brinkley testified: "During my husband's absence, he sent me about \$100 per month. Sometimes he sent the money to me, and sometimes to Mr. Hill, to pay the family expenses. * * * When Mr. Hill was at our house as our guest, he was very kind. He took care of the children, when they were sick, and looked after the household expenses. He paid the doctor's bills, the grocer, and he paid the electrician who put in the electric plant in our house. I never handled a cent, unless he gave it to me. As soon as I got the money I indorsed it, and gave it to him." Brinkley was indebted to De Groot on a promissory note which became due August 10th, and was secured by a mortgage on his household furniture. The amount due on the note for principal and interest at its maturity was \$390. On July 20th he wrote defendant from Chicago: "By the way, my note to De Groot will be due on the 10th of August, and I have the money to meet it, and will send it to you as soon as I get back to Memphis. But if he will extend the note for three months longer by your paying the interest for three months \$90, you had better pay Thiele, Clements, and others, and I will be in a position to meet the note at the time. I don't know whether he will or not, but you had better try him." Again, on August 1st, he wrote defendant from Memphis: "You had better draw on me for the money to pay De Groot, if he won't wait and extend the note. If he will, you can pay the others. Has June got the money to go home on? I will bet she has not, so I will have to pay for her ticket, I suppose. Let me know, but don't push me too hard, as you know Will gets the bulk of the profits from the opera company and theater." On the 10th of August, Brinkley caused a telegram to be sent by a bank in Memphis to a bank in Los Angeles, directing the payment to defendant of \$390, and the money was promptly paid. Shortly after receiving the money, defendant paid to De Groot \$90, and he (De Groot) agreed to wait for the balance.

In October, Brinkley came to San Francisco, and remained there about two weeks. While there, defendant was with him all the time, but nothing was said about the money. He then went to Los Angeles, and there saw De Groot, and was told by him that only \$90 had been paid on his note. After two days, he returned to San Francisco, and again met defendant and told him what De Groot said about the payment. Defendant said he had paid the whole debt, and he would go to Los Angeles and prove it. The two then went to Los Angeles, and met De Groot, and defendant and De Groot contradicted each other, and had a quarrel about

the matter. The next day, defendant told Brinkley that he had paid De Groot all the \$390, excepting \$25, and that if Brinkley would let him have that sum he would go over and pay De Groot, and get a receipt for the whole business. Brinkley gave him the \$25, and he went away, but returned shortly, and said De Groot would not accept the money. Brinkley owed Niles Pease \$89, and he then handed the defendant \$64 more, and told him to go and pay Pease. Defendant went into Pease's store, and, when he came out, said to Brinkley: "Come on home, and I will tell you something." They then got on a cable car, and went home, and Brinkley says: "In my parlor or library, he told me he hadn't paid the money to De Groot. He said he had used the money for other things. He didn't tell me right then what he did with it. He told me later in the day." On cross-examination, Brinkley testified: "A few days before this trial, and after Hill's examining trial, I received * * * a letter, in Hill's handwriting, containing a list of things * * * which it was claimed he paid out money for. He never would tell me before how he paid out the De Groot money I sent him. I do not know that he paid for my sister-in-law's ticket when she went east. Mr. Hill was attending to the payment of my family expenses. I didn't know whether he paid out this three hundred dollars for family expenses or not. I don't know what he did with it. * * * The only thing I know about it is that Dr. Thiele was paid, and I didn't know until a few days ago that he was paid. That was \$50 that I owed Dr. Thiele. I thought it was strange that he did not present his bill, and I heard that he had been paid, and I went around to see him, and he said that he had received fifty dollars. I didn't know, as a matter of fact, that Mr. Hill ever took a dollar of my three hundred dollars for his own personal purposes. I couldn't tell what he did with it. I asked him, and he said that he spent it. That is all." The defendant, in his own behalf, testified: "With this \$390 that I received, * * * I went immediately to Mr. De Groot, and paid this \$90, this interest, which I was to pay as soon as the money arrived, and Mr. De Groot said it was all right, and he would allow the principal to go on. I went immediately, and paid Dr. Thiele \$50, and paid this electrician claim of \$17.50, and I paid his sister's expenses back east, which amounted to a hundred and some odd dollars, and some small bills, drug bills, or something like that; and in that way the money was all expended for Mr. Brinkley's household expenses, and I received not a dollar benefit for myself. * * * His debts here were very numerous. There was the grocer bill, doctor bill, electrician, and, well, most every kind of a bill that could go to make up household expenses, ranging from \$10 up to \$125, * * * the general expens-

es, which amounted to between a hundred and twenty and a hundred and thirty dollars. He sent a hundred dollars per month expense money, but the general expenses run over that."

The above is a brief statement of the material evidence in this case, and certainly it appears to be by no means strong or conclusive. Looking at all the evidence, it seems to us that the jurors might well have entertained a reasonable doubt as to whether the defendant was guilty or not. There was, however, some evidence, and the verdict cannot, in our opinion, be disturbed on appeal upon the ground that the evidence was insufficient to justify it.

Appellant further contends that several errors of law were committed by the court which also call for a reversal. One of these alleged errors only need be noticed. Brinkley testified, as before stated, that he handed defendant \$25, and then \$64, and told him to go and pay his debt to Niles Pease with it; that they shortly after went to his house, and defendant then told him that he had not paid the money to De Groot, but had used it for other things. Mr. Dupuy, the deputy district attorney, then asked the witness, "When he told you that, what did you say to him, if anything?" The question was objected to by defendant on the ground that it was immaterial, irrelevant, and incompetent, and the objection was overruled and an exception reserved. The witness answered: "I asked him to give back the eighty-nine dollars that I had given him to pay Pease, and he would not do it. He says: 'No, you have lost confidence in me, and I won't give you this money, and you go back to San Francisco, and leave me here in the lurch to hustle for myself.'" During his argument of the case, Mr. Dupuy said to the jury: "There was an embezzlement of the \$89 he had given to him to pay other debts." Counsel for defendant interrupted the attorney for the people, and objected to any argument about the \$89. The court said: "The Niles Pease matter, of course, cannot have any bearing upon the present charge, except, perhaps, since it was admitted in evidence as bearing upon the intent; but, even though he had absolutely embezzled that money of Pease, it has nothing to do with this case. But it is in evidence, and is a part of the evidence in this case, and, as bearing on the intent, I think counsel has a right to comment upon it." Counsel for Defendant: "My objection is that it cannot be a proof of intent, and of something that occurred in November, from which it is sought to prove or support the intent of something that occurred in August. He might have stolen a cow in November, and it would not prove intent in August." The Court: "This was brought as a part of the transaction and talk between the defendant and Brinkley. Objection overruled." Mr. Dupuy, continuing, then said: "The two trans-

actions came together then, and while this young man was finding out the flood of this stream, the very flood involved in that stream commingled with it other infernal rascality of this defendant." The evidence objected to was clearly inadmissible. What the parties said about the \$89 was not a part of the *res gestae*, and had no connection with the alleged embezzlement two months before. The prosecution had no right to introduce such evidence for the purpose of showing an intent to embezzle the \$300 and its attorney had no right to comment upon it as a circumstance tending to show defendant's guilt. The rule is that every error is presumed to work injury, unless it appears that no injury could have resulted. That the defendant here might have been, and probably was, prejudiced by the erroneous rulings of the court, is quite apparent. It results, in our opinion, that the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; SEARLS, C.

GAROUTTE and HARRISON, JJ. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause is remanded for a new trial.

PATERSON, J. I concur. The evidence relating to the defendant's retention of the \$89 does not bring the case within the decision in *People v. Gray*, 66 Cal. 275, 5 Pac. 240. "It is a dangerous species of evidence" in any case. *Com. v. Shepard*, 1 Allen, 581.

100 Cal. 379

PEOPLE v. LANE. (No. 20,906.)

(Supreme Court of California. Dec. 1, 1893.)
HOMICIDE—RES GESTAE—EVIDENCE OF INTENTION
—SUBSEQUENT OFFENSE—INTOXICATION.

1. During a struggle between defendant and deceased in a house to which defendant had come to arrest deceased and another person, the fatal wound was given. *Held*, on prosecution for the homicide, that the shooting of defendant at the other person outside the house, where such person followed defendant a few minutes after the homicide, was not part of the *res gestae*.

2. Such subsequent offense is not admissible on the issues of whether the homicide was accidental or intentional, and, if intentional, whether it was deliberate and premeditated.

3. In a homicide case, an instruction that no act of a voluntarily intoxicated person is less criminal by reason of such condition, is proper in connection with qualifications as to cases where the actual existence of an intention is a necessary element of the offense.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

William G. Lane was convicted of murder, and appeals. Reversed.

R. B. Terry, S. J. Hinds, and W. B. Tyler, for appellant. W. D. Tupper and Atty. Gen. Hart, for the People.

HAYNES, C. The defendant was tried for the murder of William G. Canfield. The jury returned a verdict of guilty of murder in the first degree, with imprisonment for life. This appeal is from the judgment rendered upon the verdict, and from an order denying defendant's motion for a new trial.

Appellant, at the time of the homicide, was a constable at Sanger, Fresno county. Late at night he went to a house of prostitution for the purpose of arresting the deceased and one Coleman for residing in a house of ill fame, taking two men whom he found upon the street as a posse to aid him in making the arrest. Arriving at the house, appellant knocked at the door, and replied to a question from one of the inmates that he was Lane, the constable. The girl opened the door, when appellant and the other two men entered, and appellant then said he "wanted every man in the house." George Glenn, one of the men who went to the house with the constable, was called on behalf of the people, and testified that Lane told him he had to go with him, and that he was going to arrest "these men." That another man was with Lane, whom he did not know, and had never since seen. That when the door was opened he walked in with Lane. "That Canfield came out of one of the rooms, and Lane said, 'You can consider yourself under arrest,' or words to that effect. That Canfield said: 'What authority have you to arrest me? Show me your warrant;' and Bill [meaning Lane] had his gun in his left hand, and at that Canfield made a grab for the gun, and Bill put out his right hand, and says, 'Come, go with me;' and he was grabbing the gun at that time; and when the scuffle started with the gun, I turned round and left. I ran away. I heard a shot when I got about fifty yards from the house." Loe Wilson, called for the people, testified that she opened the door when defendant said he was a constable, and he and two other men came in. That Lane then said he wanted every man in the house. That Canfield came forward, and asked Lane where his warrant was. That Lane had a revolver in his hand, and replied, "This is my warrant." That witness could not remember how he had the revolver. "He had it right in front of him. I think Mr. Canfield pushed his hand up, to keep him from shooting him." That just then she heard a shot. That she heard two shots in the house. After the second shot was fired, Canfield walked back in the hall, and said he was shot; and that she thought Lane had gone outside of the house. The witness could not tell how long a time elapsed between the two shots, but thought one was right after the other. That she did not see the second shot fired, because she had turned to go back in the hall. That when the first shot was fired they were standing close together, face to face. That at the time the second shot was fired they were standing up and Lane had

hold of Canfield. Emma Newman did not remember anything the defendant said. That Canfield said something about a warrant. That when Lane came in he had a pistol in his right hand. That there were some words between him and Canfield, and afterwards a scuffle, and then some shots fired. That she heard the first shot, and went back in the room, (the second room back from the front door,) and was in the room when the second shot was fired. That "after the second shot was fired Canfield came back to the room we were in, and said he was shot. He then turned and walked into the hall again." That she next saw Canfield lying by the first door on the right-hand side. That the light was an ordinary lantern, and she did not know where that was. The light was dim. Upon cross-examination the witness testified that there was a scuffle, but she did not see Canfield grab the pistol. That he was trying to hold Lane with one hand and push him out of the house, and thought he was trying to get the pistol; and they were still struggling when she got back to the door. That they struggled "about three or four or five minutes, probably. Canfield was trying to throw him back, to throw him out. He was trying to get hold of something. I supposed it was the pistol." They were not struggling when the first shot was fired. She thought they were not together; that Canfield was between the witness and Lane. That she was not noticing Canfield particularly; was anxious about Miss Wilson. Coleman testified to the conversation at the door substantially as the other witnesses. He remained in the back room, and it does not appear that he saw any part of the transaction, or that he was seen by Lane; that the first he saw was Canfield on the hall floor after he was shot, but that the two shots were close together,—"crack, crack, just as fast as you could pull;" and indicated by clapping his hands at an interval of about half a second. After Canfield fell in the hall, Coleman examined him, and found the wound in his back, which a medical witness described as about one inch and a half from the spinal column, fracturing the eleventh rib, and ranging inwards and upwards, and from which death resulted about a week later. After Coleman discovered the wound, he started to find a physician, and was permitted, against the objection of defendant, to testify as follows: "When I started, the defendant had gone out of the house. I went out of the front door. I went down, ran down the steps, and I got a short distance away when there were two shots fired. I heard this defendant say, 'There is the son of a bitch I want,' and some one with him replied in a low tone to him. I don't know what he said. I did not see him. And immediately after saying that, as quick as possible, I heard the click of the gun, and I dropped. I threw myself on the ground

to get out of range. There were two shots fired. They both went over me or by me. Then I went for the doctor, got him, and came back with him." The time between the shooting of Canfield and the firing of the shots outside of the house is variously estimated by the witnesses. Emma Newman placed it at about 10 minutes; Loe Wilson said, "a few minutes;" and Coleman, "two or three minutes." Appellant duly excepted to the admission of the evidence of the shooting at Coleman, and contends that the ruling admitting it was erroneous. Respondent contends that it was admissible upon either of two grounds: (1) That the shooting of Coleman after he left the house was a part of the *res gestae*; (2) that, considering it as a distinct offense, it was competent to show motive, or intention to kill, and that the killing of Canfield was not, as defendant claimed, accidental.

The importance of the questions here presented can scarcely be overestimated. If the evidence as to what occurred in the house made it clear that appellant, of his willful, deliberate, and premeditated malice, murdered Canfield, no necessity existed to prove the subsequent shooting at Coleman; while if it did not make it clear that the killing was of the deliberate, willful, and premeditated malice of appellant, the verdict finding appellant guilty of murder in the first degree was wrong, unless the jury could find from the subsequent occurrence that the killing of Canfield was deliberate and premeditated. No one except the jurors can tell whether the deliberation and premeditation which the jury found to have existed were based upon the one set of facts or the other, or upon both. That the shooting at Coleman was not part of the *res gestae* is clear. The thing in litigation was the killing of Canfield during a struggle in the house. The fatal wound had been given, the struggle ended, and appellant had left the house. How long a time had elapsed—whether three minutes or ten minutes—is immaterial. What occurred outside of the house was no part of the transaction which occurred in the house. That was entirely ended, so far as appellant was concerned. "As soon as we pass the line which distinguishes between the transaction talking of itself, and talking as modifying the transaction,—in other words, as soon as we pass the line between the time of the transaction and the time that follows it,—we have no limits that can be imposed." Whart. Crim. Ev. (9th Ed.) § 262. "An act cannot be varied, qualified, or explained either by a declaration which amounts to no more than a mere narrative of a past occurrence, or of an isolated conversation held, or an isolated act done, at a later period." 1 Tayl. Ev. 52. It is urged by counsel for respondent that the two acts could not be more contemporaneous than they were; that "the double shooting sprang as offshoot performances from one

central impulse and impetus, to wit, the drunken, brutal assault upon the house." But the assault upon the house was not the issue being tried. It was the murder of Canfield,—a single substantive offense. If, during the struggle between appellant and Canfield, Coleman had appeared, and, to prevent his interference, or with a deliberate purpose, he had killed him, it would have formed a part of the transaction, and as such could have been given in evidence. I can perceive no such relation between the two acts as make the second a part of the one act under investigation. *People v. Ah Lee*, 60 Cal. 85, and *People v. Wong Ark*, 96 Cal. 126, 30 Pac. 1115, discuss the question, especially in relation to declarations; but the principles there announced, I think, fully sustain my conclusion that the shooting at Coleman was not a part of the *res gestae* which were then under investigation by the jury. Nor do I think the admission of the evidence in question can be sustained upon the second ground above mentioned. The learned counsel for the people say that it is claimed that the killing of Canfield was accidental; that, "since motive is the only question now to be investigated, this testimony was rightly introduced;" and ask the significant question: "Will it be maintained for an instant that the jury must be denied this light, and must be compelled to grope about in the dark to determine how the shooting was done, and in what frame of mind defendant was when he killed deceased?"—while appellant contends that without that testimony the jury could not have found the defendant guilty of a higher offense than manslaughter. It would therefore seem to be conceded that this evidence was controlling in its effect; and its admissibility should therefore be carefully considered, lest the appellant should escape the just punishment of his offense, or be punished for an offense he did not commit.

That evidence of a distinct and substantive offense cannot be admitted in support of the charge of the commission of another offense, is a general rule laid down by all the authorities. This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. The most familiar exceptions to the general rule above stated are cases of passing or offering to pass counterfeit money. As one may innocently pass or offer to pass a counterfeit bill or coin, not knowing that it is such, proof of prior passing or offers to pass the same or similar counterfeits is competent for the purpose of proving guilty knowledge, even though such proof shows the commission of another and complete offense. The general rule above stated is in fact but the reiteration of the still more general rule that in all cases, civil or criminal, the evidence must be confined to the point in issue. "No fact which, on principles of

sound logic, does not sustain or impeach a pertinent hypothesis is relevant; and no such fact, therefore, unless otherwise provided by some positive prescription of law, should be admitted as evidence on a trial. The reason of the rule is obvious. To admit evidence of such collateral facts would be to oppress the party implicated, by trying him on a case for preparing which he has no notice, and sometimes by prejudicing the jury against him." Whart. Crim. Ev. § 29. "In criminal cases there are peculiar reasons why the test before us should be applied to proof of collateral crimes." Whart. Crim. Ev. § 30. Applying these tests to the evidence in question, it must be remembered that there was no question that the fatal wound was inflicted by a ball discharged from appellant's pistol, and the questions to be resolved were: (1) Was the shooting accidental or intentional? (2) If intentional, was it deliberate and premeditated? Any inference to be drawn from a subsequent offense, or act constituting an offense, must be a logical inference. It is true that it is not necessary that the collateral offense, whether prior or subsequent, should conclusively prove the guilt of the accused of the offense for the commission of which he is being tried, in order to render it admissible in evidence; but, as evidence of another offense manifestly tends to his prejudice, there ought to be some clear connection between the two offenses by which it may be logically inferred that, if guilty of the one, he is of the other. It is not like the admission of some collateral fact, which, if it does not, in the opinion of the jury, prove the fact intended, yet leaves no stain or prejudice to color or pervert the direct evidence of the offense under investigation. That there was no logical or necessary connection between the intent with which the shots were fired at Coleman and the intention or absence of intention with which the shots were fired in the house, is, I think, clear. The circumstances were different, the persons were different, the result was different, and the times of the two transactions, though not widely separated, were different. The only link connecting the two, if it may be so called, was that appellant went to the house to arrest both, and that fact, therefore, only proves the intention to arrest; not to kill. It is obvious that Lane may have fired the shots in the house accidentally, or without any intention of taking the life of Canfield, or in necessary self-defense, and yet have instantly formed the purpose to kill Coleman when he saw him come out of the house. None of the circumstances of the case indicate that appellant went to the house with a pre-existing intention of taking the life of any one, and the court correctly charged the jury that no appreciable time was necessary for deliberation or premeditation, and certainly that was true of the intention to kill Coleman, if it existed.

Counsel for appellant cites the case of *Farris v. People*, 129 Ill. 521, 21 N. E. 821, in which this question was fully considered and many cases cited. The court, after stating that testimony which is relevant to the issue is not to be excluded because it tends to prove the commission of another crime, said: "But the general rule is against receiving evidence of another offense, and no authority can be found to justify its admission, unless it clearly appears that such evidence tends in some way to prove the accused guilty of the crime for which he is on trial." *Agnew, J.*, in *Shaffner v. Com.*, 72 Pa. St. 65, said: "If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." In that case the prisoner was indicted for the murder of his wife by poison. There was evidence of his criminal intimacy with the wife of S., on whose life there was an insurance, the proceeds of which, on his death, the defendant had tried to procure. It was held that evidence that S. died with the same symptoms as the defendant's wife, and had been attended by the defendant, was inadmissible. In the case of *Farris v. People*, supra, *Farris* went to the house of *McGehee* when the family were at dinner, and, declaring that he had come there to kill him, shot and killed him. Within half an hour after, and before he left the premises he committed a rape upon *Mrs. McGehee*, and this was put in evidence upon his trial, over his objection. It was contended there, as here, that the prosecution had a right to show all the defendant did from the time he came to the place of the killing until he left it, as part of one and the same transaction; but the appellate court held that the admission of the evidence was error, and reversed the judgment, and this, notwithstanding the opinion of the appellate court that the direct evidence of the homicide was sufficient to justify the verdict of guilty of murder in the first degree, as it could not be known but that the jury, in the absence of the evidence erroneously received, would have spared his life. In *State v. Lapage*, 57 N. H. 245, it was said by *Cushing, C. J.*: "I take it to be generally true that any act of the prisoner may be put in evidence against him, provided it has any logical and legal tendency to prove any matter which is in issue between him and the state, notwithstanding it might have an indirect bearing, which, in strictness, it ought not to have, upon some other matter in issue. It may be that in some cases the danger resulting from such indirect bearing might be so great in comparison with its importance in regard to matters on which its bearing was legitimate that it ought not to be admitted." In that case the learned judge, after putting an extreme case, further said: "I

mention this case to illustrate the necessity of extreme caution not to admit such testimony unless there can be seen some distinct logical connection, such as the law requires, between the fact proposed to be proved and the fact in issue." See, also, the opinions of Ladd, J., and Smith, J., in the same case, and the opinion of Peckham, J., in *People v. Sharp*, 107 N. Y. 466, 14 N. E. 319; *People v. Corbin*, 56 N. Y. 363; *Coleman v. People*, 55 N. Y. 90.

It is clear that the shooting at Coleman did not tend to show a "motive" for the killing of Canfield, as counsel for the people contend. Motive precedes intention, and is the cause or reason upon which it is formed; and, if this testimony clearly tended to show a pre-existing motive for the killing of Canfield, it would be admissible as tending to show that the homicide was not accidental, but was intentional and premeditated. I have assumed that counsel used the word "motive" in the sense of "intention." But it is obvious that an intention to do an act may exist without any known or ascertainable motive for its existence; and hence, where "intention" is apparent, or may otherwise be shown, it is not necessary to prove a motive. The contention of the respondent here would oblige the court and the jury to infer, from an intention to kill Coleman, in no wise manifested save by the act of shooting at him, a pre-existing intention to kill Canfield. I can see no clear, logical, or even possible ground upon which such inference could be based, other than that shown by his willingness and moral capacity to commit another offense; and all the authorities agree that such evidence cannot be admitted for that purpose. How an intention which may be, and often is, instantaneously formed, and the existence of which is only shown by a single instantaneous act, can be adopted as a predicate from which an inference can be logically drawn that it existed at any specified time prior to such manifestation, I do not comprehend. That it may have existed before is conceded; but that it did exist before, the subsequent fact does not either logically or clearly tend to prove. Actual or specific intentions, as controlling or prompting action, are largely the creatures of circumstance and opportunity, and are thereby created or changed; while motive, as used in criminal law, implies an evil disposition, and willingness to injure, which may exist without any specific intention to injure at all, or to injure in any specific manner; and because of this distinction collateral evidence may often be both relevant and competent to prove motive, which is comparatively permanent and constant, while it would be neither relevant nor competent to show intention as an isolated fact. But to sustain the admission of this evidence we must go further than to hold that it is competent to prove an intention to kill Canfield, since the killing may have been voluntary,—intentional,—and yet have been

only manslaughter; while here the verdict was of murder in the first degree, which required a finding not only of an intention to kill, but that it was deliberate, premeditated, and malicious; and, if deliberation and premeditation were not shown by the facts occurring in the house, or by acts preceding them, it could not be shown by the subsequent facts disclosed by the evidence objected to.

Appellant further contends that the court erred in its instruction to the jury upon the subject of his intoxication. The instruction excepted to gave the whole of section 22 of the Penal Code. The part of the instruction excepted to is as follows: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition." This language, though copied from section 22, if it had been given alone, would have been erroneous, because it omitted that portion of the section which qualified it in cases where the actual existence of an intention was a necessary element of the offense. But it was proper to include the part objected to, not only because it was a part of an entire section upon that subject, but because the information included the offense of manslaughter, to which the part objected to was applicable.

I think the jury were not misled or prejudiced by the use of the words "crime committed," in another instruction, though the word "homicide" would have been better in that connection.

As the other questions argued by appellant will not necessarily arise upon a new trial of this case, they need not be noticed. I think the judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

4 Cal. Unrep. 355
PEOPLE v. CROWL. (No. 20,965.)

(Supreme Court of California. Dec. 1, 1893.)

CRIMINAL LAW—INSTRUCTIONS—PRESUMPTIONS—
INTENTION—DUTY OF JURY.

1. An instruction, in a prosecution for assault with intent to commit rape, that a presumption is a deduction which the law expressly directs to be made from particular facts, and unless this is controverted by other facts the presumption will control, and that among such presumptions is one that an unlawful act was done with an unlawful intent, is proper, the instruction not relating to deductions of fact to be drawn by the jury.

2. An instruction that an intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused, does not assume any fact.

3. Instructions telling the jury of their duty to convict if the evidence satisfies them of defendant's guilt, though not erroneous, are better omitted.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; C. L. Clafin, Judge.

J. G. Crowl was convicted of assault with intent to rape, and appeals. Affirmed.

Goodwin & Stewart and W. N. Goodwin, for appellant. E. E. Copeland, D. W. Jenks, and Atty. Gen. Hart, for the People.

SEARLS, C. J. G. Crowl, the appellant, was indicted for the crime of an assault with intent to commit rape upon one Ida Trybschenck, a female child under 10 years of age, and upon trial was convicted as charged. The appeal is from the judgment, and the cause comes up on the judgment roll, without any bill of exceptions. At the trial the court, at the request of the prosecution, among other instructions to the jury, gave the following: "No. 3. A presumption is a deduction which the law expressly directs to be made from particular facts; and, unless this presumption is controverted by other facts, the jury is bound to find according to such presumption. Among such presumptions are the following: (1) That an unlawful act was done with an unlawful intent.

* * * No. 4. An intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity. No. 5. The jurors are the sole judges of all questions of fact, and of the credibility of witnesses. But you are not at liberty to disbelieve the evidence as jurors, if you believe it as men. You are not to throw aside any considerations connected with the testimony, which would be brought to bear in your judgment as men, simply because you are now jurors. While you are to be prudent and cautious, and to give the defendant the benefit of every reasonable doubt, you are not to hesitate in the performance of your duty by reason of any peculiar method of considering testimony or evidence, which you may think belongs to you as jurymen, but which would not belong to you as men. If you are entirely satisfied from the evidence of the guilt of the defendant, your verdict should be 'Guilty.' * * * No. 7. If the evidence entirely satisfies you of the guilt of the defendant, you can have no choice, but must find him guilty. Following the pathway of the evidence, you can turn neither to the right nor to the left, but must accept the conclusions to which the facts lead; and you should remember that it is not the juror, but the law, that inflicts the punishment. * * * No. 9. If the facts entirely satisfy you of the defendant's guilt, you must convict him. In such case no consideration of pity or mercy can influence you. With the consequences which may attend conviction you have nothing to do. They rest upon others." Appellant argues that these instructions do

not correctly enunciate the law as applicable to the case.

Instruction No. 3 is taken almost bodily from sections 1959, 1961, and subdivision 2 of section 1963 of the Code of Civil Procedure, and was alike law and applicable to the case in hand. The instruction did not relate to deductions of fact which are to be drawn by the jury, but to presumptions of law which come within the province of the court. The instruction is not inimical to the doctrine of *People v. Walden*, 51 Cal. 589; *Stone v. Mining Co.*, 52 Cal. 318; and *Scott v. Wood*, 81 Cal. 405, 22 Pac. 871.

The fourth instruction, as to intention, was correct, and did not, as appellant argues, assume any fact. It embodied a legal principle applicable to all persons charged with crime.

The fifth, seventh, and ninth instructions related mainly to the duties of jurors in the consideration of criminal cases. Unless there is an apparent necessity therefor, it would seem better in all cases for the prosecution to rely upon the good sense of jurors to do their duty under such circumstances, subject to such explanations as to the scope of their responsibilities as may properly come within its sphere in the argument of the cause. The tendency to ask too many instructions, on the part of the prosecution, is everywhere apparent. We cannot say the instructions now under consideration are positively erroneous, but, at the same time, think it would have been better to have omitted them.

The tenth instruction, which we have not set out, is an exact copy of the instruction given in *People v. Cronin*, 34 Cal. 195, in relation to the effect to be given to the testimony of a defendant when a witness in his own behalf, and found on pages 195 and 196 of that case. The objection to this instruction has been often made, and as often overruled. It matters not what our views would be on the subject, were the question here for the first time. Repeated adjudications have placed it beyond the realm of discussion. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

100 Cal. 372

THELIN v. STEWART et al. (No. 19,234.)
(Supreme Court of California. Nov. 29, 1893.)

PLEADING—COMPLAINT—MISJOINDER OF CAUSES
OF ACTION—APPEAL—OBJECTIONS WAIVED.

1. Code Civil Proc. § 427, authorizes plaintiff to "unite several causes of action in the same complaint where they all arise out of * * * (6) injuries to person; (7) injuries to property," and provides that "the causes of action so united must all belong to only one of these classes." *Held*, that plaintiff cannot join in the same complaint a cause of action for forcing the noxious fumes of chemicals into plaintiff's shop, to the injury of his health, and

a cause of action for breaking into the shop and removing his personal property.

2. Defendant does not waive his demurrer for misjoinder of causes by answering the complaint, and going to trial on the merits, after the demurrer has been improperly overruled.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Thelin against Stewart and others for injuries to person and property. Defendants demur. Demurrer overruled. Defendants appeal. Reversed.

W. T. McNealy, for appellants. J. S. Callen and Isaac G. Burnett, (Callen & Neale, of counsel,) for respondent.

HARRISON, J. The plaintiff seeks to recover damages from the defendants for injuries sustained by him from their wrongful acts. The complaint is in two counts, each of which is stated to be "a separate cause of action" against the defendants. In his first cause of action he alleges that during the whole of the 25th, 26th, 27th, and 28th days of July, 1892, the said defendants, and each of them, willfully and maliciously burned sulphur and other disagreeably smelling chemicals in a room adjacent to the room occupied by plaintiff as his shop, and in which the plaintiff was at the said time conducting his business, in such a manner as to purposely cause the said fumes from said sulphur and other chemicals to enter the said shop of plaintiff, and thereby the air in said shop was vitiated to such an extent that it was impossible to remain in said shop, and the life of said plaintiff was by said vitiated condition of said air in said shop endangered, and his health was thereby seriously affected. In the second cause of action the plaintiff alleges that during the night of the 28th day of July, 1892, the said defendants, and each of them, broke open the door of his shop, and removed therefrom all of the personal property in said shop, and deposited the same upon the edge of the sidewalk, and allowed the property to remain there during the 29th day of July, until about 5 o'clock P. M., when it was removed by said defendants without his knowledge, and to some place unknown to him. For each of these separate causes of action the plaintiff alleges that he sustained damage in the sum of \$2,500, and asks judgment for their aggregate, amounting to \$5,000. The defendants demurred to the complaint upon the ground that the several causes of action were improperly united therein, the court overruled their demurrer, and thereafter they answered, and upon the trial of the cause judgment was rendered against them for the sum of \$650. From this judgment they have appealed upon the judgment roll alone, upon the ground that their demurrer was improperly overruled. Section 427, Code Civil Proc., authorizes the plaintiff to unite in the same complaint several causes of action, "where they all arise out of * * *

(6) injuries to person; (7) injuries to property;" but the same section also declares that "the causes of action so united must all belong to only one of these classes." The cause of action set forth in the first count of the complaint is for an injury to the person of the plaintiff, while that which is set forth in the second count is for an injury to his property; and, in addition to being alleged to be "a separate cause of action," appears from the facts alleged to have arisen subsequent to the occurrence of the facts set forth in the first count. For this reason, therefore, the demurrer to the complaint should have been sustained.

The defendants did not waive their demurrer by subsequently answering the complaint, and going to trial upon the merits. The plaintiff was forbidden by the statute from uniting two causes of action in his complaint, and the objection was not waived by the defendants in submitting to a trial of the issues. A judgment rendered upon a complaint after a demurrer thereto has been improperly overruled, must be reversed, unless it clearly appears that no injury to the defendant resulted therefrom. Injury will be presumed from the error, and it is incumbent upon the respondent to make it appear to the contrary. The defense to the different causes of action herein might be different, and also require proof of different character. It is sufficient, however, to say that the statute has expressly declared that the two causes of action shall not be united in the same complaint. *Reynolds v. Lincoln*, 71 Cal. 190, 9 Pac. 176, and 12 Pac. 449; *Stark v. Wellman*, 96 Cal. 400, 31 Pac. 259; *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757. The judgment is reversed.

We concur: PATERSON, J.; GAROUTTE, J.

100 Cal. 375

PEOPLE v. RONEY. (No. 20,990.)

(Supreme Court of California. Nov. 29, 1893.)

Department 2. Appeal from superior court, Napa county; E. D. Ham, Judge.

William Roney was convicted of assault with intent to commit rape, and appeals from the judgment and an order denying a motion for a new trial. Affirmed.

Dennis Spencer and John T. York, for appellant. Henry C. Gesford, for the People.

PER CURIAM. The defendant was convicted of the crime of assault with intent to commit rape, and sentenced to imprisonment in the state prison for a term of years. This appeal is taken by him from the judgment and the order denying his motion for a new trial. It is contended by appellant that the judgment should be reversed—First, because of the insufficiency of the evidence to sustain the verdict; second, be-

cause the court erred in refusing to give certain instructions requested by the defendant; third, errors of law occurring at the trial.

As the evidence upon which the defendant was convicted fully sustains the verdict, the first ground of objection, with respect to its insufficiency, cannot be sustained. Nor is it necessary to consider the questions embraced in the ground of objection relating to the alleged errors of law occurring at the trial, further than to say that they are either untenable or immaterial. The remaining questions which we are asked to consider refer to the instructions requested by the defendant and refused by the court. An examination of the record with reference to these questions shows that the instructions requested by the defendant and refused were all substantially embodied in the charge of the court and the instructions given at the request of the defendant; and, as the jury was fully charged by the court on all matters of law necessary for their information, it follows that the judgment and order should be affirmed. So ordered.

We concur: DE HAVEN, J.; FITZGERALD, J.; McFARLAND, J.

(100 Cal. 391)

In re FLINT'S ESTATE. (No. 15,291.)

(Supreme Court of California. Dec. 2, 1893.)

WILLS—CONTEST—MENTAL CAPACITY—UNDUE INFLUENCE—EVIDENCE.

1. Code Civil Proc. § 1881, subd. 4, providing that a physician cannot, without consent of the patient, be examined as to any information acquired in attending the patient, necessary to enable him to act, cannot be waived by a contesting heir as against the proponent widow, so that a physician, in a will contest based on testator's incapacity, can testify that he prescribed for testator for mental trouble.

2. A will contest is a civil action, within the meaning of Code Civil Proc. § 1881, subd. 4, providing that in such action a medical man cannot, without the patient's consent, be examined as to any information necessarily acquired in attending him.

3. A question as to the mental soundness, to be inferred from a certain physical condition hypothetically stated, is not objectionable because the expert has already testified, as testator's physician, that such was in fact testator's physical condition.

4. It is not competent, on the issue of undue influence on the part of the proponent widow, to show that nine years before the will was made, and six years before their marriage, testator having then another wife, he and proponent went together on a camping trip, proponent being introduced as his wife.

5. When contestant has closed his case without offering any evidence as to the value of the estate, it is error to exclude evidence offered by proponent on the subject.

6. The nurse's record of what transpired at testator's sick bed, in her presence, is not competent evidence, the nurse being present and able to testify herself.

Department one. Appeal from superior court, city and county of San Francisco; W. H. Levy, Judge.

Appeal of Annie Flint, widow of William C. Flint, deceased, and proponent of his alleged will, from a judgment denying probate thereof. Reversed.

Cal. Rep. 32-34 P.—63

Frank M. Stone and F. W. Reade, for appellant. Welles Whitmore, for respondent. Wm. F. Gibson, for Greene, special administrator.

GAROUTTE, J. A judgment was entered denying probate to a certain instrument claimed to be the last will and testament of William C. Flint, deceased, upon the ground that at the time said instrument was signed the testator was not of sound and disposing mind, and also that said deceased was unduly influenced in the making thereof. The appellant, Annie Flint, wife of the deceased, made a motion for a new trial, which was denied, and this appeal is prosecuted from the order denying such motion.

The appeal is based upon certain rulings of the court in the admission and rejection of evidence offered during the progress of the trial; also complaint is made of certain instructions of law which were given to the jury. The bill of exceptions is a model in its manner of preparation, containing sufficient evidence to fully yet succinctly point the objections made, and being such as is contemplated by the statute, but forming the exception to the general rule of those placed before us. Dr. McLean, having stated that he was the attending physician of the deceased for several days prior to his death, was allowed to testify, under the objection of appellant, that during his visitations he prescribed for him for mental trouble. Subdivision 4 of section 1881 of the Code of Civil Procedure provides: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Under this provision the testimony of the doctor that he prescribed for his patient for mental trouble should not have gone to the jury. It came clearly within the scope of the foregoing provision, and it is evident that the patient was not present at the trial to give his consent to its admission. The authorities are uniform upon this question in all those states possessing statutory enactments in any way similar to the one we have quoted. See *Briggs v. Briggs*, 20 Mich. 34; *Streeter v. City of Breckenridge*, 23 Mo. App. 244; *Freel v. Railway Co.*, 97 Cal. 40, 31 Pac. 730. Counsel for respondent concedes the force of the above authorities, and also concedes that the evidence was objectionable under the provision of our statute; but insists that the privilege may be waived, not only by the patient, but by his heirs and legal representatives. The child of the deceased is here the contestant of the will, and by offering the evidence of the physician waived the privilege, provided that under the law of this state the power vested in her to make such waiver. The question of waiver of the privilege by the personal representa-

tive or heir of the deceased is a new one in this state, but the statute of New York bearing upon this matter is similar to the provision of our Code of Civil Procedure, and the decisions of the courts of that state furnish us ample light in the form of precedent. The Code of Civil Procedure of New York (section 836) provides that the privilege is present unless "expressly waived by the patient." The California provision contains the words, "without the consent of his patient." It will thus be seen that the provisions are, in effect, the same. The courts of New York, under this clause of the statute, have uniformly held that the patient alone can waive the privilege, and when such patient is dead the matter is forever closed. *Westover v. Insurance Co.*, 99 N. Y. 56, 1 N. E. 104; *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320; *Loder v. Whelpley*, 111 N. Y. 239, 13 N. E. 874. The decisions of the appellate courts of Michigan, Missouri, and Indiana support respondent's position in this regard. *Morris v. Morris*, 119 Ind. 341, 21 N. E. 918; *Groll v. Tower*, 85 Mo. 249; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510; *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882. But the statutes of those states regarding privileged communications vary quite materially from those of New York and California, and, as is said in *Thompson v. Ish*, supra: "The difference in the statutes may well cause the difference in the rule laid down in New York and Missouri."

Under the facts of this case we are not called upon to even apply the strict rule laid down by the New York authorities. The contest here arises upon the probate of a will as between the surviving widow, a devisee thereunder, and the heir, a child of the deceased by a former marriage. As yet there is no personal representative in the case, as no executor or administrator has been appointed. The cases cited from various states, with the exception of *Thompson v. Ish*, only go to the extent of the right of the personal representative to waive the privilege. In this case we have no personal representative, and the contest arises between the devisee and the heir. All of the courts concede the privilege does not lapse with death, hence it is coupled with the evidence when offered at the trial. Who has the power to waive it? Can the heir waive it, as against the objection of the devisee? That is the thing done in this case, and we think the action of the court cannot be sustained. It cannot be said that the heir is representing the deceased, for the heir is attempting to overthrow the will, and offers this evidence of the attending physician, over which the privilege rests, for the very purpose of attacking the mental soundness of the patient. Such is not the representative of the deceased referred to in the various decisions of the courts. This provision of law rests upon a sound public policy. Its object and purpose is to enable the patient

to make a full statement of his physical infirmities to his physician, with the knowledge that the law recognizes the communications as confidential, and guards against the possibility of his feelings being shocked or his reputation tarnished by their subsequent disclosure. To him the considerations are even more weighty that the privilege remain inviolate after he has gone to his grave, for his good name is left behind deprived of his protecting care. His rights are not buried in the grave, and heirs and devisees quarreling among themselves over a division of his patrimony in justice to his memory should not be allowed to waive the privilege.

The attending physician, Dr. McLean, while upon the witness stand, was also asked a hypothetical question as to his opinion, as an expert, of the patient's mental soundness, based upon a state of facts describing the deceased's physical condition, as testified to by the doctor himself. The question asked was purely hypothetical, and we think the objection thereto was properly overruled. The fact that the condition of the patient, as described in the question, was personally known to the witness, is immaterial. He was questioned as an expert upon matters presented to him in the abstract, and his opinion in either case would necessarily be the same, for the state of facts was the same.

As evidence tending to prove undue influence upon the part of the devisee, Mrs. Flint, in the execution of the will, the contestant, under objection, proved that, in the summer of 1882, Mrs. Flint, then Miss Annie Gorsig, accompanied the deceased upon a camping excursion, and at that time was introduced as Mrs. Flint. The purpose and tendency of this evidence was to establish illicit relations between these parties, and, viewed in that light, it must have prejudiced appellant's cause in the minds of the jury. The will was executed nine years after this event, and, standing alone as an isolated circumstance, disconnected with any chain of subsequent events passing down to the time of its execution tending to show an exercise of undue influence by appellant upon the testator's mind, we think the evidence objectionable, as entirely too remote to reach the only object for which it could be admissible, to wit, as tending to show undue influence. At that time the testator was not divorced from his first wife. He was not married to his present wife until six years later, and the will was not executed until three years subsequent to this marriage. The only effect the testimony could have had was to besmirch the character of appellant, and her character was not an issue in the case. While a court is allowed a liberal discretion in admitting evidence as to the relations existing between the deceased and the party charged to have exercised the undue influence, yet an isolated circumstance, such as is depicted by this evidence,

wholly fails in enlightening the jury upon the question. The testimony of McDonald and Paine, as to appellant being in the company of the testator, upon two other occasions, we think immaterial. It is scarcely sufficient even to justify an inference of unlawful relations between the parties. The rule is well settled that a woman living in illicit relations with a testator at the time he executes his will is not allowed to exercise her influence in the execution thereof to the extent that a wife is entitled. But here the evidence offered is isolated circumstances, entirely disconnected, as far as the record discloses, with events surrounding the latter years of the testator's life; and, beyond all this, the woman was his lawful wife at the time of the execution of the will, and had been such for three years prior thereto. Conceding indiscretions to have been committed by these parties at this time, such evidence wholly failed to show any undue influence at a time many years after, for in the interim the parties were married, and she had been a lawful wife for years. The foregoing views are fully supported in *Webber v. Sullivan*, 58 Iowa, 260, 12 N. W. 319; *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61; *Pierce v. Pierce*, 38 Mich. 418.

Contestant closed his case without offering any evidence as to the value of testator's estate. Evidence bearing on the question was then offered by the surviving widow, but under objection was ruled out. The ruling was erroneous. It is well settled that the amount and condition of the testator's estate is always an element to be taken into consideration in determining the mental capacity of the testator, and the influences which actuated his mind in disposing of his property. If it is good evidence for the contestants of a will, for the purpose of showing that the devises and bequests to his beneficiaries are unreasonable and unjust, as compared to the value of his estate and his relationship to the parties, thus indicating mental incapacity or undue influence, it is equally good evidence in favor of the supporters of the will for the purpose of showing a fair and reasonable allotment of his property to the parties entitled to his bounty, as indicating mental soundness, and a mind entirely free from all improper influences.

The tenth paragraph of testator's will reads: "I give, devise, and bequeath to Arthur Joshua * * *. The witness Mason testified that when the will was signed he called the testator's attention to this omission, and the deceased then said to let it go; that if he made a codicil he would then put something in the codicil for him. As bearing upon this matter, the court gave the following instruction: "Again, if you find from the evidence in this case that testator, William C. Flint, on said 5th day of January, 1891, when he signed said proposed will, omitted from the provisions thereof bequests which he desired to make, the court instructs

you that said proposed will was incomplete, and not the complete will of said testator, William C. Flint, and not his will." The instruction is erroneous; but, inasmuch as no issue was presented to the jury embodying the matter embraced within the instruction, the error would seem to be harmless.

Mrs. Lizzie Haggard was the nurse of the deceased at the time he executed his will, and she kept a record of the events transpiring at his sick bed while she was present. Upon cross-examination, contestant, under objection, offered this record in evidence. Its admission should not have been allowed. There was no question involved as to the right of the witness to refresh her recollection from the record, but it was offered as an independent piece of evidence in the case. It is difficult to see the purpose of the offer, for the witness was upon the stand, ready to testify as to all competent and material matters occurring at the times she was engaged in the sick room. A contest arising upon the probate of a will is a civil action, within the meaning of subdivision 4 of section 1881 of the Code of Civil Procedure. Neither can we give the stipulation entered into by the respective attorneys the scope and force contended for it by respondent's counsel. The order denying a new trial is reversed, and the cause remanded.

We concur: PATERSON, J.; HARRISON, J.

100 Cal. 400

In re COUTS' ESTATE. (No. 19,300.)

(Supreme Court of California. Dec. 2, 1893.)

EXECUTORS AND ADMINISTRATORS — PETITION TO SELL LAND FOR DEBTS — EVIDENCE—RES JUDICATA.

1. When, on petition to sell land of deceased for the payment of debts, notice is given to persons interested as provided by Code Civil Proc. § 1539, and thereafter an order refusing such sale is reversed on appeal, and the proceeding remanded for a new trial, the notice required by said section need not be again given; but the court, in the exercise of a sound discretion, may dispose of the petition on such notice as may be provided by its general rules, or as it may deem reasonable, provided the parties interested are not deprived of a hearing.

2. An order settling an executor's account, allowing a claim included therein, of a third person, for services rendered the estate, and adjudging that there is no money in the executor's hands to pay such claim, is conclusive on devisees not under disability, who do not appeal, and they cannot attack it on an application for the sale of land to pay such claim.

3. On an application for the sale of decedent's land to pay a claim for services to the estate, an agreement between the devisees made prior to the performance of such services, and fixing a certain sum as then due the administratrix on the settlement of account, is inadmissible.

4. On a petition for the sale of decedent's land to pay a debt due petitioner, a claim that the debt had been paid by petitioner's use and occupation of a portion of the estate is a counterclaim, which must be pleaded.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Petition by Cave J. Coutts for the sale of real estate belonging to the estate of Cave J. Coutts, deceased. From an order granting the petition, contestants appeal. Affirmed.

Trippet, Boone & Neale, for appellants. Conklin & Hughes, George J. Leovy, and Leovy & Palmer, for respondent.

HARRISON, J. Upon the former appeal herein, (87 Cal. 480, 25 Pac. 685,) it was held that the petition for the order of sale was sufficient, and that determination is conclusive of the question upon the present appeal. The subsequent permission of the court below to allow Mrs. Dear to file objections to granting an order of sale does not give her any right to renew the objections to the sufficiency of the petition. By the proper publication of the order to show cause why the petition should not be granted, she was brought within the jurisdiction of the court, and was bound by its action as fully by her default for not appearing as if she had appeared and contested the sufficiency of the petition, and the determination by this court upon an appeal from that order was equally binding upon her. We do not, however, wish to be understood as intimating that the petition is in any respect defective, but to show that the question cannot be regarded as open for discussion.

It was not necessary for the court below, after our reversal of its former order, to again give the notice required by section 1539, Code Civil Proc. By the original compliance with the requirements of that section, it had obtained jurisdiction in the matter, and over all parties interested therein; and its subsequent action upon the petition was a movement within its jurisdiction, to be reversed only for some error in law which might be shown upon a direct appeal. After the remittitur had been filed therein, that court was at liberty to hear and dispose of the petition upon such notice as might be provided by its general rules, or as it might deem reasonable in the particular case; and unless it should be made to appear that it had abused its discretion in this respect, or that the parties entitled thereto had been prevented from hearing, its action is not to be set aside. No claim of surprise, or inability to properly present their objections, was made herein, but the only objection to a hearing was the want of the statutory notice aforesaid, and this, as we have seen, was not required.

May 29, 1889, the executrix filed her account of receipts and disbursements on account of the estate from the 29th of January, 1887, to the 9th of May, 1889, and of all sums of money belonging to the said estate which had come into her hands as such executrix, and in the report accompanying

her account stated that the respondent herein, and some others, had claims against her as executrix, the validity of which, as charges against the said estate, she asked the court to determine. Upon proper notice therefor, this account was settled September 6, 1889, and in the order settling the account the court found that she had expended all the money that had been received by her as executrix, together with \$315.03 in addition, for which she was entitled to credit, and also that the claim of the respondent herein for \$1,240.57, mentioned in the report accompanying her account, was a legal charge against the estate, and she was directed to pay the same out of the moneys of said estate which might thereafter come into her hands as such executrix. At the hearing herein upon the petition for the order of sale, the contestants sought to show that the claim of the respondent had been paid and discharged prior to the filing of the foregoing account, but the court refused to allow any evidence to be given in support thereof. This ruling was correct. It was said upon the former appeal herein: "The order settling the account was appealable, and the allowance of the claim is conclusive against every one interested, except those laboring under disability." The offer of the appellants was to impeach the correctness of the judgment after it had become final.

The contestants offered in evidence an agreement entered into January 29, 1887, between all of the heirs of the decedent, for the division between themselves of a portion of the estate of the decedent, and for the sale of certain other property of the estate, and the disposition of its proceeds. This agreement provided that, of the proceeds of said sale, there should be paid "the sum of \$6,000 to Ysidora B. de Coutts, in the amount agreed to be due to her on the settlement of her accounts as executrix of the estate of Cave J. Coutts, deceased." The contestants then offered to show by one of the parties to this agreement that at the time it was executed this sum of \$6,000 was estimated as the probable cost of closing the administration, and was accordingly inserted in said agreement, and also that at the time of the allowance of the respondent's claim there was \$1,800 remaining in the hands of the executrix, and available for the costs of the administration, and that it was still in her hands, subject to disposal as the court might direct. This evidence was also excluded by the court, and its ruling is assigned as error. The agreement in question was executed more than two years prior to the filing of the account of the executrix, and that account, in its terms, purported to relate to matters "subsequent to the date of said agreement," and extending over a period of upwards of two years. The clause in the agreement itself, which the contestants relied upon as the basis of their offer, had reference to a period

anterior to the agreement, as it refers to an amount then agreed to be already due to the executrix on the settlement of her account; and the agreement also provides that, upon the coming of age of one of the heirs, she should take the necessary steps to have the administration of the estate closed. The items forming the claim of the respondent are not shown by the record, nor are their respective dates given; but annexed to the account of the executrix, which was filed in May, 1889, is a statement of her account with him, in which it appears that a balance was struck between the items June 1, 1888, and that on that date an entry was made in the account as follows: "Balance due C. J. Coutts, \$1,240.57." From all that appears from the record, therefore, the several items of this claim must be assumed to have been incurred subsequent to the execution of the agreement, and consequently not to have been included therein. Even if we could assume that the sum of \$6,000 inserted in the agreement was intended to cover the future expenses of administration, it was incumbent upon the contestants, when the validity of this claim was brought before the court by the executrix in 1889, to show that that sum was intended to include this claim, and that it was sufficient therefor, and that enough to discharge the same then remained in the hands of the executrix. The judgment of the court that there was no money then in her hands belonging to the estate, and that the claim of the respondent was a legal charge against the estate, was a determination in her favor, that there was no money in her hands, and in favor of the respondent, that his claim was a valid charge against the estate, and must be treated as conclusive upon these points. The offer of the contestants to show that, at the time the court made this order, there was the sum of \$1,800 in her hands, was an attempt to contradict the direct judgment of the court that at that time she had no money of the estate in her hands; and the offer to show that this amount of money still remained in her hands was equally an attempt to impeach the correctness of that judgment. It is not claimed, nor was any offer made to show, that she had received any moneys belonging to the estate since the settlement of that account.

The offer to show that the claim of the petitioner had been paid by reason of his having had the use and occupation of a portion of the estate, for which he should account in a sum equivalent to the amount of his claim, was properly excluded. No issue of this kind was presented to the court, and the claim, if valid, was in the nature of a counterclaim, which should have been pleaded. Even if the facts had been admitted, it would not constitute a payment. *Borland v. Bank*, 99 Cal. 94, 33 Pac. 737. The order is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

100 Cal. 376

In re BERGIN'S ESTATE. (No. 15,413.)
(Supreme Court of California. Dec. 1, 1893.)
LETTERS OF ADMINISTRATION—TO WHOM GRANTED
—FOREIGN WILL.

Under Code Civil Proc. pt. 3, tit. 11, c. 2, art. 3, entitled "Probate of Foreign Wills," and providing that an authenticated copy of the will and of its probate in any foreign country or state "shall be produced by the executor or other person interested in the will, with a petition for letters," and that after proper notice and proofs, there shall be "letters testamentary, or of administration, issued thereon," letters of administration must, in the absence of a petition by the executors, be granted to a person "interested in the will," who applies for them, to the exclusion of the public administrator.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition for Thomas I. Bergin for the admission to probate of the will of Daniel J. Bergin, deceased, and for letters of administration thereon. From an order granting the petition, A. C. Freese, public administrator, appeals. Affirmed.

H. Choynski, for appellant. Thos. I. Bergin, in pro. per.

McFARLAND, J. Daniel J. Bergin, deceased, died in March, 1892, in the city of Dublin, Ireland, leaving a last will, which was duly probated in the proper court of that country. He left some personal property in the city and county of San Francisco, Cal. By said will certain persons were appointed executors, and the respondent herein, Thomas I. Bergin, who is a citizen and resident of San Francisco, in the state of California, was named as a devisee. The said respondent produced and filed with the superior court of the city and county of San Francisco an authenticated copy of said will and probate, together with a petition that the same be admitted to probate here, and that letters of administration with the will annexed be issued to him. Afterwards, A. C. Freese, public administrator of said city and county, also filed a petition for the probate of said will, and for the issuance of letters of administration to him. The court, after a hearing of both petitions, admitted the will to probate, ordered that letters be granted to said Thomas I. Bergin, and denied the petition of Freese; and from these orders Freese appeals.

We are satisfied that the ruling of the lower court was correct. The part of the Code which governs this case is found in article 3, c. 2, tit. 11, pt. 3, of the Code of Civil Procedure, embracing sections 1322 to 1324, inclusive, under the head of "Probate of Foreign Wills." It is there provided that an authenticated copy of the will and of its probate in the foreign country "shall be produced by the executor or other person interested in the will, with a petition for letters;" and that, after proper notice and proofs, there shall be "letters testamen-

tary, or of administration, issued thereon." Said article 3 deals specially with the subject-matter of foreign wills, and it must prevail over all conflicting provisions "as to all matters and questions arising out of the subject-matter of such article." Pol. Code, § 4483. By that chapter it is clearly provided that letters testamentary must be granted to the executor upon his petition, for letters testamentary could be granted only to an executor; and we think it also clear that under the provisions of said chapter letters "of administration" must be granted to a "person interested in the will" who applies for them, in the absence of a petition by the executors. None of the cases relied on by appellant involved in any way a foreign will, except *Estate of Beach*, 63 Cal. 458, and *Estate of Garber*, 74 Cal. 338, 16 Pac. 233; and the only matter passed upon in those cases was the general right of a non-resident to nominate an administrator. The very question involved in the case at bar was not before the court in those cases, because here the respondent, who applied in his own right, was a citizen and resident in California; and there was no reference in the opinions of the court in those cases to said chapter 3, or any discussion of the point at issue in the case at bar. We do not desire, however, to have this opinion taken as assuming that a public administrator would, under any circumstances, be entitled to letters of administration in a case of a foreign will. That matter was clearly not in the mind of the court in any of the cases cited; and whether or not the general provisions of the Code about public administrators refer only to the estates of persons dying in their counties, and to domestic wills, must be considered an open question. Orders appealed from affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

(4 Cal. Unrep. 358)

KNIGHT et ux. v. PACIFIC COAST STAGE CO. (No. 19,228.)

(Supreme Court of California. Dec. 2, 1893.)

CARRIERS—INJURY TO PASSENGER—EVIDENCE OF NEGLIGENCE—INSTRUCTIONS.

1. In an action by a passenger against a stage company for personal injuries received from the upsetting of a stage in coming down a mountain road, it appeared that one of the horses had been inclined to run away; that the road was muddy and slippery; that the horses were going at "a slow jog," when they were frightened by a landslide; that they ran 100 yards before the driver regained control; that flying mud and slush made it hard for the driver to see, and tended to frighten the horses; and that the horses were going in a trot, when they were so frightened by another slide that the driver lost control, and they ran away, and upset the stage. *Held*, that there was evidence for the jury as to whether defendant failed to provide suitable horses and driver.

2. Where the only issues were as to the suitability of the horses and driver, the court properly refused to instruct concerning latent

defects in the stage, and concerning the duty of the injured party to exercise proper care in endeavoring to recover from the injury.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by William G. Knight and wife against the Pacific Coast Stage Company for personal injuries to the wife. From a judgment entered on a verdict for plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Graves & Graves, for appellant. Wilcoxon & Bouldin and J. M. Wilcoxon, for respondents.

HARRISON, J. The plaintiffs were being carried as passengers in one of the coaches of the defendant, on the night of December 30, 1891, from Santa Margarita to San Luis Obispo; and, while going down the slope of the mountain towards the latter place, and about three miles therefrom, the coach was upset, and Mrs. Knight sustained serious injuries, for which this action was brought. The jury rendered a verdict in favor of the plaintiffs for the sum of \$1,000, and from the judgment entered thereon, and an order denying a new trial, the defendants have appealed.

It was shown at the trial that it had rained very hard on the previous night, and that on the night in question the road was muddy and slippery; that after reaching the top of the mountain, and while going down, after turning a certain bend in the road, the horses attached to the coach were frightened by a slide of rocks and earth, and ran about 100 yards before they were got under control, and were then driven along until they were frightened by another slide, after which the driver lost all control of them, and, after running about three-quarters of a mile, the coach was upset. It is contended by the appellant that the evidence in the case failed to show any negligence on its part, for the reason that the accident was the result of a casualty which could not have been foreseen or guarded against, and that for this reason the verdict should have been in its favor. There was, however, evidence before the jury tending to show that one of the horses attached to the coach had been inclined to run away; and, although the bill of exceptions does not show the speed at which the horses were driven down the mountain, the driver testified that from the top of the mountain down to the bend where the first slide was encountered he was going at a "slow jog," and that, after their first fright, they ran about 100 yards, when he got them under control, so that they went in a trot. He also testified that the road was slushy and wet, and that mud was flying, so that he could hardly see anything, and that this would have a tendency to scare the horses. The court instructed the jury very fully upon the propositions of law involved in the case, and left to them to de-

termine whether the injury to the plaintiff was caused through any negligence of the defendant, or was the result of an unavoidable accident. Under the circumstances attendant upon the passage down the mountain it was incumbent upon the driver to exercise more than ordinary care, and we cannot say that there was no evidence before the jury in support of the plaintiffs' claim that the defendant was negligent in providing suitable horses, or in the manner in which they were driven.

The court did not err in refusing to instruct the jury that the defendant was not liable for any latent defect in its coach which could not be discovered by the most careful examination, or by any known test. There was no issue of this nature in the case. The charge of negligence against the defendant in the complaint is in its failure to provide a suitable driver and suitable horses for said coach, and there had been no evidence introduced respecting the insufficiency of the coach. For a similar reason the court did not err in refusing to instruct the jury respecting the duty of Mrs. Knight to exercise proper care in endeavoring to recover from the accident. No evidence was before the jury tending to show that she had in any particular failed in this respect. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

100 Cal. 404

FINNERTY et al. v. PENNIE et al. (No. 15,286.)

(Supreme Court of California. Dec. 6, 1893.)

EXECUTORS AND ADMINISTRATORS—DECREE OF DISTRIBUTION—CONSTRUCTION.

1. A decree, on petition of an administrator, for final distribution of an estate "subject to the claim of said administrator for the sum of \$834.90," creates a lien for that amount on the property in his favor.

2. M. left as his heir C., who afterwards died, leaving defendants as his heirs. K. was appointed administrator of both estates, and on settlement of M.'s estate it was decreed that it should be distributed to K. as the administrator of C.'s estate, subject to K.'s claim for a certain amount found due him as administrator of M.'s estate. *Held*, that defendants took M.'s estate subject to the lien created by this decree.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Partition by William H. Finnerty and another against James C. Pennie, Margaret O'Neill, and Mary A. Connors, and Thomas Kirkpatrick. Judgment was entered that the property sought to be partitioned be sold, and that the interests of O'Neill and Connors were subject to a lien in favor of Kirkpatrick for services performed by him as administrator of their interests in such property. From an order denying their motion for a new trial on the ground that the court erred in allowing Kirkpatrick's claim, and declar-

ing it a lien on their interests, O'Neill and Connors appeal. Affirmed.

Geo. D. Collins, for appellants. Thos. F. Barry, for respondents.

BELCHER, C. In January, 1889, Matthew Connors died, owning an undivided one-half interest in certain real property situate in the city and county of San Francisco, and leaving as his sole heir at law his father, Michael Connors. In June, 1889, Michael Connors also died, leaving as his sole heirs at law two daughters, Margaret O'Neill and Mary A. Connors. In November, 1889, Thomas Kirkpatrick was duly appointed administrator of the estate of each of the said decedents by the superior court of the city and county of San Francisco, and thereafter he duly qualified and entered upon the discharge of his duties as such. In May, 1890, the said administrator rendered and filed in court a full account and report of his administration of each of the said estates, and accompanied the same with petitions for the final distribution thereof. These accounts were settled and allowed by the court, and in the matter of the estate of Matthew Connors, on the 16th of September following, it was ordered, adjudged, and decreed that the undivided one-half of the said real property belonging to that estate be distributed to Thomas Kirkpatrick as administrator of the estate of Michael Connors, "subject to the claim of the said administrator for the sum of \$834.90, as fixed by the order settling the said account" in the first-named estate. And in the matter of the estate of Michael Connors it was on the same day ordered, adjudged, and decreed that the undivided one-half interest in the said real property be distributed in equal shares to Margaret O'Neill and Mary A. Connors, "subject to the claim of said administrator, amounting to the sum of \$271, as fixed by the order settling the said account herein." In January, 1891, the plaintiffs William H. Finnerty and Edward Finnerty, being the owners of the other undivided one-half of the said real property, commenced this action against Margaret O'Neill, Mary A. Connors, Thomas Kirkpatrick, and others, for a partition of the property, or, if a partition could not be made without injury to the owners, then for a sale thereof, and a division of the proceeds. The case was tried, and the court found, among other things, that the plaintiffs and the two defendants first named were the owners each of an undivided one-fourth of the said described property, and that the same was so situated and built upon that it could not be partitioned. The court further found "that the defendant Thomas Kirkpatrick, as administrator of the estate of Matthew Connors, deceased, has a claim, lien, and charge against the respective interests of said Margaret O'Neill and Mary A. Connors in said real estate, and there is now due and owing him thereon the sum of

eight hundred and thirty-four and ninety one-hundredths dollars, with interest thereon," etc. And there was a similar finding as to the \$271. Judgment was accordingly entered that the property be sold; that the interests of the defendants Margaret O'Neill and Mary A. Connors in the property were subject to the payment of the said sums of \$834.90 and \$271, which constituted liens thereon; and that the proceeds of the sale be applied to the payment and satisfaction of said liens. The said defendants moved for a new trial upon the ground that the court erred in allowing the claim of Kirkpatrick, as aforesaid, for the sum of \$834.90, and declaring it a lien on their interests in the property described, and ordering the proceeds of the sale applied in satisfaction thereof, and their motion was denied. From the order thus made denying their motion they appeal.

1. In support of the appeal it is contended that the decree of distribution of the estate of Matthew Connors did not create any lien upon the property distributed, for the reason that a lien can only be created by contract or by operation of law. The language of the decree was that the property be distributed, "subject to the claim of said administrator for the sum of \$834.90," etc. This was in effect declaring that the property was charged with the payment of the sum named, and, in our opinion, it created a lien on the property by operation of law. And that the court had the right and power to so charge the property was in effect decided by this court in the case of *In re Moore*, 96 Cal. 522, 31 Pac. 584.

2. It is further contended that when the property of the estate of Michael Connors was distributed to appellants they took it free and clear of all claims and liens declared against it in the distribution of the former estate, and subject to no other charge than such as was imposed by the last and final decree of distribution to them. In support of this position, sections 1666 and 1908 subd. 1, of the Code of Civil Procedure are cited. This contention cannot be sustained. Section 1666 makes the decree conclusive only as to the rights of the heirs, legatees, or devisees. It does not in any way relate to or affect the rights of adverse claimants. *In re Rowland*, 74 Cal. 523, 16 Pac. 315. And the other section cited has no bearing upon the question in hand. It declares that a judgment or order in respect to the probate of a will, or the administration of the estate of a decedent, is conclusive as to the will or administration. But no such question arises here. It follows, in our opinion, that the order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

placed in his charge by a person other than the owner, without the owner's knowledge or authority.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Dawson Lowe and others against C. L. Woods and others. There was judgment for plaintiffs, and defendant Adams appeals. Reversed.

F. Adams and F. A. Dorn, for appellant. Wilcoxon & Bouldin, for respondents.

GAROUTTE, J. This is an action brought by livery and feed stable keepers to foreclose a lien upon a horse for the feeding of the animal. The horse was placed by defendant Woods in charge of plaintiffs, he agreeing to pay the sum of \$20 per month for his care and feed. At this time Woods was in possession under a contract of purchase from the defendant Adams, the true owner, the agreement between them being that he should have the use of the horse, and should feed and care for him, but that the title should remain in Adams until the sum agreed upon was paid; and that event never came to pass. It was further expressly stipulated by these parties that Woods should keep the horse without cost or expense to Adams, and that, upon his failure to pay the amount stipulated, it should be redelivered without cost or expense. This appeal is prosecuted by defendant Adams from a judgment foreclosing the lien, and ordering a sale of the horse.

Among other matters, it is found by the trial court that Adams was at all the times mentioned in the complaint the owner of the horse; that Woods informed plaintiffs, at the time they received the horse, that Adams was the owner thereof, and within one week thereafter plaintiffs had full knowledge of the terms and conditions of the contract by virtue of which Woods had possession. It thus appears that the court not only found the ownership of the horse to be in appellant Adams, but found that respondents had knowledge of the fact upon the first day of their possession, and within a few days subsequent thereto had complete and perfect information of all the circumstances surrounding Woods' possession. There is certainly no principle of law that would entitle plaintiffs to a lien upon this horse after they became conversant with the character of Woods' possession, and all the terms of the agreement under which he held. We will not consider the effect of the finding of the court that plaintiffs were informed by Woods, when the horse was placed in their care, that Adams was the owner thereof, as we are prepared to take a broader view, and hold that in this case, as disclosed by its entire history, no lien whatever was created in favor of plaintiffs.

That portion of section 3051 of the Civil Code bearing upon this question is as fol-

(100 Cal. 408)

LOWE et al. v. WOODS et al. (No. 19,268.)
(Supreme Court of California. Dec. 6, 1893.)

AGISTOR'S LIEN—WHEN ATTACHES.

Civil Code, § 3051, providing that livery stable keepers shall have a lien dependent on possession for feeding horses, gives no lien to a livery stable keeper for boarding a horse,

lows: "And livery or boarding or feed-stable proprietors, and persons pasturing horses or stock have a lien dependent on possession for their compensation in caring for, boarding, feeding or pasturing such horses or stock." In *Domnau v. Green*, (Tex. App.) 19 S. W. 909, under a statute in all material respects similar to the provisions of our Code, and upon a state of facts involving the principle presented in this appeal, the supreme court of that state said: "This is not a question of notice, but a matter of property right, in which the doctrine of caveat emptor applies. In order for the statutory lien to attach, it is necessary that the animal be placed with the livery keeper by its owner, or some one having authority from him." In *Stott v. Scott*, 68 Tex. 304, 4 S. W. 494, the court said: "There is nothing in this statute to indicate an intention to give such a lien on property which may be placed in such a stable as is mentioned by some person, neither the owner nor the agent of the owner. It has been held that the lien given by the common law to an innkeeper upon the horse of a traveler who becomes his guest will attach, although the guest may have stolen the horse; but it is not believed that such a lien has ever been held to exist upon property placed with one who has a lien only by force of a statute, by a person not the owner or the agent of the owner." Under a quite similar statute the supreme court of New Hampshire, in *Sargent v. Usher*, 55 N. H. 287, said: "The idea that a lien may be created by a contract of the possessor of animals for their keeping, the owner being in no way privy to such contract, when no rights whatever as against the owner could be conferred or created by a contract of sale, seems anomalous, to say the least. Such a thing would, as it seems to me, be a violation of the fundamental rights of property guaranteed by the constitution, and, if the legislature had undertaken by this act to create a lien to arise on such a state of facts, I think it would be the duty of the court, as more than intimated by Foster, J., in *Jacobs v. Knapp*, 50 N. H. 82, to hold the act so far unconstitutional and void." And, in the same case, Cushing, C. J., said: "Now, there seems no good reason why a party not the owner should be permitted to pledge the property, or create a lien upon it, either at common law or by statute, any more than he should be permitted to sell it. Neither is there any good reason why a person who is about to establish relations with another out of which a lien would be created should not make the same inquiries which would be incumbent on him to make if he were going to purchase the property. * * * It is claimed in the plaintiff's brief that Robinson ought to be considered in law as agent of the defendant; but I have seen no case in which it has been held that a party who permits another to

have possession of his personal property, by so doing, in law constitutes that other his agent to sell or pledge that property." In *Small v. Robinson*, 69 Me. 425, it was held that a hackman having the possession of a hack, upon terms similar to those upon which Woods was in possession of this horse, had no interest in the hack that would allow him to create a lien upon it for repairs; the court quoting the language of Shaw, C. J., in *Hollingsworth v. Dow*, 19 Pick. 228, wherein he said: "A lien is a proprietary interest, a qualified ownership, and in general can only be created by the owner, or by some person by him authorized." The principle of law here involved is also fully discussed in *Robinson v. Baker*, 5 Cush. 137; *Jacobs v. Knapp*, 50 N. H. 71; and *Hollingsworth v. Dow*, 19 Pick. 228.

At the time Woods placed the horse in the custody of plaintiffs, defendant Adams was the owner. The title was in her. The court so found under the agreement, and authority in law is not lacking to support the finding. *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 598. Adams being the owner of the horse, without her assent Woods could not sell it; he could not pledge it; neither had he the power to create a lien upon it by placing it in the hands of an agistor. Without any contract upon appellant's part, without any personal liability whatever, without her assent in any form, and even without any notice to her of the facts which are claimed to have created the lien, it is now sought to take her property, and apply it to the satisfaction of Woods' debt. Such a practice would be violative of the fundamental principle of law that no man's property can be taken from him without his consent. Respondents' counsel rely upon *Chuch v. Garrison*, 75 Cal. 199, 16 Pac. 885, to support the judgment attacked by this appeal. The question was there presented upon a general demurrer to a complaint in intervention. The decision of the court is not as full and explicit as it might have been, but, as we construe it, it is there decided that actual ownership of the machine by the parties hiring the work done was not necessary to give plaintiffs a standing in court. In a limited sense this is true, and only in a limited sense. It was never intended to hold that a thief, by his contract with an agistor or mechanic, could create a lien upon the stolen property, or that a stranger in no way in privity with the true owner could create such a lien. Aside from the question of estoppel of the owner by reason of his negligence, (and we have no such question presented in this case,) the lien can only be created by the owner, or by some one duly authorized to act for him. English authorities, and some early American cases, have recognized a different rule as to common carriers and innkeepers; but as to common carriers the law declared in those cases was held unsound in *Robinson v. Baker*, supra,

and we have no doubt that as to innkeepers the true rule forms no exception to the general principle we have declared. For the foregoing reasons, it is ordered that the judgment be reversed and the cause remanded.

HARRISON, J. I concur.

PATTERSON, J. I concur in the judgment on the first ground stated by Mr. Justice GAROUTTE.

100 Cal. 302

SCHMITT v. CITY AND COUNTY OF SAN FRANCISCO. (No. 14,419.)

(Supreme Court of California. Nov. 10, 1893.)

DEDICATION—OFFER OF—REVOCATION.

1. The drawing of side lines through a block in a plat of land, indicating that it may be intended for a street, but not designating it by name as such, is merely an offer to dedicate; and where the land so designated is not a continuation of any existing street, and has not been accepted or used by the public, and no one has acted on the offer by purchasing lots on the faith of the delineation of the land as a street, the owner may revoke the offer.

2. A deed of the entire block by the owner, describing it by metes and bounds, without reference to the alleged street delineated on the plat, and conveying it as part of the land sold, operates as a revocation of the offer to dedicate.

3. The fact that after such revocation the city attempted to accept the offer of dedication by delineating the street on the official city maps is immaterial, since, after the revocation of the offer, the land became private property.

Commissioners' decision. Department 2. Appeal from superior court, San Francisco county; J. P. Hoge, Judge.

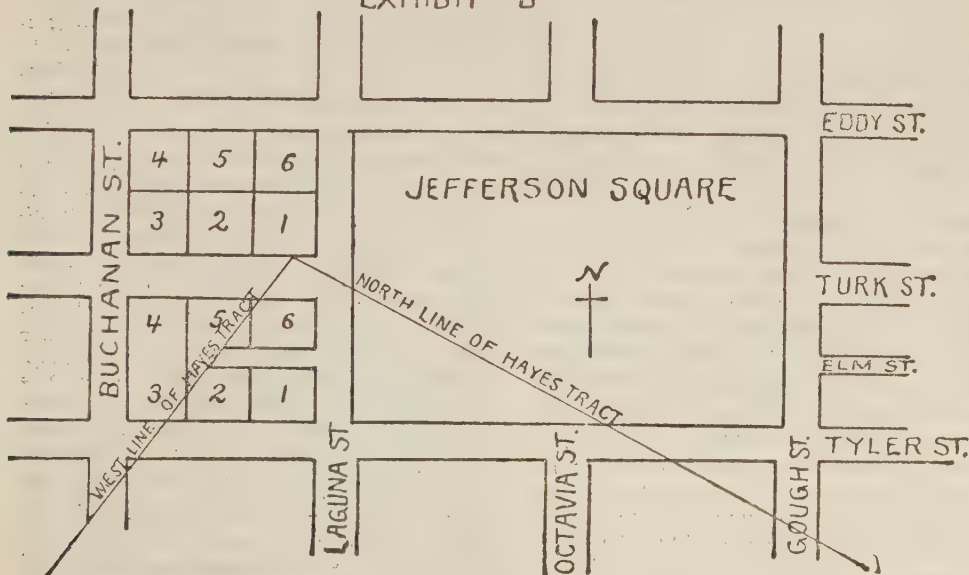
Action by George Schmitt against the city and county of San Francisco to quiet title to land alleged by defendant to be a street.

From a judgment in defendant's favor, plaintiff appeals. Reversed.

F. J. Castelhun, for appellant. John H. Durst, for respondent.

TEMPLE, C. This is an action to quiet title to portion of block 223, Western addition to San Francisco. The defendant claims that it has been dedicated to the public use as a street. Whether it has or not is the only question involved. The defendant had judgment, and plaintiff appeals from the judgment, and from the refusal of a new trial. It appears from the findings that in 1855 one Thomas Hayes owned a large tract of land within the city of San Francisco, called the "Hayes Tract," that in June, 1859, he caused the whole tract to be surveyed and subdivided into blocks and lots, extending through it the streets already existing in the city. A map was made by Hayes showing these streets, blocks, and lots, and indorsed, "Map of the Hayes tract, lots and blocks, according to the official survey by M. Hoadley." Upon this map, Hayes indorsed his certificate, which contained the following: "I, Thomas Hayes, proprietor of the land as herein subdivided within the dotted lines indicated by magnetic courses in red ink, hereby declare this map, for all time to come to be unalterable, and have this day filed the same in the recorder's office of the city and county of San Francisco for description and legal reference," etc. The certificate was dated June 10, 1859, and the map was filed on that day, and has ever since remained on file. A section of this map was put in evidence, showing the tract in controversy, and a part of the north and west lines of the Hayes tract. The following is a copy:

EXHIBIT "D"



The tract in controversy here appears as a cul-de-sac. It is contended that it forms a part of Elm street. Elm street does not appear on any official map, so far as the evidence shows, prior to 1866. Hayes tract did not touch the supposed street at any other point. The Van Ness map includes block 226, and according to it there is no street dividing block 226. I find no evidence in the record that such street has been in fact opened and used at any point. The official map of 1866, however, shows such a street, and represents it as extending through block 226. Hayes caused to be printed upon his map a notice that the property delineated would be sold at public auction at a stated time and place, and accordingly the greater part of the tract was sold and Hayes deeded to the purchasers the lots according to the map. April 26, 1862, the legislature passed an act entitled "An act to establish the lines and grades of the streets in the city and county of San Francisco," whereby a board was constituted to survey all the streets, and fix the lines thereof, and to make maps showing the width of all streets. Under this act, surveys were made which were completed, and maps made by another board created by an act passed in 1864. The maps and surveys having been made and filed, the board of supervisors gave notice for three weeks, as required by statute, that the maps and surveys were filed, and open for public inspection. Under the act any property holder dissatisfied was authorized to file objections, which should be considered by the board of engineers, and afterwards the map, as finally passed by that board, should be reported to the board of supervisors, who were then empowered to approve the same, and, if approved, the map was to stand as the legal and official map of the city, and determine the lines and grades of the streets. It is found that all of these requirements were complied with, and the map was duly approved January 30, 1866, and became and is the official map. The tax rolls and block books from the office of the assessor and tax collector were introduced in evidence for the fiscal year 1863-64 and succeeding years. The block books show the premises in controversy as a part of Elm street. The descriptions in the assessments and tax receipts, however, do not show, except by reference to the assessor's maps, that any part of block 226 was exempted from assessment and taxation. The court found from this evidence that the property had been exempt from taxation as a street since 1862. June 7, 1862, Hayes sold and conveyed to L. L. Hawley all of block 226, which was within his tract, describing it as follows: "Commencing at the northwest corner of Tyler and Laguna streets; running thence westerly, along the north line of Tyler street, to the northwestern boundary line of the Hayes tract; thence northeasterly, along said boundary line, to the south line of Turk street;

thence easterly, along the said line, to the west line of Laguna street; thence, at right angles, southerly, and along the last said line, two hundred and seventy-five feet, to the point of commencement, being a portion of block No. 226, Western addition, and a part of the Hayes tract." This was the only sale or conveyance ever made by Hayes of any land in block 226. This part of Elm avenue or street has never been used as a street. At the time of the conveyance, a high ridge of sand covered the land in dispute, and extended across Laguna street, and into Jefferson square. There does not appear to have been any improvement in the block, except a vegetable garden on Tyler street. Hawley graded the portion purchased by her, including the land in controversy, as also Laguna street, and immediately inclosed her land, building a bulkhead along Laguna street the whole distance, which still remains.

Do these facts show a dedication of the land to the public as a street, which was irrevocable? And, if not, did the deed to Hawley operate as a revocation? It will not be disputed that the survey and map, accompanied by the solemn declaration of the owner, followed by sales and conveyances of a large portion of the property described by reference to the map, constituted, as to the owner, a complete dedication of the property designated on the map as streets. The property in question, although side lines were drawn which might indicate that it was intended to be a street, was not by name designated as such, and was not the continuation of any street. Since a street was subsequently laid out there, extending through the entire block, as well as other blocks, it is probable that such a street had been proposed. As to this property, the marks upon the map may be supposed to indicate a willingness on the part of Hayes to allow a street to be established there. Treating it as an offer, could he then withdraw it? In *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, it is said: "When the owner of property which is within the limits of an incorporated city or town makes and records a map of such property, by which he subdivides the same into blocks and lots bounded by streets which are continuations of other streets already laid out by the city or town, and sells and conveys the lots abutting upon those streets, he thereby dedicates to the public the streets so laid out by him as prolongations of other streets, as well as the other streets which are laid out upon such map, intersecting and connecting the same; * * * The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use, nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. * * * Whether the owner by making sales according to such map or des-

ignation, has made the offer with reference to other streets than those by which the lots sold are bounded, is a fact that the court must determine from the circumstances of each case; * * * The owner, after selling some of the lots according to such map, might, either with the consent of the purchasers, or if he should himself repurchase all of the lots so sold, withdraw such offer at any time before the public had acquired any interest in the streets, either from formal acceptance or by actual user." In other words, if the dedication has not been accepted or the property used by the public, it is purely a question of estoppel in pais. If no one has acted upon the offer in such a mode that they would be injured by the revocation, the owner may revoke the dedication, even though it be an actual dedication, and not a mere offer. This doctrine has been frequently announced by the courts, and, so far as I can discover, has never been questioned. In *Cincinnati v. White*, 6 Pet. 431, it is said: "After being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication." See 2 Dill. Mun. Corp. p. 744, note 1, where numerous authorities are cited to the same effect; also, *Elliott, Roads & S.* 91, 92, and note.

Applying that principle to the case under consideration, I see no reason why a revocation might not have been made as to this property at the time Hayes conveyed to Hawley. It may be conceded that the purchasers from Hayes had a right to insist upon the entire scheme under which they were induced to purchase, so far as any benefit could possibly accrue to them therefrom, but they could have no interest in having a cul-de-sac established in a block which was then entirely unimproved. Until a business was established there, or improvements which they might be interested in having maintained, it must have been an immaterial matter to those who owned no property in the block. *Bridges v. Wyckoff*, 67 N. Y. 130. If, at the time Hayes conveyed to Hawley, he had a right to revoke the dedication or offer to dedicate the land in controversy, there can be no doubt that conveyance had that effect. The description made no reference to the alleged street, but conveyed it as part of the tract sold. If the map and other facts show an offer to dedicate only, a conveyance without reservation must amount to a revocation, unless the purchaser had notice of some fact which would estop the grantor from revoking. It is a proposal to donate, and, if the proposed donor transfers the property before it has passed to the donee to another, it is no longer his to give. The block map was entirely immaterial, in any view. It could not conclude the property owner. *San Leandro v. Le Breton*, 72

Cal. 170, 13 Pac. 405. At the time those books were made, there was no pending offer to dedicate, and, if there had been, the assessor had no authority to accept for the public.

Nor do I think the engineer's map of 1866 can conclude the plaintiff. The land, at the time that map was made, had become private property. It was affirmatively shown that no street or way existed at this point when the Van Ness ordinance was passed, and it was not so marked on the Van Ness map. Under such circumstances, I can discover no respect in which the case differs in principle from *Whelan v. Boyd*, 93 Cal. 500, 29 Pac. 69. The opinion in that case, it is true, states that the land in that case was held under an alcalde grant, but that fact does not distinguish that case from this. In either case the title is from the same source, the Pueblo or its successor, the city; and I do not understand that the city has reserved any right with reference to lands acquired under the Van Ness ordinance which would justify the appropriation of them without compensation, beyond those selected by the commission thereby provided for. The land in controversy was not so selected. To this it may be added that it does not appear from what source Hayes derived his title. The proposition, of course, is that the land was designated as a street on the engineer's map, and that notice was given requiring property owners to come in and make objections, if any they had, to the proposed map as showing the streets and other public grounds claimed by the city, and the provision that the board of engineers should consider such objections, and might alter the map if so disposed, and that the map, as finally approved, should be the official map, and constitute evidence of streets, etc. Even had there been no authority upon the subject, I think this map alone could not be held conclusive upon this subject. There has been, however, very little discussion of that matter in the briefs, and, as it has been decided, it is not worth while to consider the matter further. I think the judgment and order should be reversed, and a new trial had.

We concur: VANCLIEF, C.; BELCHEE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

4 Cal. Unrep. 360

CORCORAN v. HINKEL et al. (No. 15,325.)
(Supreme Court of California. Dec. 13, 1893.)

MORTGAGES — WAIVER OF REDEMPTION RIGHTS —
FORFEITURE TO SATISFY LIEN — ACTION TO RE-
DEEM — FINDINGS — EVIDENCE.

1. Defendant in a mortgage foreclosure suit made a compromise agreement with plaintiff, whereby the latter agreed to accept a part of the amount claimed if paid within 16 months, the purpose of the parties being stated to be a sale of the mortgaged premises after a reasonable time to extinguish the debt as fixed by the contract, and to save expenses of foreclosure sale. The contract provided that the land be conveyed to trustees, and be by them reconveyed in case defendant paid plaintiff within 12 months; that defendant might sell any part by having the price paid to plaintiff; that after 12 and before 16 months plaintiff might sell the remainder at auction; that a decree should be entered for the full amount claimed, and proceedings stayed until the expiration of the 16 months, at the end of which time the trustees should convey the unsold land to plaintiff, who might sell it under the decree, in which case the agreement fixing the amount due should be void. Defendant conveyed the land to the trustees, and then negotiated a sale to H., but defects in the title delayed the closing of the sale until after the 16 months during which the trustees had power to convey to a purchaser, and it was necessary to convey to plaintiff in order to give H. a good title. Plaintiff, with defendant's consent, conveyed the land to H. at the agreed price. *Held*, that Civil Code, § 2889, which provides that "all contracts for the forfeiture of property subject to lien, in satisfaction of a lien secured thereby, and all con-

tracts in restraint of the right of redemption from a lien, are void," had no application to such transaction.

2. The fact that plaintiff did not formally cancel the indebtedness against such defendant did not entitle the latter's administratrix to redeem the land from the sale to H. when it appeared that such plaintiff never asserted the existence of any such indebtedness after the conveyance of the land to it by the trustees, and that it actually received such conveyance in full satisfaction.

3. It appeared that defendant authorized the trustees to sell the land at a price named, and "to pay commissions" out of the proceeds. They then authorized certain brokers to sell, and the latter negotiated a sale at the price named by defendant. On the title being found defective, defendant directed the trustees to decrease the price agreed on through such brokers by the amount necessary to perfect the title, which they did. *Held*, that the brokers were the agents, not of the trustees, but of defendant.

4. A finding that the mortgagee granted, bargained, and sold the land to H. is not inconsistent with the finding of the circumstances attending the sale, which show that the conveyance was made in fulfillment of the arrangement between deceased, (the mortgagor,) and H., by which the mortgagee became the conduit through which the title passed.

5. In such case H.'s title is unaffected by any knowledge or want of knowledge by him of the contents of the deed from the trustees to his grantor, the mortgagee, or of the trust agreement.

6. In such action to redeem it was competent for H. to show by parol that the conveyance by the trustees to the mortgagee was made, not as a forfeiture, but to consummate a sale made by the mortgagor to a third party.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Mary F. Corcoran, as administratrix with the will annexed of the estate of William Corcoran, deceased, against John Hinkel and others, to redeem certain land which deceased had mortgaged to defendant German Savings & Loan Society, and which was afterwards conveyed by it to defendant Hinkel. There was a judgment for defendants, and an appeal by plaintiff from such judgment was dismissed. From an order denying her motion for a new trial, plaintiff appeals. *Affirmed*.

John A. McKenna, for appellant. Robert H. Countryman and T. V. O'Brien, for respondents.

PER CURIAM. Mary F. Corcoran, as administratrix with the will annexed of the estate of William Corcoran, deceased, brought suit against John Hinkel and a large number of other defendants, among whom were the German Savings & Loan Society, William M. Pierson, John R. Jarboe, and S. H. Regensberger, the principal object of which was to be permitted to redeem certain premises therein described which Corcoran had mortgaged to said German Savings & Loan Society on July 9, 1877, to secure the sum of \$95,000, then loaned to him by the mortgagee, and which was afterwards conveyed by the German Savings & Loan Society (whom for convenience we will hereafter des-

ignate as the "Bank") to defendant Hinkel. The other defendants not above named were purchasers, respectively, of portions of the property from defendant Hinkel.

The complaint, after alleging the making of the mortgage above mentioned, alleged in substance that in July, 1883, the bank commenced an action to foreclose said mortgage, claiming that there was then due thereunder about \$100,000. Corcoran answered, claiming that by reason of a sale at much less than its value of part of block 144, which he had conveyed to the president of the bank as further security, the amount due was very much less than that demanded; that on March 31, 1886, no decree having been taken in the foreclosure suit, a compromise agreement was made and executed, whereby Corcoran admitted there was then due under said mortgage the sum of \$60,000, and the bank agreed to make a further loan or advancement to Corcoran of the sum of \$5,000, and would accept in full of all its claims against him the sum of \$65,000, with interest from that date at 6 per cent., together with the amount of taxes, street assessments, etc., which it might be required to pay, provided the amounts thus agreed upon should be paid within 16 months from the date of the agreement. This agreement, which is set out in full in the complaint, recites the pendency of said foreclosure suits, and the contention as to the amount due, and declares that it is the intention of the parties to adjust, compromise, and settle such differences and disputes, and to finally fix and determine the rights, obligations, and duties of the parties; and that "it is the desire and intention of all the parties hereto that the land and premises involved and described in said action be sold, after the lapse of a reasonable time for the purpose of extinguishing all the obligations of the said William Corcoran to said corporation, as the same are determined and fixed by this agreement, and to save, if possible, the expenditure of sheriff's fees upon a foreclosure sale, and to obtain as high a price as possible for the benefit of all concerned herein." The agreement further provided that the mortgaged property, being a large number of parcels situate in Mission block No. 21 of the city of San Francisco, should be conveyed by Corcoran to John R. Jarboe and William M. Pierson by a deed of grant, bargain, and sale, to be held by them in trust for the uses and purposes specified in the agreement; that at any time within 12 months Corcoran should have the right to have conveyed to him all said property by the trustees upon payment to the bank of the sums above agreed upon, with taxes, etc., and interest, and upon such payment to release all liens and claims against him; that within said 12 months Corcoran might sell any portion of the premises with the consent of the bank, upon payment of the whole of the price received therefor; that after the expiration of 12 months and before the ex-

piration of 16 months the bank should sell the unsold portions at public auction for cash, or upon terms of credit therein stated, and any surplus that should remain should be paid to Pierson, to whom Corcoran had sold portions of the mortgaged property prior to the agreement. The agreement further provided that to secure the performance of the agreement, and to enforce a sale, in case the property could not be sold under the terms of the agreement, a decree of foreclosure should be entered in the action then pending for the full amount claimed in the complaint, but all proceeding should be stayed until the expiration of the 16 months from the date of the agreement. Time was made the essence of the agreement, and, in case the compromise sum was not paid within the 16 months, the trustees should convey all of said property, or the unsold portions of it, to the bank, who might thereafter sell under its decree, and bid it in for the face of the decree and costs; and in such case the agreement fixing the indebtedness of Corcoran to the bank at \$65,000 should be void. It was also further provided that purchasers of the property, whether made by auction, sheriff's, or other sale, should hold the same free and discharged from any claims of Corcoran, Pierson, or Jarboe, by all of whom and the bank the agreement was executed.

In pursuance of the stipulation, a decree was entered in the foreclosure case April 2, 1886, for the amount claimed in the complaint. Pierson, who had purchased some of the property subject to the mortgage, conveyed to Regensberger, and Regensberger joined with Corcoran in the conveyance to the trustees, and this deed was recorded August 20, 1887, and the said agreement was recorded February 7, 1888. On August 18, 1887, the trustees conveyed to the bank in pursuance of the agreement. The amount then due under the decree was \$113,779.07. Said deed contained the following clause: "And the said William Corcoran and the said S. H. Regensberger have joined in this instrument in token of their acknowledgment that the matters herein recited are true;" and they signed said deed. This deed, it is alleged, was recorded August 19, 1887, and on the next day the bank conveyed to defendant Hinkel all of said property for the consideration of \$80,000, and Hinkel gave the bank a mortgage on the same property for \$50,000, part of the purchase price. The complaint further alleges that Hinkel took this conveyance with full knowledge of said agreement and of the Corcoran mortgage and of the foreclosure proceedings, and that the properties so conveyed to him "were for a long time prior to the commencement of this suit, and now are, worth the sum of \$200,000 or thereabouts." The complaint was not verified.

All the defendants answered. The answer of the bank and Mr. Jarboe was: (1) A general denial. (2) A judgment of dis-

missal of a former suit brought by the plaintiff upon the same cause of action, numbered 22,804, in superior court. (3) A judgment of nonsuit in another action, numbered 27,690, in superior court. (4) Alleged the original mortgage, foreclosure proceedings, disputes as to amount of Corcoran liability, the making of the agreement, and the conveyance to the trustees, the efforts of Corcoran to sell; that it was placed in the hands of Bovee, Toy & Co., as his agents; and they negotiated a sale to Hinkel for said sum of \$30,000; that there were defects in the title which caused delays in the transaction, which carried it beyond said period of 16 months; that the power of the trustees to convey to a purchaser under the terms of the agreement had ceased, and for that reason it became necessary to convey to the bank under the terms of the trust in order to give the purchaser a good title; that such conveyance was made for the purpose of consummating the sale thus negotiated to Hinkel, and was made with the knowledge, concurrence, and consent of Corcoran, and at his instance and request; and by the conveyance to the bank and from the bank to Hinkel the sale made by the agents, Bovee, Toy & Co., was consummated, and that Corcoran never afterwards asserted or claimed that he had any interest in the property. The court found in favor of defendants, and rendered judgment against the plaintiff. An appeal was taken from the judgment, which was dismissed, and this appeal is from an order denying plaintiff's motion for a new trial.

Appellant contends that the agreement of March 31, 1886, and the trust deed to Jarboe and Pierson, were intended to and did operate as a security to the bank, for the sum fixed thereby to be due to the bank under the mortgage, and the further sum of \$5,000 then loaned by the bank to Corcoran; that the clause therein providing for a forfeiture in case the same should not be paid within 16 months was void, and that the conveyance by the trustees to the bank did not convey an absolute title, nor cut off Corcoran's right to redeem. In support of this contention counsel for appellant cites section 2889 of the Civil Code, which is as follows: "All contracts for the forfeiture of property subject to a lien, in satisfaction of a lien secured thereby, and all contracts in restraint of the right of redemption from a lien are void;" and many authorities are also cited by counsel in support of that proposition. The court found all the facts stated in the fourth defense of the answer of the bank and Jarboe and Pierson to be true, (except as to the cancellation upon the books of Corcoran's debt;) and these facts take the case out of the spirit and purpose of the above code provision. The code commissioners, in a note to this section, say: "Of course a mortgagor may sell his property to a mortgagee, but the transaction must be a genuine sale and not a forfeiture." If we

examine this contract, it will be found that its evident purpose was to afford Corcoran an opportunity to dispose of the property, and pay the compromise sum, within the time limited thereby. The title was vested in the trustees as clearly for that purpose as for the other purpose of conveying to the bank in case no sale should be made within the time limited; and the sale of the property was in fact made by Corcoran to the defendant Hinkel, though it was consummated by a conveyance through the bank, because of delays in perfecting the title after the terms of sale were agreed upon, which carried the transaction beyond the time limited in the agreement within which the trustees were authorized to convey to a purchaser, and which made it necessary that the title should pass through the bank. The testimony of the witnesses in this regard is conclusively corroborated by the conduct of the bank, for, under the terms of the agreement and of the trust deed, as well as of the deed from the trustees to the bank, it was no longer obliged to accept the compromise sum of \$65,000, but had a right to the sum found in the decree of foreclosure amounting to \$113,000, and to buy the property at that sum; but, instead of doing so, the bank carried out the sale as agreed upon between Corcoran and Hinkel, and conveyed the property to him the next day after the trustees conveyed to it, receiving \$30,000 cash, and taking a mortgage from Hinkel for \$50,000.

It is said, however, that the bank did not cancel Corcoran's indebtedness. The court found "that no formal cancellation was proved," but that it was proved that the bank had never claimed or asserted that any indebtedness existed from Corcoran after the conveyance made to it by the trustees, and that the bank actually did receive said conveyance in full satisfaction. But it is further contended by appellant that the alleged sale by Corcoran to Hinkel was not made by Corcoran; that the trustees employed Bovee, Toy & Co., real-estate brokers, to sell the property, and that they had no authority to do so. The court, however, found that Bovee, Toy & Co. were employed by Corcoran, as alleged in the fourth defense. This finding is based upon a written authority given by Corcoran to Jarboe and Pierson to sell the property for \$85,000, and to pay commissions out of the proceeds. In their efforts to sell, therefore, they were not acting under any power contained in the trust deed, but under a direct authority from Corcoran. Jarboe and Pierson, after they received this authority from Corcoran, authorized Bovee, Toy & Co. to sell. They negotiated a sale to Hinkel at the price of \$85,000, conditioned upon the title being found satisfactory. Upon investigation it was found that it would require \$5,000 to clear the title by buying Pattee's claim, and upon this being reported to Corcoran, on

July 9, 1887, he wrote Jarboe and Pierson: "You are authorized to so modify the contract of March 23, 1887, made by you through Bovee, Toy & Co. with John Hinkel for the sale of the property therein described, as to make the purchase price \$80,000, instead of \$85,000, it being understood, however, that the purchaser is to take the title subject to the Pattee title and suits and the Donahue title." The authority given Jarboe and Pierson contemplated the employment of subagents, while the above writing ratified such employment, and made Bovee, Toy & Co. his agents. The finding that the conveyance was made to the bank with the agreement that the bank should convey to Hinkel in compliance with the agreement made through Bovee, Toy & Co., and with the consent and concurrence of Corcoran, is sustained by the evidence; and, in view of the foregoing the further contention of appellant that \$80,000 was not an adequate consideration for the property is without merit.

It is further insisted by appellant that certain of the findings are conflicting. The conflict alleged is between finding No. 45 and findings numbered 20 to 25, inclusive. In finding 20 it is said the bank granted, bargained, and sold the property to Hinkel. This is not inconsistent with the finding of the circumstances attending it which show the conveyance to have been made in fulfillment of the arrangement between Corcoran and Hinkel which made the bank the conduit through which the title passed. Finding 21 is to the effect that Hinkel had only constructive knowledge of the contents of the deed from the trustees to the bank. But it is immaterial, so far as the validity of his title is concerned, whether he had actual or constructive knowledge. Finding 22 relates to Hinkel's knowledge of the trust agreement, and to which the above is a sufficient reply. His title is unaffected by any knowledge or want of knowledge of that agreement. Finding 23 is that Hinkel purchased in good faith. We find nothing in the findings which conflicts with that statement. As to findings 24 and 25, it is immaterial whether Hinkel relied as to title upon the fact that the bank had taken a mortgage upon the property, or whether he had only constructive knowledge of the decree of foreclosure, nor can we perceive any conflict in the findings which in any manner affects the judgment.

Appellant further insists upon a reversal because the court failed to pass upon certain objections to evidence during the trial. Defendants had put in evidence the written authority given by Corcoran to Jarboe and Pierson, dated July 29, 1887, to accept \$80,000 from Hinkel because of some defect in the title; and Mr. Pierson, being examined as a witness on the part of defendants, was asked, "When was that sale consummated?" The witness replied: "It was consummated

through the German Bank. I don't know the date of the transaction." Counsel for plaintiff said, "We object to that, unless there is some authority here." The court said, "Well, he has not offered it yet." The witness, continuing, testified that after the negotiations had culminated in an agreement as to price, the question of passing the title came up. An objection was made that the power of the trustees had expired by limitation, and that the proper course would be for the trustees to convey to the bank, and have the bank complete the transaction. Plaintiff's counsel contended that, unless this was followed up by written authority, the testimony was irrelevant and incompetent. After discussion the court said, "I see no objection to the proof at all." The record then states that the witness was allowed to go on with the understanding that defendants supplement the parol proof with written evidence that Corcoran authorized it, and that plaintiff had the right to renew these objections at any time during the trial. Other parts of the record show that it was not claimed that Corcoran in writing assented to this mode of transfer, unless such assent could be inferred from the fact that he joined in the deed to the bank in token that the recitals therein contained were true, while nothing is found intimating that defendants intended to supplement this evidence by written evidence; nor does the record show that the objections were renewed. In appellant's brief it is said the point was argued in the court below in the briefs filed, but that is not in the record. The objection raised by counsel was clearly ruled upon by the court, when it said, "I see no objection to the proof at all;" and no exception was taken. Besides, the evidence was clearly competent, and the plaintiff would not have been benefited by an exception. Without citing authorities, it may be briefly said that in this state it is well settled that a deed absolute upon its face may be shown by parol evidence to be a mortgage, and, that being true, no reason can be conjectured why such evidence may not be rebutted by parol. It was clearly competent to show by parol that the conveyance was made to the bank, not as a forfeiture to it, but to consummate a sale made by Corcoran to a third party. We find no ground for a reversal. The order appealed from is affirmed.

100 Cal. 414

SNYDER v. CLARK. (No. 15,173.)

(Supreme Court of California. Dec. 11, 1893.)

ACTION ON CONTRACT—EVIDENCE—ESTOPPEL.

In an action against an administrator on a contract for the payment of money, it appeared that one W. had a judgment against such decedent and plaintiff's father, as sureties for another, and a separate judgment against plaintiff as surety for the same person. Two days

before the sale of the principal debtor's land on executions, plaintiff agreed to pay the judgment against her father and decedent, and the latter agreed to repay her one-half such sum. At the sale, plaintiff bid in the land for the amount of both judgments, and gave to W. her notes for the amount, which she afterwards paid. The sheriff returned the executions satisfied by such sale. *Held*, that she was not estopped from showing that the land was heavily incumbered, and worth much less than the amount bid by her at the sale.

Department 2. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by Rachel J. Snyder against Fred. L. Clark, administrator of the estate of O. W. Craig, deceased, on a contract between plaintiff and defendant's intestate for the payment of money. From a judgment for defendant, and from an order denying her motion for a new trial, plaintiff appeals. Reversed.

Lippitt & Lippitt, for appellant. Wm. E. McConnell, for respondent.

McFARLAND, J. The defendant is administrator of O. W. Craig, deceased. Craig, in his lifetime, and Franklin Sears, as sureties, had, with G. C. P. Sears as principal, made two promissory notes to one Wickersham for something over \$4,000, and on December 9, 1889, Wickersham had recovered judgment on said notes against all three of said persons for \$4,280.40 and costs. The plaintiff herein and said Franklin Sears had also, as sureties, made another note, with said G. C. P. Sears as principal, to said Wickersham for a large amount, upon which Wickersham at the same time had recovered a judgment for \$21,582.60 and costs. Wickersham took out executions on said judgments, upon which personal property of G. C. P. Sears was levied upon, and sold for something over \$16,000. This money was applied pro rata upon the two judgments, leaving unsatisfied upon the judgment against Craig and the two Searses, the sum of \$2,010, and upon the judgment against the plaintiff, Mrs. Snyder, and the two Searses, \$10,053. There is no issue in the case as to the propriety and legality of said pro rata application to said judgments.

The said Franklin Sears was the father of the plaintiff, Mrs. Snyder, and it is averred in the complaint (substantially) that she proposed to Craig that she would pay her father's half of said balance of \$2,010, for which she was not liable, if he, Craig, would pay the other half; that Craig assented to the proposition, but said that he would not have any ready money for a short time, and agreed and promised that, if she would also pay his half and satisfy the judgment, he would pay to her his half, to wit, \$1,005; that in pursuance of his agreement and promise she paid the whole of said amount, and thereby satisfied said judgment; that afterwards Craig refused to pay her any part of said \$1,005, and that his administrator, after due presentation of her claim, also refuses to pay

any part thereof. The action is to recover said \$1,005. The court below found that such contract had been made by and between said Craig and plaintiff, but found, also, that plaintiff had not paid and satisfied said balance of judgment of \$2,010, and thereupon gave judgment for defendant. Plaintiff appeals from the judgment and from an order denying a new trial.

The only question involved is whether or not appellant paid and satisfied said judgment. At the time of the levy of the execution upon the personal property of said G. C. P. Sears there was also a levy made upon certain real property belonging to him, and this real property was sold by the sheriff on June 30, 1890, which was after the said contract between Craig and plaintiff. Plaintiff purchased this real property at said sale, and bid for it the whole amount of both of said judgments. The sheriff returned the executions as wholly satisfied, and got from the attorney of Wickersham a receipt for the money bid by plaintiff. Plaintiff gave to Wickersham her note for the full amount of her bid and of the two judgments, which note she afterwards paid in full. Under these circumstances the court found that appellant had not satisfied said judgment against Craig and Sears, but that it was satisfied out of the proceeds of said sale of the real property of G. C. P. Sears to appellant under said executions. It is strenuously argued by appellant that the finding that she did not satisfy said judgment in accordance with her contract with Craig is against the evidence, and also that the court erred in excluding certain evidence offered by appellant on that point. From certain rulings made at the trial, and from a certain question asked by the court of one of the witnesses, we are disposed to think that the court attached too much conclusiveness to record facts about the sale of the real property, to wit, that appellant bid at such sale a certain sum of money, that she received a certificate of purchase, that the sheriff got a receipt from Wickersham's attorney for the amount of money bid, and that the executions were returned wholly satisfied. These facts seem to have been treated, to some extent, as an estoppel against appellant. For instance, the court finds that "the moneys derived from said sale were applied by said sheriff in payment of the judgments," and that "the said moneys so realized by said sheriff from the sales of said property of said G. C. P. Sears was paid by said sheriff to I. G. Wickersham, the judgment creditor." But these findings must have been based largely upon the legal view that the return of the sheriff was conclusive, for the evidence shows, beyond question, that as a fact the sheriff never paid any money arising out of the sale of the real property to Wickersham, and never received any money on that transaction except his costs. Lippitt, who was attorney for Wickersham, and whose testimony is uncontra-

dicted, after explaining the transaction fully, testified that "she bought it from the sheriff, and the note was given for the balance of the judgments, and I received of Mrs. Snyder the money which satisfied the judgments. The sheriff never had any money, but the satisfaction of the judgment was through the sheriff." If the real property to be sold was of little or no value, and the contract between appellant and Craig contemplated her right to bid at the sale, if she chose so to do, with a faint hope of getting something out of the property, it is clear that her purchase at such sale was no breach of her contract with Craig; and it is equally clear that going through the mere forms of having the sheriff return that he received the money as the price bid for the land, paid it over to the judgment creditor, etc., did not estop appellant, as against Craig, from showing the real facts. And the evidence tends strongly to the point that the contract was made in contemplation of appellant's right to bid at the sale. The contract was made on Saturday, June 28, 1890, and the sale of the real property was to take place on the 30th,—the next Monday. Mr. Enos, who witnessed the making of the contract, and whose testimony is uncontradicted, testified as follows: "Mrs. Snyder said to Mr. Craig: 'The sale of the real estate is to take place on Monday, and I want to know whether I will pay my father's share of the judgment of \$2,010, or not. I will pay my father's share of that judgment if you will pay your share. I have got a ten thousand dollars and a little over judgment against me that I am responsible for, and I will not bid the real estate off unless you agree to pay your half of the judgment.' Mr. Craig told Mrs. Snyder that if she would pay her father's share of that judgment against him, that he would pay her \$1,005, his share of the \$2,010; that he expected George Maxwell to pay him, on the first of August, \$2,000; then he would pay her the money. Mrs. Snyder said: 'Mr. Craig, I will pay the whole of the judgment if you will pay your half according to this arrangement.' He said he would." He further testified that Mrs. Snyder gave her note to Wickersham for the amount of the two judgments, and that he (the witness) afterwards paid and took up the note with her check. Lippitt also testified that he acted for Mrs. Snyder at the sale; that he was first instructed by her to bid the amount of the judgment upon which she was liable,—something over \$10,000,—and was afterwards instructed by her to bid the amount of both judgments, "as she had an agreement with Mr. Craig." This witness also testified that the purchase turned out to be worthless. We are not able to see where this testimony was materially weakened, although the cross-examination developed a little confusion, and the evidence was perhaps not quite as full as it might have been. We will not, therefore, determine whether or not the finding

was against the evidence that was actually introduced, because we think that the court erred to the prejudice of appellant in excluding certain evidence which she offered.

Appellant offered to prove that the land bid in by her at said sheriff's sale was mortgaged to the extent of \$6,000, and that there had been a homestead declaration upon it made by G. C. P. Sears before the levy of the executions. The court sustained a general objection to this evidence, and appellant excepted. We think that this ruling was erroneous and material. The appellant clearly had the right to show the condition and value of the land, as a circumstance in the light of which her said contract with Craig was made, and as tending to show that the contract was as she claimed it to be. It is not to be supposed that Craig would have made such a contract if the land which he knew would be sold in a day or two, under the executions could probably be sold to a bona fide bidder for the amount of both judgments; but if the land was so incumbered as to be of no value, or of but a slight speculative value, he might well get rid of a judgment for the whole of which he was liable, by agreeing to pay one-half of it, regardless of the fact that appellant might, if she chose, bid off the land at the sheriff's sale, and take the chance of making something out of it in the future. The condition and value of the property bid off by appellant, the circumstances under which the bid was made, and the agreement with Craig entered into, and whatever tended to show whether or not the purchase of the land by appellant was a breach of said contract, should be admitted in evidence. We think that the court properly admitted in evidence the executions and the returns of the sheriff thereon. But they were not conclusive against appellant in this action. She had the right to show the real facts as to the satisfaction of the judgment, although the returns of the sheriff showed the form by which such satisfaction was expressed. Judgment and order reversed, and a new trial ordered.

We concur: DE HAVEN, J.; FITZGERALD, J.

100 Cal. 459

PEOPLE v. WELLS. (No. 21,027.)

(Supreme Court of California. Dec. 22, 1893.)

CRIMINAL LAW — MISCONDUCT OF PROSECUTING ATTORNEY—ASKING IMPROPER QUESTIONS.

Where, on a prosecution for forgery, the chief evidence against defendant was the testimony of H., the principal in the crime, and in his own behalf his own testimony, a conviction will be reversed where the prosecuting attorney asked defendant if he had not at another time forged his father-in-law's name, and also asked the captain of police (telling him not to answer until defendant had an opportunity to object) if one S. had not come to him and reported about defendant wanting him to tell H. to skip, though the questions are stricken out, since the asking of them was prejudicial and inexcusable, and made evidently for the purpose of taking an unfair advantage of defendant.

Department 2. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

James E. Wells was convicted of forgery, and appeals. Reversed.

Clara Foltz, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The information charges the defendant, Wells, jointly with Ollie Hutchings, alias Grace Gilbert, with the crime of forgery. Wells was tried separately, was convicted, and appeals from the judgment and from an order denying a new trial.

Appellant contends for a new trial upon several grounds: Because the assistant district attorney, representing the people, in his opening address to the jury made misstatements of facts prejudicial to appellant; because the court, while excluding all other witnesses not under examination, refused to so exclude a policeman who was a witness for and an active participant in the prosecution; because the court refused to strike out certain answers of the witness Leavitt; because one or two of the jurors were guilty of misconduct; because there is newly-discovered evidence material to appellant; and because appellant was prevented from having a fair and impartial trial by reason of the misconduct of the prosecuting attorney in asking a certain question of the witness Lees, and certain questions of the appellant when on the stand as a witness on his own behalf. The last ground of contention is the only one which we deem it necessary to largely discuss. It appeared from the evidence that Ollie Hutchings falsely personated Miss Emma L. Dick, the owner of certain real property in San Francisco; forged the name of Miss Dick to a note and mortgage on said property; acknowledged the

mortgage as Miss Dick, before a notary; procured a loan of \$8,000 on the mortgage, and in a day or two afterwards disappeared. The appellant, Wells, was a general business agent dealing in real and personal property, etc., and the said loan to Ollie Hutchings was effected in part by his agency. The prosecution charged that appellant was an accomplice of said Ollie in said false personation and forgery, while appellant claimed that, like the notary and others, he was deceived by her, and believed her to be Miss Dick. It appeared that after the forgery had been discovered appellant made considerable effort to discover the said Ollie, and for that purpose employed one Leavitt and one Staniels, who traveled through a number of the counties and cities of the state to find her. Staniels was put on the stand as a witness for the prosecution. Afterwards, while the captain of the police was being examined as a witness for the people, the prosecuting attorney asked him this question: "I want to ask one leading question, and do not answer it until counsel has an opportunity to object. Is it a fact that, a short time after that, Staniels came to you, and reported about Wells wanting him to tell the woman to skip?" Objection was made by appellant, and, of course, sustained. There was not the slightest excuse for asking this question. In fact, there was injected into it an apology for asking it. What, then, was its purpose? Clearly, to take an unfair advantage of appellant by intimating to the jury something that was either not true, or not capable of being proven in the manner attempted. And the wrong was not remedied because the court sustained an objection to the question. Counsel undoubtedly knew beforehand that the objection would be sustained. The inexcusable asking of the foregoing question would not be, perhaps, of itself, sufficient ground for reversing the judgment; but it is of importance when taken in connection with questions asked the defendant when a witness, as showing the general manner and temper with which the prosecution was conducted. Upon cross-examination of appellant the prosecuting attorney asked him these questions: "Where did you formerly reside? Do you know the Highland National Bank of Newberg, New York? Were you married to your present wife when you came here with her? Did not you admit in a letter to Mr. M. C. Beeknap that in November, 1893 you forged your father-in-law's name to a note in New York?" To these questions counsel for appellant objected as incompetent, immaterial, irrelevant, and not in cross-examination; declared that they were unfair to appellant; and asked the court to instruct the district attorney not to ask any more such questions. The record merely shows that after discussion the objections were sustained. The first three of these questions are important mainly as leading up to the last one, the asking of which was utterly inexcusable and reprehensible.

It would be an impeachment of the legal learning of the counsel for the people to intimate that he did not know the question to be improper, and wholly unjustifiable. Its only purpose, therefore, was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. The prosecuting attorney may well be assumed to be a man of fair standing before the jury, and they may well have thought that he would not have asked the question unless he could have proved what it intimated if he had been allowed to do so. He said plainly to the jury what Hamlet did not want his friends to say: "As, 'well we know;' or, 'we could, an if we would;' or, 'if we list to speak;' or, 'there be, an if there might.'" This was an entirely unfair way to try the case; and the mischief was not averted because the court properly sustained the objection,—though we think it should have warned counsel against the course which he was taking,—and instructed the jury specially on the subject. The wrong and the harm was in the asking of the question. Of course, in trials of criminal cases, questions as to the admissibility of evidence will frequently arise about which lawyers and judges may fairly differ in opinion; and in such cases defendants must be satisfied when courts sustain their objections. But where the prosecuting attorney asks a defendant questions which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers, and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict.

These views have been substantially announced several times by this court and by courts of sister states. In *People v. Devine*, 95 Cal. 231, 30 Pac. 378, the court, through Sharpstein, J., say: "We agree with appellant's counsel that 'the statements, questions, and remarks of the district attorney were peculiarly calculated to prejudice the substantial rights of the defendant.' We think what was said by this court in *People v. Lee Chuck*, 78 Cal. 327, 20 Pac. 719, and *People v. Bowers*, 79 Cal. 415, 21 Pac. 752, peculiarly applicable to the conduct of the district attorney in this case, and we hope the court may not again have occasion to animadvert upon similar conduct of a prosecuting officer." And in a concurring opinion by De Haven, J., the views heretofore stated are fully expressed, and a number of authori-

ties cited to the point. In *People v. Ah Len*, 92 Cal. 282, 28 Pac. 286, the judgment was reversed for conduct of the prosecuting attorney not more censurable than that in the case at bar; and in that case the trial court warned the jury specially upon the subject. In *People v. Bowers*, 79 Cal. 415, 21 Pac. 752, the court say: "Still more objectionable was the conduct of the district attorney. It is true the court properly interfered, rebuking the attorney, and instructing the jury to pay no attention to the statements. But the statements were well calculated to influence the jury in a case of this character, and it is impossible for us to say that no injury resulted to the defendant therefrom." In *People v. Lee Chuck*, 78 Cal. 329, 20 Pac. 719, the court say: "Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust." In *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, the judgment was reversed because certain improper questions were asked the defendant when a witness, and it was contended that no injury was done because they were answered in the negative; but the court said: "It is quite evident that the questions, and not the answers, were what the prosecution thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense." In the foregoing cases the facts were not precisely like those in the case before us; but the principle applied there is equally applicable here. The main difference is that in those cases the statement of the obnoxious matter was in a different form from that employed in the case at bar. The following are some of the cases on the point from other states: *Gale v. People*, 26 Mich. 161; *People v. Cahoon*, 88 Mich. 456, 50 N. W. 384; *Leahy v. State*, 31 Neb. 566, 48 N. W. 390; *Tucker v. Henniker*, 41 N. H. 317; *State v. Trott*, 36 Mo. App. 29. In the last case the supreme court of Missouri says: "The state's attorney must have known that the answer called for by the question was inadmissible, and, if he knew it, the putting of such a question to the accused was so unfair and improper that it may well be doubted whether it could be deemed to have been cured by the prompt action which the court took."

The only question, then, is whether or not we can see from the record that the conduct of the prosecuting attorney did not

prejudice the appellant; and we certainly cannot see that it did not. The main evidence in the case was the testimony against appellant of Ollie Hutchings, acknowledged to be not only an accomplice, but the principal in the alleged crime, and the testimony of appellant in his own behalf. Therefore the credibility of appellant was a most important matter in the case, and whatever tended to impair that credibility was material in the highest degree; and that the conduct of the prosecuting attorney so tended is entirely clear. It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent. There are no other points likely to arise on another trial, although it may be proper to say that appellant's motion to strike out certain answers of the witness Leavitt should have been granted after it had appeared that the declaration of appellant which he swore to was not made to him, but to his partner. Judgment and order reversed, and a new trial ordered.

We concur: De HAVEN, J.; FITZGERALD, J.

(100 Cal. 437)

PEOPLE v. CHUEY YING GIT et al. (No. 21,013.)

(Supreme Court of California. Dec. 21, 1893.)

INDICTMENT — DESCRIPTION OF PROPERTY — DATE OF CRIME — EVIDENCE.

1. An indictment for robbery, describing the property stolen as "money, jewelry, and hair ornaments," no demurrer or objection to evidence being taken, is good on motion to arrest judgment, under Pen. Code, § 967, providing that, in an indictment for larceny of money, it is enough to allege the larceny to be of money, without specifying the coin, number, denomination, or kind thereof.

2. The parties being Chinese, and the prosecuting witness having testified that the crime took place on a certain Chinese date; that she knew nothing of the American dates, but that it was the day before she made complaint,—the district attorney, in order to fix the date, may put in evidence the complaint.

3. Evidence as to the disappearance and present whereabouts of prosecuting witness' daughter, who had left home the day of the robbery, was immaterial, where it appeared that one defendant that day called on prosecuting witness, at her home, and told her that her daughter was at his house; that thereupon witness went with him to his house, and there, as she and others swore, was robbed of her money and jewels. Nor could there be prejudice when another witness testified that he had at that time taken said daughter away to a correct and lawful residence.

Commissioners' decision. Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Chuey Ying Git, Woo Ah Woy, and Chung Ki Foon, being accused of robbery of Ah Bow, the two latter were convicted, and appeal. Affirmed.

Mahon & Laird and J. A. Haralson, for appellants. W. H. H. Hart, Atty. Gen., for respondent.

SEARLS, C. The appellants were accused by information of the crime of robbery, and, upon a trial, Woo Ah Woy and Chung Ki Foon were convicted. The appeal is prosecuted from the final judgment, and from an order denying a new trial.

The first objection to the judgment is that the court erred in rendering judgment against the defendants in the case "because the information upon which said defendants were tried and convicted did not state facts sufficient to constitute a public offense." The information is in all respects in consonance with the usual form in cases of robbery, except that the only description of the property taken is as follows: "Personal property, to wit, money, jewelry, and hair ornaments." There is no demurrer interposed to the information, no objections to testimony upon the ground of the insufficiency of the information, and no motion in arrest of judgment. All objections appearing upon the face of the indictment must be taken by demurrer, "except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial in arrest of judgment." Pen. Code, § 1012. In *People v. Swenson*, 49 Cal. 338, the indictment was as follows: "Of the crime of an assault with intent to commit murder, committed as follows, to wit, the said C. G. T. Swenson, on or about * * *, did assault, with intent to commit murder, one Benjamin Cook." Defendant failed to demur to the indictment, but did move in arrest of judgment. This court held that by failing to demur the defendant had waived the objection, and could not move in arrest of judgment on the ground that the indictment did not conform to the requirements of sections 950, 951, and 952 of the Penal Code, and that, as the indictment contained a sufficient charge of an assault, the judgment could not be arrested on the ground of not stating facts constituting a public offense. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear." Pen. Code, § 211. It includes larceny, and under the indictment the defendant may be found guilty of larceny. *People v. Jones*, 53 Cal. 58. Robbery and grand larceny, when the property is taken from the person of another, or when the property taken is a horse, etc., do not depend upon the value of the property taken. Pen. Code, § 487. Hence, it

was unnecessary to specify the value of the personal property taken. *People v. Townsley*, 39 Cal. 405; *State v. Burke*, 73 N. C. 83. The authorities hold, almost universally, that the description of the property taken in robbery is required to be equally specific with that required in larceny. Prior to the amendment of 1880 to our Penal Code, a much greater degree of particularity was required in this respect than at present. By section 967, it is now provided that in an indictment or information for the larceny or embezzlement of money, bank notes, etc., it is sufficient "to allege the larceny or embezzlement * * * to be of money, bank notes, * * * without specifying the coin, number, denomination or kind thereof." This statute does not, in terms, apply to cases of robbery, but as the latter crime is but larceny from the person, accomplished by force or fear, and as the same reasons exist for the modification of the rule in such cases, it may well be held that a rule which often required impossibilities in description, the existence of which courts often regretted, as tending to thwart rather than promote justice, should be modified. Be this, however, as it may, after judgment in an action without objection, whether in a civil or criminal case, a pleading which states a cause of action or offense, but states it defectively, cannot be successfully attacked. It is not, in such cases, a defective allegation, but a total lack of allegation, which renders the judgment void, and hence open to attack. There is here an attempt to describe the personal property taken,—a lame one, it must be confessed,—but, imperfect though it be, it is nevertheless such a one as will support a judgment. Wharton on Criminal Pleading and Practice, quoting Blackburn, J., says "that where an averment which is necessary to support a particular part of the pleading has been imperfectly stated, and a verdict on an issue involving that averment is found, and it appears to the court, after verdict, that unless this averment were true the verdict could not be sustained, in such case the verdict cures the defective averment, which might have been had on demurrer," and in this respect there is no distinction between the pleadings in civil and criminal proceedings. Section 760; *People v. Swenson*, supra. A review of the cases, coupled with the phraseology of our Code, leads to the conclusion that the defect in the information was waived by the defendant. Had objection been made at the trial to testimony describing the property taken from the prosecuting witness, upon the ground that it was not sufficiently described in the information, its admission might have been made the basis of error on a motion for new trial, but no objection on this ground was interposed.

At the trial the prosecuting witness described the robbery as having taken place on the "Chinese October 26th," and stated that she knew nothing of the American date,

but that it was the day before she made and filed the complaint against defendants. Thereupon the district attorney, for the purpose of "fixing the date upon which the transaction was said to have occurred," offered in evidence the complaint made and filed against the defendants. The court admitted it for the purpose indicated, and the ruling is assigned as error. It was admissible as evidence for the purpose in view.

The court, at the trial, made several rulings excluding testimony in reference to the disappearance and whereabouts of a young daughter of the prosecuting witness, who, it seems, had disappeared on the day of the commission of the alleged offense, and these rulings are assigned as error. It appears that, on the night of the alleged offense, Chuey Ying Git, one of the defendants, called upon Ah Bow, the prosecuting witness, at her home in Bakersfield, and informed her that her girl was down at his house, and that thereupon she accompanied Ying Git to his house, where, according to her statement, she did not find her daughter, and where, as she testified, as do two other witnesses, the defendants, by force and violence, robbed her of her money and jewels. The proffered testimony in reference to the daughter was not pertinent to any issue in the case, and its exclusion was not error. Had it been otherwise, the error would have been cured by the testimony of the witness Brown, who seems to have a mission school, and who, in reply to a question by a juror, stated that he and his wife had taken the girl away, and sent her to a "good Christian home in San Francisco, and the girl is there now, [at the time of the trial,] comfortable and happy." The theory that the charge against the defendants grew out of the disappearance of this girl, in the face of the positive evidence of robbery against the defendants, is farfetched, and entitled to little consideration.

The other objections to evidence are not of sufficient importance to require comment. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

4 Cal. Unrep. 369

DREW v. ROGERS. (No. 18,245.)
(Supreme Court of California. Dec. 19, 1893.)

CHIEF OF POLICE—ELECTION—QUALIFICATION.

Where one, without the qualification of being a citizen of the United States, has been elected to the office of chief of police of a city, the election will be annulled, and his certificate canceled.

In bank. Appeal from superior court, Sacramento county; W. C. VanFleet, Judge.

Proceeding by Moses M. Drew against John B. Rogers to contest defendant's right to the office of chief of police. Judgment for plaintiff. Defendant appeals. Affirmed.

Robert T. & Wm. H. Devlin and Brusie & Layson, for appellant. Johnson, Johnson & Johnson and C. T. Jones, for respondent.

PER CURIAM. On March 8, 1892, there was a general municipal election in the city of Sacramento, at which the defendant, Rogers, received the highest number of votes for the office of chief of police of that city. He received a certificate of election, and entered upon the duties of the office. This proceeding was brought in the superior court, under section 1111 et seq. of the Code of Civil Procedure, to contest the right of said Rogers to hold said office, upon the ground that he was not eligible thereto at the time of said election. The court found that he was not eligible, and entered judgment annulling the election and canceling the said certificate. From this judgment Rogers appeals.

The appellant was born in Australia, of British parents, and came with them to this country when a child; and the question before the court was whether or not he had become a citizen of the United States 90 days before the election. He contends that he had at that time become a citizen—First, because his father, Thomas H. Baxter, was naturalized before appellant was 21 years old; and, second, because, while he was a minor, his mother, Mary Baxter, married one W. A. Rogers, who was a native-born citizen. As to the first of these contentions, the court found that appellant's father was not naturalized until after appellant had attained his majority; and the evidence upon that point was such, to say the least of it, as to leave no room for disturbing the finding. As to the second contention, the court finds that at the time of the alleged marriage of Mary Baxter to W. A. Rogers the husband of the former, Thomas H. Baxter, was living, and continued to live until after the death of said Mary; and that, while they had separated, they were never divorced; and this finding is clearly warranted by the evidence. Appellant contends that the law to sustain the second marriage will presume a divorce, but it is not necessary to inquire into the correctness or extent of such presumption, for the court finds that, independent of the absence of proof of divorce, there never was any marriage between appellant's mother and said W. A. Rogers; and we cannot say that the evidence does not warrant such finding. There are no other points in the case which we deem necessary to be noticed. As remarked by the learned judge of the court below, it is perhaps unfortunate that the judgment is not in harmony with the choice of a majority of the voters as expressed at the time of said election, but the will of the people can be exercised only by

the methods and within the limitations prescribed in their constitution and laws. The judgment appealed from is affirmed.

100 Cal. 442

SAN LUIS OBISPO COUNTY v. PETTIT et al. (No. 19,287.)

(Supreme Court of California. Dec. 21, 1893.)
COUNTY TREASURER—MISAPPROPRIATION OF FUNDS—ESTOPPEL.

A county auditor, as required by the county government act, (section 115,) settled the accounts of a tax collector, certified to the treasurer the amount payable into the county treasury, and, on the presentation and filing of the treasurer's receipt therefor, discharged the collector, and charged the treasurer with the amount. The county treasurer gave his receipt to the collector, and charged himself with the amount in his official books; and in making his monthly settlements with the auditor, as required by section 80, he made a sworn statement that he had received such amount from the collector, and that it was then on hand. *Held*, that the treasurer was estopped by his receipt and his statement under oath to deny the receipt of such amount from the collector.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the county of San Luis Obispo against B. F. Pettit and others on the official bond of said Pettit as county treasurer. From a judgment for plaintiff, defendants appeal. Affirmed.

Wilcoxon & Bouldin and McD. R. Venable, for appellants. F. A. Dorn, Dist. Atty., for respondent.

HARRISON, J. The defendant Pettit was elected treasurer of the county of San Luis Obispo at the general election in 1890 for the term of two years, and held his office until January, 1893. June 2, 1891, the other defendants became sureties on his official bond for the faithful performance by him of all his official duties. The present action was brought to recover the sum of \$2,316.19, which it is alleged had been misappropriated or lost by Pettit while it was in his possession as such treasurer. Judgment was rendered in favor of the plaintiff and the defendants have appealed. The facts upon which the judgment was given are as follows: One Madison Graves was a license tax collector for the county, and by virtue of a county ordinance imposing license taxes collected various sums of money for the county, which it was his duty to pay into the county treasury. On the 1st of August, 1892, Graves made a settlement with the county auditor for the license taxes that had been collected by him, and such settlement showed that he had at that time in his possession \$2,927.21 of license tax money collected by him and belonging to the county, and the county auditor issued to him a certificate showing that he had made such settlement, and that the above amount was due to the county. Graves delivered this certificate to Pettit on

or about the 30th of September, 1892, and on the 4th of October, Pettit, as county treasurer, delivered to the auditor of the county a receipt, showing that he had received from Graves this sum of money. Thereupon the auditor made entries in his books charging Pettit with the amount mentioned in the receipt, and crediting Graves with the same amount; and entries were afterwards made by Pettit in the county treasurer's books, charging himself, as treasurer, with said sum, as having been received from Graves by him on account of license taxes. On the 1st of December, 1892, when the official count of the money in the treasury was made, there was a shortage of \$2,316.19 in the moneys which should have been in the treasury, and when Pettit, at the expiration of his term, handed over to his successor the moneys in the treasury, there still remained this deficiency according to his books.

It is alleged by the sureties in their answer as a defense to the action that at the time when the receipt was given to the auditor, Graves did not in fact pay over the money therein named, except about \$400, and that he has never paid any other portion thereof; and in support of this averment evidence was offered at the trial that at the time the receipt was given to the auditor Pettit had not received any of the money therein named, but that he delivered the receipt at the request of Graves, and upon his agreement that he would subsequently give him a check for the amount; that he did afterwards receive from Graves his check upon a local bank for the sum of \$2,500, which he still held, for the reason that Graves had stopped its payment. Pettit made entries in his books in the early part of October to the effect that he had received this amount of money, and on the first of each month thereafter during his term made his sworn statement to the auditor, as required by law, that this amount of money was in his hands as treasurer of the county. Upon these facts it is contended by the sureties that, as Pettit did not receive the money from Graves, they are not liable upon his bond, and that Graves, and not Pettit, is indebted to the county for the amount of the check. Graves, however, testifies positively that he paid this entire sum of money to Pettit, as county treasurer, prior to October 4, 1892. But, assuming that the facts were as claimed by the appellants, we are of the opinion that they do not constitute a defense to the action. Section 115 of the county government act (St. 1891, p. 323) requires the county auditor to settle the accounts of all persons holding moneys payable into the county treasury, and to certify the amount to the treasurer; and provides that upon the presentation and filing of the treasurer's receipt therefor, he shall give to such persons a discharge, and charge the treasurer with the amount received by him. In *Butte Co. v. Morgan*, 76 Cal. 1, 18 Pac. 115, it was held that "the

auditor is not required to go to the treasurer and ask him whether the amount has been actually paid; or, in other words, whether the receipt states the truth. He is authorized to accept the receipt as sufficient evidence of the fact of payment." This case presents many points similar to the present one, and must be regarded as controlling. Section 80 of the county government act requires the treasurer to settle his accounts with the auditor on the first Monday of each month, and, for the purpose of making such settlement, to make a statement under oath of the amount of money received prior to the period of such settlement, the sources whence the same was derived, and the amount remaining on hand. These settlements and statements were made by Pettit, and he ought not now to be permitted to exonerate himself from liability to the county by showing that these statements were false, and that, instead of requiring Graves to pay this money into the treasury, he had taken his individual promise to pay it at a subsequent date. By delivering to the auditor his receipt for the moneys which Graves had collected, he had authorized the auditor to enter upon his books a discharge of Graves' liability, and is thereby estopped from questioning the correctness of his receipt. If he chose to permit Graves to retain this money upon his promise to subsequently pay it to him, to that extent he failed to perform his official duty in requiring the money to be paid into the treasury, and must be regarded as having become himself, rather than the county, the creditor of Graves. If any loss occurred by reason of Graves' subsequent failure to pay his check, it should be borne by Pettit, rather than by the county, since the loss had been made possible by reason of Pettit's violation of his official duty; and his sureties are liable to the county equally with him for such misappropriation or loss of the money.

Whatever defect there was in the complaint by reason of its uncertainty was cured by the answer of the defendants, in which they allege that the amount of money for which this receipt was given, and which they allege was not paid, is the same money as that which is claimed in the action. The judgment is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

100 Cal. 434
CITY OF SAN LUIS OBISPO v. BRIZZOLARA et al. (No. 19,216.)

(Supreme Court of California. Dec. 21, 1893.)

EMINENT DOMAIN—EVIDENCE OF DAMAGES.

To show the market value of land condemned, the report of commissioners appointed to assess neighboring land, reciting the price to be paid for neighboring land, and the consideration which determined such report, is irrelevant.

Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Proceedings by the city of San Luis Obispo against Mariana Brizzolara and others to condemn land. Judgment for defendants for \$6,500. Plaintiff appeals. Reversed.

Wm. Shipsey, for appellant. Wilcoxon & Bouldin, for respondents.

HARRISON, J. Proceedings to condemn certain lands for a public street in the city of San Luis Obispo. The jury assessed the value of the land taken from the defendants at \$6,500. The plaintiff moved for a new trial upon the ground that the verdict was not sustained by the evidence. The court below was of this opinion, but held that the evidence would support a verdict for \$5,000, and made an order that, if the defendants would remit \$1,500, a new trial should be denied. The defendants having remitted that amount, the court denied a new trial, and the plaintiff has appealed.

We have carefully examined the record, and are unable to concur with the views of the learned judge of the court below. The land sought to be taken for the street has a frontage of 18 feet and 10 inches on Monterey street, and the highest estimate placed upon its value by any witness who testified upon the subject is \$200 per front foot. Other witnesses estimated its value at a much lower amount. Some of the witnesses for the defendants stated that they estimated the land upon that side of the creek as worth about 25 per cent. more than land upon the other side, and one of them said that if he was to buy this property he would pay from 20 to 25 per cent. more than he would for property on the other side of the creek. Neither of these witnesses, however, gave any evidence of the value of the land on either side of the creek, and the only testimony of the value of the land upon the other side was that of the witness Warden, who said that he gave \$150 a foot for it. The defendants introduced in evidence the report of the commissioners who had been appointed to determine its value, under the statute by virtue of which the proceedings were had, (St. 1889, p. 70,) from which it appeared that they had awarded to the owner of 10 feet of land on the other side of the creek, which had been taken under the same proceeding, the sum of \$3,750, which was made up as follows: Land taken, \$2,500; damages to improvements, \$1,000; damages to realty affected, \$250,—and that they had also awarded to these defendants, for the land in question, \$3,900. These commissioners were also witnesses at the trial, and testified that the value of the land in question was \$150 a front foot. They also stated that they had allowed the sum of \$3,900 to the defendants for the reason that they were willing to pay more than the property was worth, for the sake of time and to pre-

vent a lawsuit, and that they had been willing to pay more for the land on the other side of the creek than they thought the property was worth, in order to save a condemnation suit. We do not consider that this report of the commissioners was competent to show the value of the land in question. It has been held that, for the purpose of ascertaining the value of a piece of land, evidence may be received of sales of other parcels of land in the immediate vicinity, similarly situated, if recently made; but we have not been referred to any case in which it has been held that the value fixed by an agreement between the owner and a corporation seeking to condemn his land by virtue of eminent domain can be taken as a criterion of the market value of other land in that vicinity. As was said by the supreme court of Massachusetts in *Cobb v. City of Boston*, 112 Mass. 181: "The price so fixed by compromise, when there can be no other purchaser, and the seller has no option to refuse to sell, and can only elect between the acceptance of the price offered and the delay, uncertainty, and trouble of legal proceedings for an assessment, is not a reasonable or fair test of market value. It is in no sense a sale in the market." Mr. Lewis, in his treatise on Eminent Domain, (section 447,) says: "What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more, or the other taking less, than is considered to be the fair market value of the property. For these reasons, such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party, or otherwise." See, also, *City of Springfield v. Schmook*, 68 Mo. 394; *Railroad Co. v. McLaren*, 47 Ga. 546; *Fall River Print Works v. Fall River*, 110 Mass. 428; *In re Thompson*, 127 N. Y. 463, 28 N. E. 389; *Railroad Co. v. Pearson*, 35 Cal. 262. In *Waterworks v. Drinkhouse*, 92 Cal. 532, 28 Pac. 681, where the court had endeavored to ascertain the value of the property sought to be condemned, and a witness had been asked how much the plaintiff had paid for other lands, we said: "However the rule may be in other states, it is settled here that such facts are not admissible as evidence in chief, but only by way of cross-examination, for the purpose of testing the fairness or honesty of an opinion which the witness may have given upon his direct examination, in relation to the value of the property involved in the action." In the present case the above evidence was proper in cross-examination of the plaintiff's witnesses, for the purpose of testing the accuracy and honesty of the opinions which they had given of the value of the land in their direct examination; but, as it would not have

been admissible as affirmative evidence for the purpose of establishing the value of the land in question, it was not competent for the court to consider it for that purpose, even though properly brought before it in cross-examination. It may be added that, even if it had been competent evidence of the value of the land for which the price was given, it would not sustain the conclusion of the court. The judgment and order are reversed, and the court is directed to grant a new trial on this issue.

We concur: PATERSON, J.; GAROUTTE, J.

100 Cal. 446

COLLINS et al. v. SCOTT et al. (No. 17,174.)
(Supreme Court of California. Dec. 21, 1893.)

MORTGAGE ON HOMESTEAD—FORECLOSURE—
PARTIES—RIGHTS OF CHILDREN—VACATION
OF DECREE—FRAUD—REVIEW ON APPEAL.

1. Error in striking out parts of a complaint is waived by the subsequent filing of an amended complaint.

2. Under Civil Code, § 1265, providing that, upon the death of one of the spouses, the homestead vests in the survivor if it had been selected from community property, the children of homesteaders, upon the death of their father, acquire no interest by succession as his heirs at law in a homestead so selected, and hence no equity vests in them to redeem from the foreclosure of a mortgage on such homestead.

3. As an inducement to the signing by the wife of a mortgage on the homestead, the mortgagee agreed to convey to the wife and her children, in case of foreclosure, either a part of the mortgaged premises, or other land. Held, that the mortgagee's failure to so convey was no ground for the vacation of a decree foreclosing the mortgage, as the wife and children had an adequate remedy at law to enforce the agreement.

4. As under Civil Code, § 1265, the title to a homestead selected from community property vests, on the death of one of the spouses, in the survivor, the heirs of a deceased spouse are not necessary parties defendant to an action to foreclose a mortgage on the homestead, brought after the death of such spouse.

5. The fact that the mortgagee of a homestead, who, as an inducement to the signing of the mortgage by the wife, had agreed to convey to the wife and her children, in case of foreclosure, certain land, told the administrator of the husband and the attorney for the children, prior to instituting proceedings to foreclose, that there was no defense to foreclosure, does not constitute fraud on his part, and is no ground for the vacation of a decree of foreclosure.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county.

Action by Orville E. Collins and others against Angelia R. Scott and another to procure the vacation of a judgment foreclosing a mortgage, and all proceedings thereunder. From a judgment for defendants, entered upon an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Henry E. Highton, for appellants. Galpin & Zeigler, for respondents.

SEARLS, C. This action is brought to procure a vacation, as to the plaintiffs, of a judgment of foreclosure and all proceedings thereunder, including a sale of the mortgaged premises, to have a certificate of sale and a sheriff's deed declared void, for an accounting by the purchaser and his successor in interest of the rents and profits, and for a decree allowing plaintiffs to redeem the undivided three-tenths of said mortgaged premises on paying a like three-tenths of the amount found due upon an accounting on said mortgage, etc. A demurrer was interposed to the amended complaint of plaintiffs, which was sustained by the court, and, upon plaintiffs' failure to amend, final judgment was entered in favor of the defendants, from which judgment plaintiffs appeal.

There is a bill of exceptions in the record, taken to the action of the court in striking out portions of the original complaint, but, as an amended complaint was subsequently filed, the error, if any, in the order striking out was thereby waived. Were it otherwise, the portion stricken out is substantially inserted, and at greater length, in the amended complaint.

The demurrer was based upon a failure of the amended complaint to state facts sufficient to constitute a cause of action, and this is the only question presented for consideration. The following synopsis of the allegations of the complaint are deemed sufficient to illustrate its salient points: On the 12th day of January, 1877, Lemuel P. Collins and Cymantha O. Collins, his wife, executed to Salvin P. Collins a mortgage upon two parcels of land situate in Santa Clara county, to secure the payment by Lemuel P. Collins to said Salvin P. Collins, mortgagee, of \$10,000, with interest at 1 per cent. per month from date, and payable on or before January 12, 1878. The mortgaged property was community property of the mortgagors, Lemuel P. Collins and Cymantha O. Collins, his wife, a homestead having been duly declared thereon under and by virtue of the laws of the state of California. Cymantha O. Collins was possessed of separate estate and property, and, in purchasing the land mortgaged, Lemuel P. Collins, her husband, had used over \$5,000 of his said wife's funds in paying the purchase price of said land, for which sum he was indebted to her at the date of the mortgage. Salvin P. Collins, the mortgagee, knew the foregoing facts and for the purpose of inducing Cymantha O. Collins, the wife, to unite in the execution of the mortgage, and for her benefit, and for the benefit of the children of herself and of her husband, at and immediately before the execution of the mortgage, promised and agreed with the mortgagors and their children that if she, the said Cymantha, would unite in the execution of the mortgage to him, he would, in the event of an action to foreclose and sell the mortgaged premises, set apart and convey to the said Cymantha

and her children a sufficient quantity of the mortgaged land, or land in some other part of the county of Santa Clara, in or near to San Jose, to an amount in value of not less than \$2,000, to be secured and conveyed as a homestead for said Cymantha O. Collins and her children, and for their use and benefit. This has not been done. Lemuel P. Collins died intestate on the 27th day of May, 1879, leaving as heirs Cymantha O. Collins, his wife, and the plaintiffs herein, their children, all then infants, and two daughters by a former marriage. On or about July 12, 1879, Salvin P. Collins, the mortgagee, procured one John T. Bury to be appointed administrator of the estate of Lemuel P. Collins, deceased, and with the fraudulent intent of avoiding his said agreement in regard to a conveyance of the value of \$2,000, and without the knowledge of plaintiffs, who were infants, falsely represented to the administrator that there was no defense to his mortgage, and thereupon brought an action to foreclose said mortgage. It is further charged that with like fraudulent intent he procured one Charles F. Wilcox, an attorney at law, to be appointed and to appear as an attorney for the infant plaintiffs herein, and for their brother, now deceased, to whom he made like declarations, and the administrator and attorney, believing the representations to be true, made no defense to an action which said Salvin P. Collins brought to foreclose his mortgage, and judgment of foreclosure was entered in favor of plaintiff and against the infant children, who, it is to be inferred, were, but who are not directly stated to have been, made defendants in the action. On the 17th day of February, 1880, an order of sale issued in the foreclosure proceedings, under which the mortgaged premises were sold on the 15th day of March, 1880, and purchased by Salvin P. Collins, the mortgagee, for the amount found due him under his judgment of foreclosure, who received a certificate of sale, and thereafter, and on the 20th day of September, 1880, a deed of the premises. Plaintiffs knew nothing of the foreclosure proceedings, and had no opportunity to redeem from the foreclosure sale, or to enforce the agreement made by Salvin P. Collins. Said Salvin P. Collins, upon receiving a sheriff's deed, entered into possession of the premises, and he and his successors in interest have received, since that date, the rents and profits thereof. Salvin P. Collins departed this life August 28, 1884, leaving a last will, whereby the premises in question were devised to his wife, and such proceedings were had that in September, 1885, the property was distributed to his widow, who has intermarried with Emerson W. Scott, and they are husband and wife, and the defendants in this action. One of the children of Lemuel P. Collins and Cymantha O. Collins, L. P. Collins, died under age, and said Cymantha has been duly appointed his administratrix,

as well as guardian of John A. Collins, who is under the age of 21 years.

The whole question of the sufficiency of the amended complaint must turn upon the rights acquired by plaintiffs under the agreement made at and immediately before the execution and delivery of the mortgage. A homestead having been declared upon the community property prior to the execution of the mortgage, when Lemuel P. Collins, the husband of Cymantha O. Collins, died, on the 27th day of May, 1879, the homestead became the sole property of his surviving wife. Civil Code, § 1265; *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852; *Mawson v. Mawson*, 50 Cal. 539; *Estate of Headen*, 52 Cal. 295; *Gagliardo v. Dumont*, 54 Cal. 496; *Herrold v. Reen*, 58 Cal. 443; *Rich v. Tubbs*, 41 Cal. 34; *Watson v. His Creditors*, 58 Cal. 556. These remarks are indulged for the purpose of showing that the plaintiffs here acquired no interest in the property in question by succession as the heirs at law of their deceased father, and can only rely upon the agreement in support of their cause of action. This agreement may be succinctly stated thus: In consideration of Cymantha O. Collins executing with her husband a mortgage upon their homestead, Salvin P. Collins, the mortgagee, promised them and their children that, in the event of an action to foreclose and sell the mortgaged premises, he would set aside and convey to Cymantha and her children, land of the value of \$2,000, either out of the mortgaged premises, or elsewhere in the county, in or near San Jose, as and for a homestead. There is no suggestion that this agreement was incorporated in or made any part of the mortgage. It was not a promise whereby a lien was created upon the mortgaged premises, for the reason, among others, that it was not a promise to convey a portion of the mortgaged premises, but left it optional to convey such portion, or other land, at the option of the promisor. It was a promise to other parties than those included in the mortgage; an agreement for the benefit of the mother and her children. It was a personal promise to plaintiffs and their mother, having no relation to the mortgage, except that the execution of the latter constituted the consideration for it. If the offer to convey was a part of the negotiations leading up to the execution of the mortgage, and a part of the mortgage contract, then we must presume it was all merged in the written mortgage as executed, and that instrument contains the final determination of the parties. But this theory is not in accord with the allegations of the complaint or the contention of appellant. That contention is that the agreement was separate and distinct from the mortgage, but constituted a defense to it which, by the fraudulent representations of the mortgagee, they were prevented from setting up in the foreclosure proceedings. We cannot concur in this view, but regard the agreement, if a valid one, as

giving to the plaintiffs, upon its breach, a right to an action at law. Their right was not to defeat a foreclosure, but to have a conveyance of land of the value of at least \$2,000. This right was not a condition precedent to the mortgagee's right to a foreclosure, but a right to enforce which they had a plain, speedy, and adequate remedy at law. As heirs at law of the mortgagor, Lemuel P. Collins, these plaintiffs were not necessary parties to the action to foreclose, (*Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, and 4 Pac. 486; *Monterey Co. v. Cushing*, 83 Cal. 507, 23 Pac. 700;) and whether or not they were made parties defendant in that action is of no moment. To entitle a defendant to relief against a judgment or decree on the ground of fraud, it must appear that he had a good defense on the merits, and that such defense has been lost to him without fault on his part. *Freem. Judgm. (4th Ed.)* § 486; *People v. Rains*, 23 Cal. 128; *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888; *Gregory v. Ford*, 14 Cal. 139; *Gibbons v. Scott*, 15 Cal. 285; *Logan v. Hillegas*, 16 Cal. 201.

If we are correct in our conclusion that the agreement on the part of the mortgagee to convey land to plaintiffs and their mother was an independent contract, then the facts, as stated in the complaint, showed no fraud upon the part of the mortgagee in representing to the administrator and to the attorney of plaintiffs that there was no defense to the action to foreclose. On the contrary, we think he formed and stated a correct conclusion, and, treated as advice, it was sound and salutary. Treated as a bill to redeem, the complaint cannot be sustained.

1. As the title to the homestead vested in the mother of the plaintiffs upon the death of their father, no equity of redemption vested in them.

2. The statutory right to redeem was in the administrator or the mother, or in both, and was restricted to the six months provided by the statute. *Code Civil Proc.* § 702. The cases of *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200, *Warder v. Enslen*, 73 Cal. 291, 14 Pac. 874, and *Raynor v. Drew*, 72 Cal. 311, 13 Pac. 866, cited by appellant, were all cases in which no foreclosure had been had, and hence cases in which there was no statutory bar to the action. No doubt, an action to redeem a mortgage of real property, with or without an account of the rents and profits, may be brought by the mortgagor or those claiming under him against the mortgagee or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage, as contended by appellants. *Code Civil Proc.* § 346; *De Cazara v. Orena*, 80 Cal. 132, 22 Pac. 74. This section of the Code applies, however, to cases in which there has been no foreclosure of the mortgage and equity of redemption; and where, as in the present case, there has been a fore-

closure valid against the interests of the infant plaintiffs (if any they had) by making the administrator of the estate, during the pendency of administration proceedings, a party defendant, no such right remains after the expiration of six months from the sale under the foreclosure proceedings, except in those cases in which some fraud has intervened, rendering the decree and sale thereunder voidable. The original complaint in the cause is set out in the record, and is referred to by counsel for appellants in his brief. It was superseded by the amended complaint, upon which the judgment appealed from was rendered, and thenceforth filled no office as a pleading. As evidence of the date at which suit is brought, and for a few other purposes, such a pleading may sometimes be properly used. *Gilman v. Cosgrove*, 22 Cal. 357; *Barber v. Reynolds*, 33 Cal. 497; *Kelly v. McKibben*, 54 Cal. 192; *Kentfield v. Hayes*, 57 Cal. 409; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

100 Cal. 425

In re VANCE'S ESTATE. (No. 15,349.)
(Supreme Court of California. Dec. 19, 1893.)
HOMESTEAD—HOW BARRED—CONVEYANCE OF ALL
INTEREST AS HEIR.

An instrument executed by testator's widow recited that in consideration of \$50,000, the amount of her legacy, paid her by one of the heirs, she conveyed to him all her interest in testator's estate; that such instrument was a conveyance of her interest both as legatee and as widow or heir if the will were revoked. *Held* not to bar her right to a probate homestead, as a widow's right to probate homestead is not an interest in land, and consequently was not embraced in the conveyance.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Settlement of the estate of John Vance, deceased. Phoebe A. Vance applied for an admeasurement to her of a probate homestead in decedent's land and from an order granting the application the executors of decedent's will appeal. Affirmed.

E. W. Wilson, for appellants. A. J. Monroe, for respondent.

TEMPLE, C. This appeal is from an order setting apart a probate homestead to the widow of deceased. John Vance died testate, leaving a widow and two sons, issue of a former marriage. There were no minor children. The will was duly admitted to probate, but, subsequently, S. A. Vance, one of the sons of the testator, inaugurated a contest, and asked that the probate be

revoked. The value of the estate exceeded \$1,000,000. The will gave the widow \$50,000 in cash, but no further interest in the estate. The grounds of the contest do not appear, nor what part, if any, the widow took in it. Apparently she would have been greatly benefited by having the will defeated. However, while the contest was pending, S. A. Vance paid her \$50,000, the amount of her legacy, and took from her an instrument in writing, as follows: "This indenture, made and entered into this 16th day of June, 1892, witnesseth that I, Phoebe A. Vance, the widow of John Vance, deceased, for and in consideration of the sum of fifty thousand dollars, gold coin, to me in hand paid by Silas Albert Vance, the receipt of which sum is hereby acknowledged, do hereby grant, bargain, sell, assign, transfer, and convey unto the said Silas Albert Vance, his heirs and assigns, all my right, title, claim, and interest of every kind and nature of, in, and to the real and personal property belonging to the estate of said John Vance, deceased. This is a conveyance of all my right, title, claim, and interest of, in, and to the said estate of said John Vance, deceased, both as a legatee under the last will and testament of said John Vance, deceased, and as a conveyance of all my right, title, claim, and interest of, in, and to said estate of said John Vance, deceased, as the widow and heir at law of said John Vance, deceased, in the event of the last will and testament of said John Vance, deceased, being set aside by the decree of a court of competent jurisdiction. In witness whereof, I have hereunto set my hand and seal the day and year first above written." At the same time both sons of testator, who were beneficiaries under the will, executed to her the following: "In the superior court of the county of Humboldt, state of California. In the matter of the estate of John Vance, deceased. We, and each of us, hereby consent and agree that the family allowance heretofore made by said court to Phoebe A. Vance, widow of said decedent, shall continue during such time as the court may direct and order, it being understood that the conveyance this day made by Mrs. Phoebe A. Vance to Silas Albert Vance of her interest in the estate of John Vance, deceased, shall not affect her right to said family allowance. Edgar H. Vance. S. Albert Vance. June 16, 1892." The contest seems to have been dismissed soon after, for it appears that the executors paid S. A. Vance the \$50,000. The executors then applied to the court to have the allowance to the widow revoked, on the ground that she had then no interest in the estate and no longer needed it. Partly in response—apparently to this application—she applied to have the exempt property set apart to her, and to have a probate homestead set apart for her use. The court refused to discontinue

the allowance, and proceeded to admeasure to her a probate homestead, which, it is found, is worth not to exceed \$5,000. It is now contended that the instrument executed by the widow should prevent her from obtaining a probate homestead, as by that she conveyed the right to S. A. Vance, or waived it for a valuable consideration, and is estopped from claiming a homestead. Whether there was a sufficient consideration to support a conveyance by the widow of her interest in the estate beyond her right to the legacy, which virtually was paid, need not be considered. She received for it only what she was entitled to under the will; and though she conveyed it to S. A. Vance, the record shows that E. H. Vance also participated in the transaction. It would, indeed, be no very violent conclusion to suppose that the \$50,000 paid her by S. A. Vance was the same money received by S. A. Vance from the estate; but that is not material. The first part of the instrument executed by her is sufficient in form to convey her interest in the land, if she had any. But she had no interest whatever, unless her right to have a probate homestead admeasured to her constituted an interest in the estate. In *Estate of Moore*, 57 Cal. 437, it was expressly decided that this right did not constitute an interest in the land. Had the will been set aside, she would have been the owner of a one-third interest. The instrument is to be construed in view of all the facts. The learned judge of the probate court held that the general language in the first part of the instrument is limited and qualified by what follows, which seems designed solely to define what her interest in the estate was. I think this construction correct. In consideration of the payment of the legacy by S. A. Vance, she assigned to him her right to receive it from the estate; and to make it more secure she conveyed to him her right as heir in case the legacy should fall by the revocation of the will. As the will was not revoked, she has conveyed no interest in the estate. If this transaction had been with one who had no interest in the estate, the deed, if it be one, could have had no further effect. As the transaction was really with her stepsons, who took all the residue of the estate, and as she had no claim save as legatee, the purpose of the transaction is unmistakable. I think, therefore, it is not necessary to decide whether a widow who has conveyed the estate of her husband after his death by a deed of bargain and sale, there being no minor children, can afterwards claim and have admeasured to her a probate homestead. I advise that the order be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

100 Cal. 429

**HENKE v. EUREKA ENDOWMENT ASS'N
OF CALIFORNIA.** (No. 15,192.)

(Supreme Court of California. Dec. 21, 1893.)

PLEADING—COMPLAINT.

1. Where a complaint alleges that defendant is a corporation organized for the purpose of paying its members periodical installment endowments; that plaintiff became a member, and received a certificate entitling her to rights of membership, and participation in the endowment fund to the extent of \$6,000, to be paid at 10 stated periods, etc.; that defendant thereupon executed a certain contract in writing, whereby it promised and agreed to pay plaintiff, on a certain date, \$600, and that no part of said sum has been paid,—a demurrer on the ground of ambiguity is properly overruled, as it is clear that the cause of action is based on the written contract to pay, and the previous allegations are but inducements to the contract.

2. As Civil Code, § 1614, provides that a written instrument is presumptive evidence of a consideration, a special averment of a consideration is not necessary, where the complaint in an action on a contract states that it is in writing; and it is immaterial that the contract is set out according to its legal effect only, and not in *haec verba*.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Christena Henke against the Eureka Endowment Association of California. From a judgment for plaintiff, defendant appeals. Affirmed.

Taylor & Craig, for appellant. Sullivan & Sullivan, for respondent.

SEARLS, C. The respondent, Christena Henke, brought this action to recover \$600. The complaint avers, in substance, that the defendant is a corporation organized and having for its object the payment to its members of certain sums of money at stated times, as periodical installment endowments; that on the 8th day of February, 1889, plaintiff became a member of said corporation defendant, and received from it, duly executed, etc., an endowment certificate by which she became and still is entitled to all the rights and privileges of membership, and to participate in the endowment fund in the amount of \$6,000, to be paid at 10 stated periods, computed according to the maturity table of the constitution of defendant, in 10 respective amounts, not to exceed \$600 each; that defendant thereupon duly executed a certain contract in writing, whereby it promised and agreed to pay plaintiff, on the 2d day of January, 1892, the sum of \$600; that no part of said sum has been paid. Wherefore, plaintiff asks judgment for \$600 and costs of suit. Defendant demurred to the complaint upon the grounds: (1) That it did not state facts sufficient to constitute a cause of action. (2) That the complaint is ambiguous, in that it cannot be determined whether plaintiff seeks to recover by virtue of the endowment certificate of February 8, 1889, or by virtue of the contract. (3) That it is unintelligible, in that it does not allege any consideration for

the contract to pay plaintiff \$600. (4) That be determined therefrom (a) whether there is any mutuality rendering the alleged promise binding; (b) whether plaintiff ever performed the, or any, act or acts on her part necessary to perfect a cause of action upon the contract; (c) whether, according to the maturity table of the constitution of defendant, a right of action upon the promise of defendant had accrued to plaintiff. The demurrer was overruled by the court, and leave given defendant to answer. No answer was filed, and judgment was in due time entered in favor of plaintiff for \$600 and costs, from which judgment defendant appeals. The case comes up on the judgment roll, and the only question made is upon the propriety of the order of the court below in overruling the demurrer.

The first contention of appellant is that no consideration is alleged in the complaint for the execution by defendant of the agreement upon which a recovery is sought. Section 1614 of the Civil Code provides that "a written instrument is presumptive evidence of a consideration." It is a familiar rule of pleading under our code system that every fact which a plaintiff will be called upon to prove at the trial must be averred in his complaint. It is equally a rule that presumptions of law should not, or at least need not, be stated. When the plaintiff averred in her complaint that the defendant executed a contract in writing, wherein it promised, at a given date, to pay her a certain sum of money, she stated facts from which the law presumed a consideration; hence, it was unnecessary to aver it specially. A like presumption was indulged as to sealed instruments and negotiable paper long before the adoption of our Code, and as to such instruments and paper no special averment of a consideration was necessary. *McCarty v. Beach*, 10 Cal. 462; *Wills v. Kempt*, 17 Cal. 99.

Counsel for appellant admit the force of section 1614 of the Civil Code, but contend that it only applies in those cases where the contract is set out *haec verba*. We do not so understand it. The practice of setting out copies of papers upon which actions were founded in the declaration did not prevail at common law, the practice being to plead an instrument according to its legal effect. Chitty, in his work on Pleadings, declares it is not necessary to aver a consideration in those cases where the law implies it, and gives a form of declaration upon a bill of exchange, in which the bill is set out according to its legal effect, and in which no consideration is averred. Bliss, in his work on Code Pleadings, after stating the rule that a consideration should be averred, except in cases where, at common law, the instrument, such as deeds and negotiable promissory notes, imported a consideration, proceeds to state the exception which prevails

In those states where by statute a different rule has been established, and, after quoting section 1614 of our Civil Code, adds: "Thus the pleader is relieved of the necessity of averring consideration, leaving the want of it to be set up as a defense, when authorized by statute." Bliss, Code Pl. §§ 268, 269. The necessity of pleading a consideration for the contract is obviated by the fact that it is in writing, and not by the mode of pleading it. The cases of *Douglass v. Davie*, 2 McCord, 215, and *Goddard v. Fulton*, 21 Cal. 437, cited by appellant, are not in point.

It is quite apparent from the complaint that the cause of action is based upon the written contract to pay, and that the allegations of membership by plaintiff in the defendant corporation, issuing to her an endowment certificate, and her right as a member to participate in the endowment fund, etc., are but inducements to the contract upon which she counts, and do not render the complaint ambiguous, uncertain, or unintelligible. That most, if not all, of this matter, is redundant, and might have been stricken out as such, under section 453, Code Civil Proc., is highly probable, but is not a cause for demurrer.

The other objections are without merit. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.



